JOINDER, NOT JURISDICTION: TOWARD A NEW THEORY OF STANDING

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This Article builds on an important development in the Supreme Court's standing jurisprudence to propose a novel theory that would allow more meaningful access to federal courts while vindicating legitimate separation-of-powers concerns. In its recent decision in TransUnion LLC v. Ramirez*, the Supreme Court endorsed a theory of standing based on Article II, writing that litigation between private parties—even when explicitly authorized by Congress—can run afoul of the executive branch's interest in "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law." This Article II move has been justifiably criticized. But it is more plausible than the prevailing notion that a plaintiff invoking a statutorily authorized cause of action against another private party fails to present even a "case or controversy" under Article III if that plaintiff has not suffered some additional "injury in fact."*

*A proper understanding of this Article II executive-branch interest can yield a more sensible approach to standing than the current Article III framework. When a lawsuit between private parties runs afoul of the Court's injury-in-fact requirement, the remedy should not be to dismiss the case for lack of jurisdiction, but rather to allow an opportunity for the executive branch to participate in the litigation. The opportunity for executive-branch involvement was an important feature of pre-*TransUnion *decisions on standing in litigation between private parties. And this Article shows how the Federal Rules of Civil Procedure—*

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particularly Rule 19's provisions on required joinder—empower private defendants to prompt that involvement by the executive branch in cases where the plaintiff lacks the concrete injury that is currently viewed as a requirement of Article III. This approach preserves the potential interests of the executive branch, but it also maintains both Congress's authority to enact private-enforcement mechanisms and the federal judiciary's core function of interpreting and applying federal law. Standing doctrine would be more coherent from a federalism standpoint as well, correcting some perverse implications with respect to state law and state institutions.

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INTRODUCTION

Article II of the Constitution is having a moment. Fundamental questions about the authority and structure of "[t]he executive Power"[1] are percolating through the courts and will continue to do so in the coming months and years.[2] Less noticed among these hot-button issues has been a new task the Supreme Court has recently assigned to Article II—standing. For decades, standing doctrine has been a function of Article III, which permits federal court jurisdiction only with respect to "cases" or "controversies."[3] A "case or controversy" exists only when (among other things) the plaintiff has suffered or imminently will suffer an "injury in fact."[4] The lack of such an injury means that Article III forbids federal court jurisdiction, even if the plaintiff is pursuing a claim and a remedy that Congress has explicitly provided by statute.[5]

In *TransUnion LLC v. Ramirez*,[6] the Supreme Court began by deploying the prevailing Article III framework. But it then declared that Article II also places constraints on standing to sue—even in litigation between private parties that do not involve the executive

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1. U.S. CONST. art. II, § 1.

2. *See, e.g.*, United States v. Trump, 740 F. Supp. 3d 1245, 1252 (S.D. Fla. 2024) (holding that prosecution of President Trump by Special Counsel Jack Smith violated the Appointments Clause of Article II), *appeal filed*, No. 24-12311 (11th Cir. July 18, 2024), *appeal dismissed* (Nov. 26, 2024); Dellinger v. Bessent, 766 F. Supp. 3d 57, 60 (D.D.C. 2025) (issuing temporary restraining order against President Trump's removal of Special Counsel Hampton Dellinger), *stayed*, 145 S. Ct. 515; Dellinger v. Bessent, 768 F. Supp. 3d 33, 75 (D.D.C. 2025) (granting Special Counsel Dellinger's motion for a permanent injunction), *vacated and remanded*, No. 25-5052, 2025 WL 935211 (D.C. Cir. Mar. 27, 2025); Letter from Sarah M. Harris, Acting Solic. Gen., to Mike Johnson, Speaker H.R. (Feb. 12, 2025), https://perma.cc/33C7-T2EB (stating that the Trump Administration will urge the Supreme Court to overrule *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and to hold that tenure protections for members of independent agencies violate Article II).

3. U.S. CONST. art. III, § 2.

4. *E.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992); Summers v. Earth Island Inst., 555 U.S. 488, 492–93 (2009); Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408–09 (2013); Spokeo, Inc. v. Robins, 578 U.S. 330, 338–39 (2016). The injury-in-fact requirement is the first of a three-element test for Article III standing: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* at 338 (first citing *Lujan*, 555 U.S. at 560–61; and then citing Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000)).

5. *See, e.g.*, *Spokeo*, 578 U.S. at 341 (rejecting the argument 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" because "Article III standing requires a concrete injury even in the context of a statutory violation").

6. 141 S. Ct. 2190 (2021).

branch itself.[7] On this point, Justice Kavanaugh's majority opinion reasoned that such private litigation can interfere with the executive branch's interest in deciding "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law."[8] Thus, plaintiffs whose credit reports had mistakenly labeled them as potential terrorists lacked standing to sue the reporting agency for the statutory damages explicitly authorized by the Fair Credit Reporting Act (FCRA).[9] The majority reasoned that, because those particular plaintiffs' credit reports had not been disseminated to third parties,[10] allowing them to obtain the damages authorized by Congress would infringe upon the executive branch's authority under Article II.[11]

The Supreme Court's Article III standing jurisprudence has long been criticized, by scholars and jurists from across the ideological and philosophical spectrum.[12] Article II's role with respect to standing has received less attention, although it has been percolating for some

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7. As explained *infra* notes 92–94 and accompanying text, Article II plays a more natural role when the executive branch itself is the target of the litigation.

8. *TransUnion*, 141 S. Ct. at 2207.

9. *See infra* notes 28–31 and accompanying text.

10. *See infra* notes 38–39 and accompanying text. The Court did uphold standing with respect to class members whose credit reports were distributed to banks or other third-party businesses. *TransUnion*, 141 S. Ct. at 2200.

11. *See infra* notes 43–53 and accompanying text.

12. Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 957–58 (11th Cir. 2020) (Jordan, J., dissenting) ("That we need to resolve what is essentially a policy question to determine the boundaries of our subject-matter jurisdiction reminds us how far standing doctrine has drifted from its beginnings and from constitutional first principles."); Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1128 (11th Cir. 2021) (Newsom, J., concurring) ("Article III, which by its terms circumscribes the 'judicial Power,' has somehow been transformed into a check on the *legislature's* authority to pass substantive laws that create enforceable rights."); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 74 (1984) (arguing that the Supreme Court's case law on standing "reveals a Supreme Court in confusion about the role of the federal courts and of Congress"); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) ("The structure of standing law in the federal courts has long been criticized as incoherent. It has been described as 'permeated with sophistry,' as 'a word game played by secret rules,' and more recently as a largely meaningless 'litany' recited before 'the Court . . . chooses up sides and decides the case.'" (footnotes omitted)); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1132 (2009) (noting that Court's Article III standing doctrine "is widely regarded to be a mess"); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1160 (1993) ("[T]he injury in fact standard is incapable of providing a comprehensible and ingenuous limitation on the power of Congress to grant standing."); Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 358 (2021) ("One might well ask: What was the source of the injury-in-fact test? Did the Supreme Court just make it up? The answer is basically yes.").

time.[13] Following its recent endorsement in *TransUnion*, the Article II theory of standing has been met with considerable scholarly pushback.[14] But cataloging those critiques is not my purpose here. Rather, I argue that *TransUnion*'s Article II theory has a potentially positive silver lining. Foregrounding the role of the executive branch in assessing when legal violations warrant judicial enforcement may be the key first step toward a better approach to standing that is free from the problems and inconsistencies in the Court's Article III standing jurisprudence.

For decades now, an important line of academic debate has been whether standing is about the federal court's *jurisdiction* or about the substantive *merits* of a plaintiff's claim for relief.[15] Framed through the lens of the Federal Rules of Civil Procedure, is standing a Rule 12(b)(1) issue or a 12(b)(6) issue?[16] The Court's recent embrace of an Article II theory of standing invites a yet-unexplored third possibility. Standing is about joinder—or, more precisely, the failure to join. With respect to the Federal Rules, it is a Rule 12(b)(7) issue.[17] Under this approach, the plaintiff's lack of a concrete, particularized "injury in fact" does not deprive federal courts of jurisdiction. Rather, it requires the opportunity for participation by the executive branch.

This approach reconciles inconsistencies in the Supreme Court's standing decisions in cases involving claims between private parties. In two such decisions—*Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[18] and *Vermont Agency of Natural*

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13. *See infra* notes 114 & 128.

14. *See* Nitisha Baronia, Jared Lucky & Diego Zambrano, *Private Enforcement at the Founding and Article II*, 114 CAL. L. REV. (forthcoming 2026); Thomas P. Schmidt, *Standing Between Private Parties*, 2024 WIS. L. REV. 1, 54–58 (2024).

15. *See* Fletcher, *supra* note 12, at 223 ("I propose that we abandon the attempt to capture the question of who should be able to enforce legal rights in a single formula, abandon the idea that standing is a preliminary jurisdictional issue, and abandon the idea that Article III requires a showing of 'injury in fact.' Instead, standing should simply be a question on the merits of plaintiff's claim."); *see also, e.g.*, *Sierra*, 996 F.3d at 1131 (Newsom, J., concurring) ("If, as I maintain, a plaintiff's 'standing' ultimately turns on whether she has a cause of action, then it implicates the merits of her claim, *not* the court's power to entertain the case."); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 508 (2008) ("One dominant suggestion is to abandon standing altogether and return to the question of whether the plaintiff states a claim.").

16. Rule 12(b)(1) authorizes dismissal of a case for "lack of subject-matter jurisdiction," while Rule 12(b)(6) authorizes dismissal for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b).

17. FED. R. CIV. P. 12(b)(7) (authorizing dismissal for "failure to join a party under Rule 19"). Rule 19, in turn, governs when a person "must be joined as a party." FED. R. CIV. P. 19(a)(1). *See infra* notes 155–58 and accompanying text (discussing Rule 12(b)(7) and Rule 19).

18. 528 U.S. 167 (2000).

Resources v. United States ex rel. Stevens[19]—the Court found that standing existed despite the plaintiff's lack of a concrete, particularized injury in fact that would be redressed by the statutorily authorized remedy.[20] In both cases, however, the Supreme Court emphasized the fact that the executive branch could intervene and participate in such actions. The FCRA claims brought in *TransUnion*, by contrast, did not include an explicit statutory mechanism for executive-branch participation.

What *TransUnion* overlooked—and what this Article brings to light—is that the Federal Rules of Civil Procedure themselves provide the mechanisms to allow this kind of executive-branch participation. Rule 24's framework for intervention of non-parties permits the executive branch to intervene in the action when it takes affirmative steps to do so.[21] And Rule 19's framework for required joinder of parties gives the defendant in such an action a mechanism to initiate executive-branch involvement.[22] These insights suggest that—going forward—cases like *TransUnion* should not be dismissed for lack of federal subject-matter jurisdiction. Rather, a defendant like the credit reporting agency in *TransUnion* should file a Rule 12(b)(7) motion that asserts the plaintiff's lack of an "injury in fact" and therefore seeks joinder of the relevant executive branch official or agency to vindicate the executive branch's Article II interest. That will give the executive branch precisely the opportunity to participate that was so crucial in the Court's earlier cases. As with those earlier cases, however, the action may proceed whether or not the executive branch takes up that opportunity. When the executive branch declines to participate in a particular piece of litigation once the opportunity has been presented via the defendant's motion, it has made the decision that such private litigation does not undermine its Article II interest.[23]

What are the federalism implications of this new theory of standing? Unlike the prevailing view of Article III standing, this executive-branch participation norm would apply with equal force to federal law actions that are filed in state court. Also, unlike the

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19. 529 U.S. 765 (2000).

20. *See infra* notes 107–23 and accompanying text.

21. *See infra* Section III.A.

22. *See infra* Section III.B. As explained in greater detail below, the structure of Rule 19—when applied to this Article's theory of standing—confirms that the executive branch may be a *required* party but not an *indispensable* party, meaning that the action need *not* be dismissed if the executive branch opts not to participate. *See infra* Section III.B.2. Sovereign immunity principles confirm that the executive branch cannot be compelled to become a party against its will. *See infra* notes 176–84 and accompanying text.

23. As explained *infra* notes 128–33 and accompanying text, this approach would differ from a more aggressive view of Article II standing based on non-delegation.

prevailing view of Article III standing, there would be no obstacle to suits that are brought in federal court based on state substantive law. Such claims may, however, be susceptible to participation by state-level executive branch officials. The final federalism point is a surprising one. Recognizing a defendant's right to demand an opportunity for state-level officials to participate in suits arising under state law mitigates the problematic anti-adjudicative consequences of the Supreme Court's recent decision in *Whole Woman's Health v. Jackson*[24] (decided, coincidentally, just months after *TransUnion*). The *Whole Woman's Health* decision made it impossible to mount a constitutional challenge in federal court to Texas's S.B. 8, a statute authorizing purely private lawsuits that effectively shut down access to abortion in Texas during a period when *Roe v. Wade*'s[25] recognition of a constitutional right to abortion access remained the law of the land.[26] This Article's approach would provide an avenue for pre-enforcement constitutional challenges that the Supreme Court failed to consider. Potential targets of private lawsuits (under S.B. 8 or any analogous private-enforcement regime) could seek declaratory or injunctive relief against state-level executive officials based on those officials' ability to participate in future lawsuits initiated by private parties.

To be clear, this Article does not seek to defend the substantive elements of constitutional standing, including the oft-criticized injury-in-fact requirement.[27] Nor does it endorse the notion that either Article II *or* Article III should be read to impose constraints on litigation between private parties based on causes of action that Congress has explicitly authorized. Instead, my approach accepts that—for the moment—the Supreme Court is not prepared to discard the basic constitutional standing test that it applied in *TransUnion* and countless other cases. I argue, however, that *TransUnion*'s invitation to consider Article II as the basis for that constitutional standing test can—if properly conceived—pave the way toward a more desirable approach. A failure to satisfy constitutional standing requirements does not kill the lawsuit entirely; it simply gives the executive branch an opportunity to participate.

This Article proceeds as follows: Part I summarizes the Supreme Court's decision in *TransUnion*, both as an example of the typical Article III theory of standing and as a foundation for a new Article II theory. It then critiques the notion that Article III is a suitable basis for standing requirements in actions between private parties. Part II situates *TransUnion*'s endorsement of an Article II theory of standing in the longer arc of Supreme Court decisions on constitutional standing in litigation between private parties. It argues that the

24. 142 S. Ct. 522 (2021).
25. 410 U.S. 113 (1973).
26. *See infra* notes 191–206 and accompanying text.
27. *See supra* note 4 (describing the three-element test).

opportunity for the federal executive branch to participate in such litigation is sufficient to allay the constitutional concerns that had conventionally been framed as an Article III problem. And it describes how the Article II interest suggested in *TransUnion* can be understood to ensure this opportunity for executive-branch involvement. Part III fleshes out how such an executive-participation norm can be implemented under the Federal Rules of Civil Procedure, even in a case like *TransUnion* for which the federal statute creating the private cause of action does not explicitly enable such participation. Finally, Part IV revisits the federalism dimensions of this issue, including how this Article's proposal can provide a solution to the problem highlighted by the Supreme Court's decision in *Whole Woman's Health*, a case that rendered the federal courts unable to address glaring constitutional problems with a private-enforcement regime enacted by the State of Texas.

I. CONSTITUTIONAL STANDING IN ACTIONS BETWEEN PRIVATE PARTIES

This Part uses the Supreme Court's *TransUnion* decision to illustrate the current approach to constitutional standing in suits between private parties. It then critiques that approach through a variety of lenses, including interpretive coherence, federalism, and separation of powers.

A. The TransUnion *Decision*

TransUnion LLC v. Ramirez involved claims brought under the Fair Credit Reporting Act (FCRA), which requires consumer reporting agencies to follow reasonable procedures to assure maximum possible accuracy of consumer reports. The FCRA also provides that willful failure to comply with its requirements gives an individual a claim for actual damages or for statutory damages (regardless of actual injury) "of not less than $100 and not more than $1,000."[28] In the case before the Supreme Court, the defendant—the credit reporting agency TransUnion—had generated credit reports that misleadingly labeled individuals as potential terrorists because their names matched those on the U.S. Treasury Department's Office of Foreign Assets Control list.[29] The lower court certified a class action on behalf of over 8,000 consumers whose credit reports included those labels, leading to a damages award for the class totaling about $40 million.[30]

In a 5-4 decision, the Supreme Court held that class members whose reports had not been disseminated to a third party lacked standing because they had not suffered the "injury in fact" needed to

28. 15 U.S.C. § 1681n(a)(1)(A).
29. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2201 (2021).
30. *Id.* at 2200.

satisfy Article III's case-or-controversy requirement.[31] The injury-in-fact element—as the Court had explained in earlier cases—entails "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"[32] A "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way."[33] And a "concrete" injury must be "real, and not abstract."[34] Although *TransUnion* and earlier cases recognize that some "intangible" harms can also be "concrete,"[35] the harm must be something more than a "bare procedural violation[]."[36]

Applying these principles to the facts of *TransUnion*, the majority agreed that "the harm from being labeled a 'potential terrorist'" *could* be sufficient for purposes of Article III.[37] But it found that class members whose reports were not disseminated had suffered no concrete harm.[38] In this regard, the Court drew a distinction between retrospective monetary relief and prospective injunctive relief. A risk of future harm may justify "forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial."[39] But in the *TransUnion* case itself, the class members had sought exclusively monetary damages.[40] Accordingly, only the 1,800 class members whose credit reports had been disseminated to third-party businesses had standing to sue; the other 6,300 class members did not.[41]

The *TransUnion* case was hardly the first Supreme Court decision to deploy standing doctrine to block individuals' access to the federal courts to enforce federal substantive law. One of many

31. *Id.* at 2200–03 ("[W]e start with the text of the Constitution. Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'"); *id.* (noting that a to establish standing a plaintiff must show "that he suffered an injury in fact that is concrete, particularized, and actual or imminent").

32. Spokeo, Inc. v. Robins, 578 U.S. 330, 339 (2016) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

33. *Id.* (quoting *Lujan*, 504 U.S. at 560 n.1).

34. *TransUnion*, 141 S. Ct. at 2204 (quoting *Spokeo*, 578 U.S. at 340).

35. *Id.*

36. *Id.* at 2213 (quoting *Spokeo*, 578 U.S. at 341).

37. *Id.* at 2209.

38. *Id.* at 2210 ("The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm.").

39. *Id.* (first citing Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 n.5 (2013); and then citing Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).

40. *Id.* at 2202.

41. *Id.* at 2212–13 ("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 . . . whose credit reports were disseminated to third-party businesses during the class period suffered a concrete harm.").

important examples is *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,[42] where the Court found that plaintiffs lacked standing to challenge the federal government's gift of property to a religious institution as a violation of the Establishment Clause; the Court noted that the plaintiffs failed to allege that they suffered "an injury of any kind, economic or otherwise."[43] Another example is *Lujan v. Defenders of Wildlife*,[44] where the Supreme Court denied standing to organizations claiming that the Secretary of the Interior violated the Endangered Species Act by refusing to apply it to actions taken in foreign countries; the organizations' members had no "concrete plans" to visit any such foreign locations where endangered species might be affected.[45] Likewise, *Clapper v. Amnesty International USA*[46] found that American journalists, attorneys, and human rights organizations lacked standing to challenge the constitutionality of 50 U.S.C. § 1881a, which expanded the federal government's ability to surveil foreign communications.[47] The plaintiffs in *Clapper* could not show a sufficient likelihood of injury because they had "no actual knowledge of the Government's § 1881a targeting practices";[48] and even if the plaintiffs' foreign contacts were likely to be targeted for surveillance (which would include the plaintiffs' own communications with those parties), they "can only speculate as to whether the Government will seek to use § 1881a-authorized surveillance (rather than other methods) to do so."[49]

As these examples show, many of the Supreme Court's standing decisions involve lawsuits challenging actions of the federal government itself. The plaintiffs were asking the federal courts to provide remedies against a co-equal branch of government, potentially exacerbating separation-of-powers concerns.[50] In *TransUnion*, however, standing was denied in an action between private parties, even where the political branches had explicitly ratified both the private cause of action and the underlying substantive law.[51]

Perhaps aware of this distinction, the *TransUnion* majority turned to a new line of argument with separation-of-powers

42. 454 U.S. 464 (1982).
43. *Id.* at 486 (emphasis removed).
44. 504 U.S. 555 (1992).
45. *Id.* at 564.
46. 568 U.S. 398 (2013).
47. *Id.* at 418.
48. *Id.* at 411.
49. *Id.* at 412.
50. *See infra* notes 92–94 and accompanying text (discussing the differences between actions against the federal government and actions between private parties).
51. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200–01 (2021).

implications. Justice Kavanaugh warned that "[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."[52] He argued that "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."[53] Private parties and their attorneys, by contrast, "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."[54]

B. Critiquing Article III as a Basis for Constitutional Standing Requirements in Actions Between Private Parties

The *TransUnion* decision illustrates the effect that constitutional standing requirements can have on litigation between private parties. The crux of the majority's analysis was grounded in the usual source of constitutional standing doctrine: Article III. But it proceeded to endorse—for the first time in a majority opinion—the notion that Article II offers a basis for standing requirements in such cases, even when the suit is explicitly authorized by Congress and seeks to vindicate substantive federal law. This Section critically examines Article III as a source for external standing obligations in litigation between private parties, setting the table for the development of an alternative theory of standing grounded in Article II.

1. Interpretive Critique

The principal interpretive argument against reliance on Article III to support current standing doctrine is the text of Article III itself. The three-part test for constitutional standing—including the injury-in-fact requirement—purportedly stems from the fact that Article III allows federal courts to decide only "cases" or "controversies." For the kinds of cases affected by *TransUnion*, however, codified federal law—enacted in accordance with Article I—has given the plaintiff a federal cause of action, with legislatively designated remedies, the availability of which hinges on the defendant's violations of substantive federal law. It is hard to explain as a textual matter why a lawsuit that Congress has explicitly authorized to enforce substantive federal law does not even qualify as a "Case[], in Law and Equity, arising under . . . the Laws of the United States."[55]

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52. *Id.* at 2207 (emphasis removed).

53. *Id.*

54. *Id.*

55. U.S. CONST. art. III, § 2. For other scholars and jurists who have critiqued Article III standing on textualist grounds, see, e.g., Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1122 (11th Cir. 2021) (Newsom, J., concurring) ("[N]othing in Article III's language compels our current standing doctrine, with all its attendant rules about the kinds of injuries—'concrete,' 'particularized,' 'actual or

Scholars and jurists have also questioned the historical justification for Article III standing doctrine. To highlight just two examples of many, Cass Sunstein called it "essentially an invention of federal judges, and recent ones at that," and argued that "it should not be accepted by judges who are sincerely committed to the original understanding of the Constitution and to judicial restraint."[56] More recently, Judge Kevin Newsom of the U.S. Court of Appeals for the Eleventh Circuit penned a lengthy concurring opinion marshaling "[e]vidence regarding the sorts of suits that courts routinely heard in the years surrounding the Founding," including "English and American courts' historical treatment of (1) suits for nominal damages, (2) *qui tam* actions, and (3) criminal prosecutions."[57] That historical record left no room for reading Article III to impose a "stand-alone requirement of a factual injury, separate and apart from a legally cognizable cause of action."[58]

Finally, grounding standing doctrine in Article III creates internal incoherence with other aspects of Article III. In *TransUnion* and earlier cases, the Supreme Court has explained that "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)."[59] That is precisely

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imminent'—that suffice to make a 'Case.'"); Sunstein, *supra* note 12, at 363 ("[T]he text of Article III contains no such limits.").

56. Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992); *see also* Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1318 (2021) (arguing that history supports reading Article III to permit lawsuits seeking to vindicate a plaintiff's "interest in respectful treatment"); James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement in a Partisan World*, 92 FORDHAM L. REV. 469, 471 (2023) ("Whatever one might say about its wisdom as a matter of policy, the Court's use of strict standing rules to preclude private enforcement of public law cannot be defended on originalist grounds."); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1396 (1988) (arguing that practice at the time of the Framers was not limited to "the private rights model of the seven common law forms of action" or "the 'injury-in-fact' paradigm of modern standing doctrine" but instead permitted suits that were "astonishingly similar to the 'standingless' public action or 'private attorney general' model that modern standing law is designed to thwart"). *But see* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 732 (2004) ("This Article has sought to show that standing doctrine has a far longer history than its modern critics concede.").

57. *Sierra*, 996 F.3d at 1123 (Newsom, J., concurring).

58. *Id.*

59. *TransUnion*, 141 S. Ct. at 2208; *see also* Lewis v. Casey, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross."); Davis v. Fed. Election Comm'n, 554 U.S. 724, 734 (2008) ("'[A] plaintiff must demonstrate standing for each claim he seeks to press' and "'for each form of relief'" that is sought." (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006))).

why the *TransUnion* Court could conclude that some of the class members had standing to pursue their FCRA claims in federal court but others did not.[60] It is well-established, however, that subject-matter jurisdiction for purposes of Article III *is* "dispensed in gross." It has been black-letter law for more than half a century that Article III permits jurisdiction over claims that lack an independent basis for federal subject-matter jurisdiction as long as those claims arise from the same "common nucleus of operative fact" as the claims that do fall within one of the categories authorized by Article III.[61] This includes claims by additional plaintiffs (such as the class members whose claims were rejected in *TransUnion*), even when those plaintiffs have no claims that would independently satisfy Article III's requirements.[62] The Court has never sought to reconcile these mutually inconsistent approaches.

2. Federalism Critique

Putting aside its interpretive shortcomings, grounding constitutional standing restrictions in Article III has led to a very strange allocation of authority between state courts and federal courts. Ever since the Supreme Court's 1989 decision in *ASARCO Inc. v. Kadish*,[63] it has been clear that state courts are not subject to the standing limitations that the Supreme Court has attributed to Article III. And correctly so. By its terms, Article III governs only the jurisdiction of the federal courts.[64] As Justice Kennedy explained in *ASARCO*,

> the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability *even when they address issues of federal law*, as when they are called upon to interpret the Constitution or, in this case, a federal statute.[65]

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60. *See supra* note 41 and accompanying text.

61. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

62. 28 U.S.C. § 1367(a) (permitting federal courts to assert "supplemental jurisdiction" over "claims that involve the joinder or intervention of additional parties"); *see also* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 549 (2005) (noting that "claims of other plaintiffs" can be included "in the same Article III case or controversy"); *id.* at 558 ("The last sentence of § 1367(a) makes it clear that the grant of supplemental jurisdiction extends to claims involving joinder or intervention of additional parties.").

63. 490 U.S. 605 (1989).

64. U.S. CONST. art. III.

65. *ASARCO*, 490 U.S. at 617 (emphasis added). Despite *ASARCO*'s instruction, state courts have often mistakenly concluded that they are bound to follow the Supreme Court's jurisprudence on Article III standing. *See, e.g.*, Adam Flaherty & Isaiah W. Ogren, *The New Standing Doctrine, Judicial Federalism, and the Problem of Forumless Claims*, 134 YALE L.J. 1008, 1021–22 (2025).

Accordingly, the kinds of congressionally authorized substantive claims at issue in cases like *TransUnion* are still viable. But they can only be vindicated in state court.[66] This conclusion is doctrinally sound given standing's textual grounding in Article III, but it is an exceptionally odd result. Claims based on federal causes of action undeniably present federal questions, and the central motivation for federal question jurisdiction is that federal judges—on balance—will do a better job in interpreting and applying federal law.[67] To be sure, the Supreme Court has recognized some situations in which even important federal law claims are outsourced to state court; numerous abstention doctrines have this effect, for example.[68] Such doctrines, however, have explicit federalism justifications.[69] No such justification exists for reading Article III to compel the adjudication of federal law causes of action in state court whenever a particular plaintiff fails to satisfy one or more elements of the Court's standing doctrine.[70] State courts do not have some kind of comparative advantage in adjudicating claims for which the plaintiff has not suffered a concrete, particularized injury in fact. Nor does it show respect for state courts to give them exclusive jurisdiction over such

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66. Justice Thomas's dissenting opinion in *TransUnion* made precisely this observation, noting that—under the majority's reasoning—"state courts will exercise exclusive jurisdiction" over these kinds of FCRA claims. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2224 n.9 (2021) (Thomas, J., dissenting); *see also, e.g.*, Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211 (2021). For an argument that the Supremacy Clause obligates state courts to hear federal law claims even if Article III would prevent standing in federal court, see Flaherty & Ogren, *supra* note 65, at 1031–49.

67. *See, e.g.*, Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 158–59 (1953) (noting that adjudication of federal law issues by federal judges will "promote[] a more uniform, correct application of federal law" and is "more likely to give full scope to any given Supreme Court decision, and particularly ones unpopular locally" (footnote omitted)).

68. *See generally* MARTIN H. REDISH, SUZANNA SHERRY, JAMES E. PFANDER, STEVEN S. GENSLER & ADAM N. STEINMAN, FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS 565–97 (9th ed. 2022).

69. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 44 (1971) (calling "proper respect for state functions" a "vital consideration" in "recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways"). The Court went on to declare that *Younger* abstention was a core component of "Our Federalism." *Id.*

70. One feature of situating standing doctrine in Article II is that it can avoid the peculiar channeling of federal law claims to state court. If litigation between private parties runs afoul of Article II executive-branch interests, then those interests would be equally violated by litigation in state court. *See infra* Section IV.A.

claims.[71] If anything, it has an air of disrespect: these actions do not even qualify as "cases or controversies" that warrant the attention of our august federal judges; but you state court judges should deal with them.[72]

Now consider what happens after such a case is initiated in state court. *ASARCO* also addressed how the appellate process would unfold. If a plaintiff lacks standing to bring a particular claim in federal court because of the Supreme Court's jurisprudence on Article III standing, that case must be brought—if at all—in state court, with the state court deciding any federal law issues.[73] Does the lack of Article III standing mean that the Supreme Court lacks jurisdiction to exercise appellate review of those federal law issues from the state court system? The Court in *ASARCO* instructed that appellate review was indeed available, because the state court judgment creates the requisite "injury in fact."[74] As Justice Kennedy explained, the state court litigation was "judicial in nature, and resulted in a final judgment altering tangible legal rights."[75]

Looking more closely, however, this is a peculiar form of appellate review, because it is only available if the plaintiff *wins* in state court. Then, the Supreme Court can review the relevant federal law issues and, potentially, reverse the plaintiff's victory. But if the plaintiff *loses* in state court—perhaps because the state courts made mistakes in interpreting and applying federal substantive law—appellate review by the Supreme Court is not available.[76] This is an unacceptably one-sided approach to appellate review. It is one thing to leave federal questions to be decided in state court, with the potential safety net of appellate review by the Supreme Court.[77] It is

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71. *Cf. Younger*, 401 U.S. at 44.

72. Congress itself, of course, may deny the lower federal courts jurisdiction over certain categories of claims, meaning that they must be brought in state court as an initial matter. But this stems from the power of Congress to create and define the jurisdictional scope of the lower federal courts. *See* U.S. CONST. art I, § 8 (giving Congress the "Power . . . [t]o constitute Tribunals inferior to the supreme Court"); *id.* art. III, § 1 (vesting the "judicial Power" in the Supreme Court and "in such inferior Courts as the Congress may from time to time ordain and establish").

73. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989).

74. *Id.* at 619.

75. *Id.*

76. *See, e.g.*, 13B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.14 (3d. ed. 2025) (noting that under the logic of *ASARCO*, "unsuccessful plaintiffs accorded standing by state courts may lack standing to provoke a decision on the merits by the Supreme Court," while "defendants defeated in state court by plaintiffs who do not meet federal standing tests may secure Supreme Court review").

77. Because of *Younger* abstention, important constitutional law issues relating to criminal procedure must first be litigated in the context of the state court criminal prosecution, but decisions on those federal law issues may be

another to allow Supreme Court review only where the state court's approach to federal law disadvantages the defendant.[78]

3. Separation-of-Powers Critique

As the Supreme Court has emphasized repeatedly, "standing is 'built on a single basic idea—the idea of separation of powers.'"[79] Such language is little more than an empty slogan, however, if it does not invite a thoughtful assessment of what the relationship between those powers should be.[80] It is far from clear that the Article III

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appealed up through the state court system to the U.S. Supreme Court. *See* Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2289 (2018) (noting that *Younger* abstention reflects a "compromise" that generally "trust[s] and rel[ies] on state criminal processes to adjudicate constitutional claims during an ongoing criminal proceeding"); *see also* Juidice v. Vail, 430 U.S. 327, 342–43 (1977) (Brennan, J., dissenting) (objecting to the use of *Younger* abstention in that case but recognizing "the possibility of review by this Court of state decisions" in cases where *Younger* abstention applies). In the civil context, federal law defenses to state law claims—such as First Amendment protections against libel or defamation suits—do not open the door to original jurisdiction in federal district court. *See, e.g.*, Monks v. Hetherington, 573 F.2d 1164, 1166 (10th Cir. 1978) ("The underlying controversy here is the defamation action. This, of course, arises under state law and plainly there is no federal jurisdiction as to this. The fact that the defendants in that action . . . seek to advance the First Amendment as a defense does not constitute a basis for federal jurisdiction, for it is fundamental that anticipation of a defense cannot confer jurisdiction." (first citing Gully v. First Nat'l Bank, 299 U.S. 109 (1936); and then citing Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908))). Litigation of those issues must also proceed through the state appellate system, after which U.S. Supreme Court review of the state's highest court is available. *See, e.g.*, Milkovich v. Lorain J. Co., 497 U.S. 1, 10 (1990).

78. Such an asymmetric form of appellate review might be justified in situations where the costs of error are greater in one direction than in another. Consider, for example, the maxim that "it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned." Furman v. Georgia, 408 U.S. 238, 367–68 n.158 (1972) (Marshall, J., concurring) (quoting William O. Douglas, *Foreword* to JEROME FRANK & BARBARA FRANK, NOT GUILTY 11–12 (1957)). Asymmetric appellate review of criminal verdicts reflects this; "[t]he Double Jeopardy Clause . . . typically prohibits the prosecution from appealing a verdict of acquittal, but there is no comparable limit on appeals by defendants convicted at trial." Adam N. Steinman, *Rethinking Standards of Appellate Review*, 96 IND. L.J. 1, 44–45 (2020). This rationale does not, however, justify the sort of asymmetric review created by *ASARCO*.

79. United States v. Texas, 143 S. Ct. 1964, 1969 (2023) (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)); *accord* FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1554 (2024).

80. Will Baude and Sam Bray recently made the following observation about the Court's emphasis on separation of powers: "Is the Court making the tautological point that because standing is a judicial construction of the requirements of Article III, and because the separation of powers comprises Articles I, II, and III of the Constitution, any violation of the doctrine of standing

approach to standing in litigation between private parties serves—rather than undermines—that relationship.

Denying federal court jurisdiction in cases like *TransUnion* directly thwarts the interests of the legislative branch. Congress explicitly created federal substantive law, a federal cause of action, and a set of federal law remedies—with the anticipation that federal courts would be available to adjudicate claims invoking those remedies. To be sure, some defiance of the legislative branch is an unavoidable consequence of judicial review.[81] That move is problematic, however, when it rests on the thin reed that a lawsuit Congress has explicitly authorized to enforce substantive federal law does not even qualify as a "Case[], in Law and Equity, arising under . . . the Laws of the United States."[82]

Indeed, this aspect of the *TransUnion* decision is in tension with other decisions by the Supreme Court suggesting that Congress can effectively bestow Article III standing when it creates, via legislation, substantive rights and remedies.[83] Consider the recent decision in *United States v. Texas*.[84] Although the Court concluded that the States of Texas and Louisiana lacked standing to challenge the Biden administration's immigration enforcement guidelines, it stated that the result might be different if Congress had "specifically authorize[d]" suits challenging executive-branch underenforcement.[85]

The Supreme Court made a similar observation in connection with the political question doctrine, a constraint on access to the federal courts that is also attributed to Article III.[86] In *Rucho v.*

must also be a violation of the separation of powers? If so, the invocation of separation of powers adds nothing but an air of seriousness." William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 161 (2023).

81. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178–80 (1803) ("If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply. . . . [A] law repugnant to the constitution is void.").

82. U.S. CONST. art. III, § 2.

83. *E.g.*, Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.").

84. 143 S. Ct. 1964 (2023).

85. *Id.* at 1973. To be clear, the Court did not take an affirmative position on this question. *Id.* ("We do not take a position on whether such a statute would suffice for Article III purposes; our only point is that no such statute is present in this case."). But the possibility that it might indicates that the constitutional nature of Article III is not fundamentally inconsistent with Congress creating federal substantive rights, the violation of which would give rise to the requisite "case or controversy."

86. Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019).

Common Cause,[87] a 5-4 majority found that the political question doctrine barred the federal courts from considering the plaintiffs' claims that the congressional districting maps adopted in two states were unconstitutional partisan gerrymanders.[88] The purported justification was that the plaintiffs' proposed standards for evaluating such claims were not "judicially discernible and manageable."[89] But the Court indicated that the result might be different if those standards had been formally codified.[90] It is hard to square the premise that the political question doctrine is a jurisdictional requirement grounded in Article III with the suggestion that Congress can eliminate that problem via legislation. And if congressional legislation can solve that Article III problem, why doesn't the explicit creation of a private cause of action such as the FCRA do the same?[91]

What about the interests of the executive branch? In many cases, standing is invoked to limit a party's ability to sue federal officials or agencies.[92] Such lawsuits invite a direct conflict between the judicial branch and the executive branch, because they seek to enlist the judicial branch in examining whether the executive branch's conduct complies with federal law. Even when Congress explicitly authorizes the judicial branch to play that role, a separation-of-powers inquiry must reckon with whether such a two-on-one creates too great an infringement on the executive branch. As Justice Scalia explained in the landmark *Lujan* decision:

> 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

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87. 139 S. Ct. 2484 (2019).

88. *Id.* at 2506–07.

89. *Id.* at 2502.

90. *Id.* at 2507–08.

91. Similarly, the Supreme Court has recognized that Congress may bestow substantive rights on all persons—such as the right to obtain certain kinds of information—and that when it does so, that substantive entitlement is sufficient grounds for Article III standing. *See, e.g.*, FEC v. Akins, 524 U.S. 11, 20 (1998) (holding that standing existed based on the plaintiffs' inability to obtain statutorily required information regarding a political committee's donors and expenditures); Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 449 (1989) ("As when an agency denies requests for information under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee's activities to the extent [the federal statute] allows constitutes a sufficiently distinct injury to provide standing to sue.").

92. *See supra* notes 43–49 and accompanying text; *see also* Summers v. Earth Island Inst., 555 U.S. 488, 490 (2009) (finding that the plaintiffs lacked standing to challenge the United States Forest Service's regulation exempting certain projects from public notice and comment); United States v. Texas, 143 S. Ct. 1964, 1968 (2023) (finding that the plaintiffs lacked standing to challenge the Biden Administration's policy on immigration enforcement).

> 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." 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," and to become "'virtually continuing monitors of the wisdom and soundness of Executive action.'"[93]

This concern is not present, however, when litigation arises between private parties and does not target the conduct of any federal governmental actor.[94] The Article II theory alluded to in *TransUnion* does, however, add a plausible executive-branch interest that litigation between private parties may affect. As explained above, Justice Kavanaugh's opinion indicates that permitting private-party litigation in federal courts could violate Article II by interfering with the power of the executive branch to enforce federal substantive law as it sees fit.[95]

This understanding of Article II raises questions, however. If this power to choose "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law" belongs exclusively to the executive branch,[96] why is *any* private litigation based on federal substantive law allowed? Even plaintiffs who easily satisfy constitutional standing requirements (such as the *TransUnion* class members whose credit reports *were* disseminated to third parties)[97] are "pursu[ing] legal actions against defendants who violate the law."[98] Do their claims infringe on the executive branch's

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93. Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (citations omitted) (first quoting U.S. CONST. art II, § 3; then quoting Massachusetts v. Mellon, 262 U.S. 447, 489 (1923); and then quoting Allen v. Wright, 468 U.S. 737, 760 (1984)).

94. Justice Thomas—who has notably declined to join his conservative colleagues in some significant decisions on standing—made this point in a separate opinion he wrote in a pre-*TransUnion* FCRA case. Spokeo, Inc. v. Robins, 578 U.S. 330, 347 (2016) (Thomas, J., concurring) (noting that "[t]he separation-of-powers concerns underlying our public-rights decisions are not implicated when private individuals sue to redress violations of their own private rights" because "there is generally no danger that the private party's suit is an impermissible attempt to police the activity of the political branches"). *See also* Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 958 (11th Cir. 2020) (Jordan, J., dissenting) ("Cases like this one, involving the alleged invasion of a congressionally-created private right by a private party against another private party, do not implicate structural or institutional concerns. They are exactly the type of cases suited for initial congressional judgment and ensuing judicial resolution."); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 317–21 (2008); Schmidt, *supra* note 14, at 6–8.

95. *See supra* notes 52–54 and accompanying text.

96. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021).

97. *See supra* note 41 and accompanying text.

98. *TransUnion*, 141 S. Ct. at 2207.

authority under Article II?[99] Justice Kavanaugh's *TransUnion* opinion acknowledged this concern. He conceded that any Article II interest must "accept the 'displacement of the democratically elected branches when necessary to decide an *actual case*'"—that is, a case brought by a plaintiff who satisfies constitutional standing requirements for purposes of Article III.[100] On this account, however, the Article II theory itself relies on Article III. And if so, the critiques of Article III set forth above would taint the Article II theory as well.

This Part has shown that allowing Article III to block litigation between private parties is problematic for numerous reasons. An Article II theory of standing along the lines of what the Court described in *TransUnion* may fare better than Article III in one sense; it adds to the separation-of-powers calculus an executive-branch interest that at least deserves consideration.[101] Greater clarification is needed, however, regarding both (a) the precise scope and content of the Article II interest in litigation between private parties, and (b) how it intersects with the clear existence of standing for plaintiffs who do satisfy the injury-in-fact requirement and other elements of constitutional standing. The next Parts of this Article develop an approach that addresses those issues.

II. THE EXECUTIVE BRANCH AND STANDING IN PRIVATE LITIGATION

To situate *TransUnion*'s endorsement of an Article II theory of standing, this Part begins by considering previous Supreme Court decisions involving standing in actions between private parties. Section A argues that the Supreme Court's case law in this area reveals that the ability of the executive branch to participate in that litigation is a key consideration. Section B argues that this interest in participation offers a coherent way to understand Article II's

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99. Even before *TransUnion*, scholars recognized this potential problem with relying on Article II to justify constitutional standing requirements. *See* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 788 (2009) ("A party with an injury-in-fact is free to bring an enforcement action that the Executive Branch has declined to bring, and sometimes even to bring suit directly against the Executive Branch."); Nichol, *supra* note 12, at 1165 (arguing that "[t]he nature and extent of the plaintiff's injury tells us very little about the scope of presidential power" because "[a] plaintiff with a demonstrably concrete and personalized injury may seek relief which intrudes fundamentally upon the executive domain").

100. *TransUnion*, 141 S. Ct. at 2207 (emphasis added) (quoting John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993)). As the citation indicates, Justice Kavanaugh's opinion relied on an article written by Chief Justice Roberts prior to his appointment to the federal bench.

101. Article II and Article III are not the only constitutional provisions relevant to litigation between private parties. As discussed *infra* Section III.C, the Due Process Clause may constrain particularly abusive forms of private enforcement.

impact on standing and clarifies the scope and content of that Article II interest.

A. Reconciling the Court's Case Law

TransUnion was not the first Supreme Court decision to discuss the relationship between standing in private litigation and the interests of the executive branch. A quarter-century earlier—in *Steel Co. v. Citizens for a Better Environment*[102]—the Supreme Court *rejected* the Article II theory endorsed in *TransUnion*. Like *TransUnion*, *Steel Co.* was a case involving litigation between private parties based on a cause of action that was explicitly authorized by federal statute.[103] The Court found that "an association of individuals interested in environmental protection" lacked standing to sue the defendant—a private manufacturing company—under the federal Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA).[104] Justice Scalia's majority opinion stressed that its standing analysis was "not motivated . . . by the more specific separation-of-powers concern that [the] suit 'somehow interferes with the Executive's power to "take Care that the Laws be faithfully executed."'"[105] Rather, he made clear that "[t]his case calls for nothing more than a straightforward application of our standing jurisprudence, which, though it may sometimes have an impact on Presidential powers, derives from Article III and *not Article II*."[106]

Although *Steel Co.* aligns with *TransUnion* in its ultimate conclusion—in that both decisions found that the plaintiffs lacked standing—more recent decisions are hard to reconcile on that score. First consider *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[107] This case involved an action seeking civil penalties against the defendant for its failure to comply with

102. 523 U.S. 83 (1998).

103. *Id.* at 86. Although the plaintiff's claim in *Steel Co.* was based on an explicit statutory cause of action, the case did present a question about the precise scope of that cause of action. *See id.* (noting a "merits question, answered in the affirmative by the United States Court of Appeals for the Seventh Circuit, whether EPCRA authorizes suits for purely past violations"). But the Supreme Court's Article III analysis assumed that the plaintiffs did have a claim under the statute; indeed, the majority held that it was constitutionally barred from addressing a purely legal question regarding the scope of the statutory cause of action, because the federal judiciary could not permissibly address that question unless Article III standing existed. *Id.* at 101–02 (rejecting "a doctrine of 'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in doubt" and stating that "[f]or a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires").

104. *Id.* at 86, 109.

105. *Id.* at 102 n.4 (quoting *id.* at 129 (Stevens, J., concurring)).

106. *Id.* (emphasis added).

107. 528 U.S. 167 (2000).

limitations imposed by its federal National Pollutant Discharge Elimination System (NPDES) permit that was issued pursuant to the Clean Water Act.[108] The Clean Water Act explicitly authorized private citizens to sue in federal court to enforce such limitations.[109]

The Supreme Court found that the private parties had standing to sue for those civil penalties—even where those penalties would be payable entirely to the government.[110] The majority's reasoning in *Friends of the Earth* fits almost perfectly with the sort of private FCRA lawsuits for which standing was found lacking in *TransUnion*. Quoting Justice Frankfurter from decades earlier, the *Friends of the Earth* Court explained that "[h]ow to effectuate policy"—including the judicial remedies by which "proscribed conduct is to be deterred"—was "a matter within the legislature's range of choice."[111] And the civil penalties awarded under the Clean Water Act for violations of the defendant's permits "carried with them a deterrent effect" that was "likely" to "abat[e] current violations and prevent[] future ones."[112] That reasoning rings equally true with respect to the statutory damages sought by the class members in *TransUnion*. Yet the *TransUnion* majority made no attempt to reconcile the Court's *Friends of the Earth* reasoning with its rejection of standing for most of the FCRA class members in *TransUnion*. The logic of *Friends of the Earth* seems far more receptive to allowing private parties to vindicate violations of federal law through federal court lawsuits—provided that Congress has made its "choice"[113] in favor of that remedial and enforcement mechanism.[114]

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108. *Id.* at 173–77.

109. *Id.* at 174 (citing 33 U.S.C. § 1365(a), (g)).

110. *See id.* at 185 ("Civil penalties offer no redress to private plaintiffs, Laidlaw argues, because they are paid to the Government, and therefore a citizen plaintiff can never have standing to seek them."). This particular argument focused on the redressability element of Article III standing. *See id.* ("Here the asserted defect is not injury but redressability."); *see also supra* note 4 (describing the requirement of Article III standing that the plaintiff's injury "is likely to be redressed by a favorable judicial decision"). The Court in *Friends of the Earth* also rejected an argument that the plaintiffs lacked the requisite injury in fact, noting that the defendant's conduct had "directly affected" the "recreational, aesthetic, and economic interests" of various members of the plaintiff organizations. *Id.* at 183–84.

111. *Id.* at 187 (quoting Tigner v. Texas, 310 U.S. 141, 148 (1940)).

112. *Id.*

113. *Id.* (quoting *Tigner*, 310 U.S. at 148).

114. *Friends of the Earth* prompted two separate opinions alluding to Article II's potential relevance to standing. Justice Kennedy authored a concurring opinion observing that "[d]ifficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States." *Id.* at 197 (Kennedy, J., concurring). He declined to weigh in on that issue, however, noting that "these matters are

Just months after *Friends of the Earth*, the Court decided *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.[115] That case upheld the constitutionality of qui tam actions, brought by private parties, to collect monetary damages from other private parties who violated the False Claims Act (FCA) by submitting fraudulent claims to the U.S. government.[116] The FCA authorizes such claims to be brought by any private person (the "relator") "for the person and for the United States Government,"[117] with the private party retaining a share of the proceeds. That private party need not show that it suffered any concrete, particularized injury from the defendant's fraud on the U.S. government.[118]

Accordingly, the Supreme Court recognized that the private relator bringing a qui tam action under the FCA would not ordinarily meet the requirements for standing. Although the relator's share of the proceeds if the suit is successful gives the party "a 'concrete private interest in the outcome of [the] suit,' . . . [a]n interest *unrelated to injury in fact* is insufficient to give a plaintiff standing."[119] Yet the Supreme Court blessed such lawsuits based on "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor,"[120] concluding that the FCA "can reasonably be regarded as effecting a partial assignment of the Government's damages claim."[121]

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best reserved for a later case." *Id.* Justice Scalia's dissenting opinion—though grounded in Article III—also flagged the Article II issue for future consideration. *Id.* at 209 (Scalia, J., dissenting) ("Article II of the Constitution commits it to the President to 'take Care that the Laws be faithfully executed' and provides specific methods by which all persons exercising significant executive power are to be appointed. As Justice Kennedy's concurrence correctly observes, the question of the conformity of this legislation with Article II has not been argued—and I, like the Court, do not address it." (citations omitted) (quoting U.S. CONST. art. II, § 3)).

115. 529 U.S. 765 (2000).

116. *Id.* at 787. The particular FCA claim pursued in *Stevens* was ultimately rejected on statutory grounds because that claim was brought against an agency of the State of Vermont. *See id.* at 787–88 ("We hold that a private individual has standing to bring suit in federal court on behalf of the United States under the False Claims Act but that the False Claims Act does not subject a State (or state agency) to liability in such actions." (citation omitted) (citing 31 U.S.C. §§ 3729–3733)).

117. *Id.* at 769 (quoting 31 U.S.C. § 3730(b)(1)); *see also* United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1726 (2023) (describing qui tam actions).

118. *See Stevens*, 529 U.S. at 771–74.

119. *Id.* at 772 (alteration in original) (emphasis added) (citation omitted) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 573 (1992)).

120. *Id.* at 773.

121. *Id.* Since *Stevens*, some have challenged the constitutionality of qui tam actions on Article II grounds; that argument and its relationship to my Article's theory are discussed *infra* notes 128–33 and accompanying text.

The logic of *Stevens* is also hard to square with the restrictive approach to standing endorsed by the *TransUnion* majority. Both cases involved alleged violations of federal substantive law by private parties. Both cases involved private parties bringing suit against the alleged violators, in order to obtain a monetary remedy that was explicitly authorized by federal substantive law. And in both cases, there is no question that the executive branch itself could seek remedies through lawsuits in federal court. In *TransUnion*, however, plaintiffs who could not show some "concrete" injury stemming from the defendant's violation lacked standing to seek the explicitly authorized remedies in federal court.[122] Yet in *Stevens*, the lack of such a concrete injury was irrelevant on the theory that the governing statute had partially assigned to the private party the U.S. government's own right to sue.[123]

TransUnion's endorsement of an Article II theory of standing provides a way to reconcile these seemingly incoherent decisions. In both *Friends of the Earth* and *Stevens*, the Supreme Court emphasized that the executive branch could intervene and participate in such actions. The Clean Water Act scheme at issue in *Friends of the Earth* authorized the Administrator of the Environmental Protection Agency "to 'intervene as a matter of right' and bring the Government's views to the attention of the court."[124] And when a qui tam action is brought under the False Claims Act, the government has a 60-day window to intervene in the action and to assume "primary responsibility for prosecuting the action," although the private party "may continue to participate in the litigation and is entitled to a hearing before voluntary dismissal and to a court determination of reasonableness before settlement."[125] The decision in *TransUnion*, by contrast, did not recognize any opportunity for executive-branch participation in private litigation seeking remedies for FCRA violations.[126]

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122. *See supra* notes 31–38 and accompanying text.

123. *See, e.g.*, Myriam E. Gilles, *Representational Standing:* U.S. *ex rel.* Stevens *and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 367 (2001) (arguing that "the theory of 'representational standing' announced in *Stevens* provides legislators with a blueprint for constitutionally vesting in private citizens the authority to vindicate important public interests in the federal courts").

124. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 188 n.4 (2000) (quoting 33 U.S.C. § 1365(c)(2)).

125. *Stevens*, 529 U.S. at 769 (citing 31 U.S.C. § 3730(c)(1), (2)).

126. For articles discussing the significance of the statutory executive-participation provisions that were present in *Friends of the Earth* and *Stevens*, see Gilles, *supra* note 123; Stephen M. Johnson, *Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits*, 49 U. KAN. L. REV. 383 (2001). Those scholars did not, however, discuss the possibility that the Federal Rules of Civil Procedure themselves provide the requisite mechanisms for such participation. As my proposal develops in Part III, *TransUnion*'s recognition of an executive-

B. Delineating Article II's Impact on Standing

As explained above, the constitutionally ratified schemes in *Friends of the Earth* and *Stevens* suggest that the executive branch's Article II interest is not violated when the executive branch has the opportunity to participate in litigation between private parties but chooses not to do so. This aligns well with the broader separation-of-powers calculus. In that scenario, Congress has explicitly approved the cause of action, the remedies, and the substantive law underlying the plaintiff's claim; federal courts are performing their usual role of interpreting and applying federal law and providing the remedies such federal law allows; and the executive branch has decided *against* intervening in order to contest that litigation's effect on the proper "prioritiz[ation]"[127] of enforcement.

Accordingly, when the executive branch has opted not to participate, the litigation should be allowed to proceed as Congress provided regardless of whether the plaintiff has suffered some externally assessed "injury in fact." This is an important feature of my proposal, and it differs in a fundamental way from an alternative conception of Article II's impact on standing—a "non-delegation" theory. On that account, congressionally authorized litigation whereby a private plaintiff "sue[s] on behalf of the community and seek[s] a remedy that accrues to the public" is categorically prohibited as an unconstitutional delegation of executive power to individuals or entities outside of Article II.[128] Litigants are currently deploying this non-delegation theory to challenge the constitutionality of the kind of qui tam actions that the Supreme Court approved in *Stevens*,[129] and

branch interest under Article II provides a strong case for such a rules-based mechanism—thus vindicating that executive-branch interest without requiring dismissal of private litigation on constitutional standing grounds, even if there is no specialized statutory provision for executive-branch participation.

127. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021).

128. *See* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1136 (11th Cir. 2021) (Newsom, J., concurring) ("Congress may not give to anyone but the President and his subordinates a right to sue on behalf of the community and seek a remedy that accrues to the public . . . . Were Congress to confer on a private plaintiff the power to bring that kind of action, it would unlawfully authorize him to exercise Article II 'executive Power.'"); Grove, *supra* note 99, at 784 ("I argue that standing doctrine does have a constitutional foundation: it enforces the Article II nondelegation principle by curtailing private prosecutorial discretion."); Harold J. Kent & Ethan G. Shenkman, *Of Citizens Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1794 (1993) ("[W]e believe that the structural imperative in Article II for a unitary executive precludes Congress from delegating outside the Executive's control the power to protect the interests of the public as a whole in the face of external or internal threats.").

129. For a recent discussion of the Article II arguments against qui tam actions, see Sarah Leitner, *The Private Rights Model of Qui Tam*, 76 FLA. L. REV. 865 (2024).

one district court has agreed with that view.[130] That district court decision is currently on appeal, however, and it remains an outlier position.[131]

Because the non-delegation theory would bar private litigation entirely in this situation, it reflects a far more aggressive understanding of Article II than my approach. And although some current justices have expressed an interest in considering (while not necessarily endorsing) this non-delegation theory,[132] the Court's own description of Article II's impact on standing in *TransUnion* belies it. Again, *TransUnion* emphasized the executive branch's power to choose "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law."[133] That authority is better served by giving the executive branch the opportunity to participate in the private litigation rather than imposing an absolute bar to such litigation. In many cases, the executive branch may find the private litigation to be entirely consistent with its "choice" regarding the proper prioritization of federal law enforcement. If so, it would flout—not serve—the interests of the executive branch to block the private litigation on non-delegation grounds.

Another feature of my proposal is that it can be justified by Article II without the circular reliance on Article III that Justice Kavanaugh suggested in *TransUnion*.[134] The basic three-part test, which includes the injury-in-fact requirement,[135] would have no

130. United States *ex rel.* Zafirov v. Fla. Med. Assocs., LLC, 751 F. Supp. 3d 1293, 1324 (M.D. Fla. Sept. 30, 2024).

131. United States v. Chattanooga Hamilton Cnty. Hosp. Auth., No. 21-CV-84, 2024 WL 4784372, at *3 (E.D. Tenn. Nov. 7, 2024) (calling *Zafirov* an "outlier trial-court decision that whistles past precedent"). The appeal of *Zafirov* now pending in the Eleventh Circuit (No. 24-13581) has attracted a diverse range of amicus briefs arguing against the district court's conclusion that qui tam actions categorically violate Article II. *See* Brief of Senator Charles E. Grassley as Amicus Curiae in Support of Appellants at 3, *Zafirov*, 751 F. Supp. 3d 1293 (11th Cir. Jan. 15, 2025) (No. 24-13581); Brief of Amicus Curiae Former Prosecutors in Support of Plaintiff-Appellant and Intervenor-Appellant, and in Support of Reversal at 2, *Zafirov*, 751 F. Supp. 3d 1293 (11th Cir. Jan. 15, 2025) (Nos. 24-13581, -13583).

132. *See* Wisconsin Bell, Inc. v. United States *ex rel.* Heath, 145 S. Ct. 498, 515 (2025) (Kavanaugh, J., concurring, joined by Thomas, J.) ("[I]n an appropriate case, the Court should consider the competing arguments on the Article II issue."); United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1741 (2023) (Thomas, J., dissenting) ("There are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation."); *id.* at 1737 (Kavanaugh, J., concurring, joined by Barrett, J.) ("In my view, the Court should consider the competing arguments on the Article II issue in an appropriate case.").

133. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021).

134. *See supra* notes 96–100 and accompanying text.

135. *See supra* note 4.

grounding in Article III at all. Rather, private litigation would trigger the Article II interest in choosing "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law"[136] only with respect to actions where the plaintiff fails the current test for constitutional standing (including the injury-in-fact requirement). This understanding aligns with Article II if one accepts, as Justice Kavanaugh observed in a footnote, that what is problematic about suits by "unharmed plaintiffs" is that they are "doing no more than enforcing general compliance with regulatory law."[137] The executive branch's authority over the prioritization of federal law enforcement applies only to private litigation falling into that "general compliance" category—namely, those for which the plaintiff lacks one of the three requirements of the standing test.[138] Again, this understanding is starkly different from the non-delegation theory described above,[139] because it permits the executive branch to make the choice that the private litigation *does* align with its enforcement priorities.

The final issue regarding this new theory of standing is what happens when the executive branch decides to participate in the litigation in service of its interest in prioritizing the enforcement of federal law. When the Article II theory of standing kicks in, does the executive branch have an absolute right to control (and perhaps to veto) litigation between private parties to vindicate its "choice"[140] regarding the proper prioritization of federal law enforcement? Is Article II satisfied merely by the executive branch's ability to participate in the litigation? Or does the executive branch wield some less-than-absolute power over such private litigation, such as a presumption of control that is subject to some kind of judicial review?

To be sure, absolute control would be the most forceful way to effectuate the executive branch's views regarding how to prioritize the enforcement of substantive federal law. But one can imagine—and find analogies for—a lesser amount of control. The Class Action Fairness Act, for example, requires that parties to a proposed settlement of a class action notify appropriate state and federal officials.[141] The purpose of the provision is to give those executive

136. *TransUnion*, 141 S. Ct. at 2207.

137. *Id.* at 2207 n.3.

138. One can certainly dispute whether the three-part standing test should be attributed to the Constitution *at all*. *See supra* note 12 (citing critiques of the constitutional standing text). The goal of my proposal, however, is to explore whether Article II offers a better alternative for situating and implementing the current requirements for constitutional standing than Article III.

139. *See supra* notes 128–32 and accompanying text.

140. *TransUnion*, 141 S. Ct. at 2207.

141. *See* 28 U.S.C. § 1715(b) ("Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each

branch officials the opportunity to weigh in on whether the court should approve the settlement, but it does not give them absolute veto power.[142]

The statutory framework for qui tam actions provides another template. As discussed above, the False Claims Act (FCA) gives the executive branch an opportunity to intervene in the privately-initiated action and to assume "primary responsibility" over its prosecution.[143] The statute also gives the private plaintiff "the right to continue as a party to the action," but it authorizes the court to limit the private party's participation in certain situations—such as when "unrestricted participation" would "interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment."[144] The federal government may also move to dismiss the action entirely, but the statute guarantees the private plaintiff an opportunity for a hearing on such a motion.[145] The FCA regime, therefore, gives the executive branch significant but not-quite-absolute control over the litigation, leaving some opening for judicial review if the government insists on dismissal of the case over the private plaintiff's objection.[146]

State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement . . . .").

142. *See* 28 U.S.C. § 1715(d) ("An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b)."); S. REP. No. 109-14, at 32 (2005) ("New section 1715 is designed to ensure that a responsible state and/or federal official receives information about proposed class action settlements and is in a position to react if the settlement appears unfair to some or all class members or inconsistent with applicable regulatory policies.").

143. *See supra* note 125 and accompanying text.

144. 31 U.S.C. § 3730(c)(1), (2)(C). The statute also allows the court to limit the private plaintiff's participation if the defendant shows that the private plaintiff's "unrestricted participation . . . would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense." *Id.* § 3730(c)(2)(D).

145. *Id.* § 3730(c)(2)(A).

146. In *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 143 S. Ct. 1720 (2023), the Supreme Court sought to provide guidance on how a court should resolve a motion by the federal government to dismiss an FCA action over the objection of the private relator who initiated the action. It held that such motions were to be assessed using Rule 41(a) of the Federal Rules of Civil Procedure, which "governs voluntary dismissals in ordinary litigation," *id.* at 1733, but it noted that the application of this standard in the FCA context should give considerable deference to the executive branch's decision. The Court wrote that "a district court should think several times over before denying a motion to dismiss" and should grant the motion as long as "the Government offers a reasonable argument for why the burdens of continued litigation outweigh its benefits." *Id.* at 1734.

This Article does not aim to propose a comprehensive answer to this control question. Under any of these approaches, this Article's theory would mean that when a plaintiff lacks "standing," there is no categorical bar to federal court jurisdiction. Rather, the remedy is to allow participation in litigation by the executive branch, as was statutorily authorized in cases like *Friends of the Earth* and *Stevens*. The next Part of this Article will show that the Federal Rules of Civil Procedure already provide the mechanisms for implementing that requirement—even in cases where the relevant statute lacks an explicit route to executive-branch participation in ongoing private litigation.

III. IMPLEMENTING AN EXECUTIVE-PARTICIPATION NORM: JOINDER, NOT JURISDICTION

For the reasons discussed in the previous Part, executive-branch participation in privately initiated litigation can eliminate any potential constitutional defect. It is mistaken, therefore, to say that there is a categorical lack of federal subject-matter jurisdiction just because a plaintiff lacks a concrete injury. Rather, the problem is that a particular party—the executive branch—is missing from the litigation. Accordingly, the proper disposition when a lawsuit between private parties runs afoul of the Court's concrete-injury requirement is not to dismiss the case for lack of jurisdiction, but rather to allow an opportunity for the executive branch to participate in the litigation. This Part explains how the Federal Rules of Civil Procedure permit executive-branch intervention in such litigation. The rules also permit the defendants in such litigation to prompt that involvement by the executive branch. Defendants may still make the same argument regarding the plaintiff's lack of a concrete injury. But they are entitled to a narrower remedy.

A. *The Executive Branch's Right to Intervene*

In federal court, intervention is governed by Rule 24.[147] The rule creates two flavors of intervention. Rule 24(a) sets forth the situations where the federal court must allow intervention—known as intervention of right.[148] Rule 24(b) addresses permissive intervention, by which the district court has discretion whether to allow intervention.[149] A right to intervene exists when the intervenor "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to

147. *See generally* Caleb Nelson, *Intervention*, 106 VA. L. REV. 271 (2020).
148. FED. R. CIV. P. 24(a).
149. FED. R. CIV. P. 24(b).

protect its interest, unless existing parties adequately represent that interest."[150]

My approach's theory of standing shows precisely why an executive branch officer or agency would have the right to intervene in litigation between private parties for which the plaintiff lacks the concrete injury required by current standing doctrine. As stated in *TransUnion*, the Article II concern is that such litigation—if left purely to the private litigants—threatens to "infringe on the Executive Branch's Article II authority."[151] The executive branch itself, therefore, has an interest in "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law."[152] Permissive intervention by an executive branch agency or official is also authorized by Rule 24. According to Rule 24(b)(2), "the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on . . . a statute . . . administered by the officer or agency."[153] That language would include the situation alluded to by *TransUnion*, and it would also permit the kind of executive-branch participation that is the crux of this Article's theory of standing.[154]

150. FED. R. CIV. P. 24(a)(2).

151. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021).

152. *Id.* An Article II theory also explains why that interest is not adequately represented by existing parties. As Justice Kavanaugh put it, the private litigants "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." *Id.* Some scholars have raised concern about recent decisions suggesting more reluctance regarding the executive branch's right to intervene. *See* Helen Hershkoff & Luke P. Norris, *The Beleaguered Sovereign: Judicial Restraints on Public Enforcement*, 103 TEX. L. REV. 1073, 1106–10 (2025). Those examples do not, however, call into question the executive's right to intervene in the kinds of private litigation for which a private plaintiff's standing may come into play (like *TransUnion*). To deny intervention in that situation would be especially hard to square with the Article II theory endorsed in *TransUnion*, which embraces the executive branch's interest in prioritizing legal actions against individuals or entities that violate federal law. *See supra* notes 52–54 and accompanying text.

153. FED. R. CIV. P. 24(b)(2)(A). The rule also permits intervention when a private party's claim or defense is based on "any regulation, order, requirement, or agreement issued or made under the statute." FED. R. CIV. P. 24(b)(2)(B).

154. The current language in Rule 24(b)(2) was added to ratify an approach to intervention by government agencies that the Supreme Court embraced in *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 460 (1940) (allowing permissive intervention by a federal commission based on its "interest in the maintenance of its statutory authority and the performance of its public duties"). The *United States Realty* case allowed intervention by a government agency based on what was then the sole grounds for permissive intervention: that the "applicant's claim or defense and the main action have a question of law or fact in common." *Id.* at 459; *see also* David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 736 (1968) ("[T]here are some cases in which government intervention seems wholly

Intervention is not the only procedural device relevant to the executive-branch participation norm. It is also crucial to recognize the ability of a private party (presumably the defendant who might object to the plaintiff's lack of an injury in fact) to invite executive-branch participation. The next Section explains how Rule 19's provisions on required joinder, combined with Rule 12(b)(7)'s authorization of a pre-answer motion to dismiss for lack of joinder, serve that role.

B. How a Private Party Initiates the Executive-Participation Norm

1. The Rule 12(b)(7) Motion and Failure to Join a Party Under Rule 19

The mechanism by which a defendant would invite the constitutionally required opportunity for executive-branch participation involves the interplay of several provisions of the federal rules. The first is Rule 12(b)(7), which empowers a defendant in a civil action—prior to answering the complaint—to present a motion asserting as a defense the plaintiff's "failure to join a party under Rule 19."[155] This motion would tee up participation in the litigation by the executive branch as a required party under Rule 19.[156]

Before getting into the weeds of Rule 19, it should be recognized that—in terms of timing—a defendant responding to a complaint under my Article's theory would proceed in the same way that a defendant invoking a lack of Article III standing does under the traditional approach. Under the current approach, the mechanism is a motion under Rule 12(b)(1) asserting a lack of subject-matter jurisdiction. Under my approach, it is a Rule 12(b)(7) motion asserting the failure to join the relevant executive branch official or agency as a party. And the defendants under both theories would be making precisely the same arguments regarding the plaintiff's lack of a concrete, particularized injury. Under the current approach, that lack of injury requires dismissal for lack of subject-matter jurisdiction. Under this Article's approach, it requires the opportunity for executive-branch participation.

Rule 19 is perfectly suited for the Article II executive-branch interest developed here. The argument is quite similar, in fact, to the

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appropriate even though there is no issue of constitutionality, no statute or order that the agency administers relied on in a party's claim or defense, and no claim or defense in the accepted sense asserted by the government itself." (citing *U.S. Realty*, 310 U.S. at 434)).

155. FED. R. CIV. P. 12(b)(7).

156. *See* FED. R. CIV. P. 19(a)(1) (identifying persons "who . . . must be joined as a party"). *See generally* Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1078–79 (1985) (describing the "three situations in which compulsory joinder is appropriate" and how "[e]ach of these situations embodies an interest protected by the compulsory joinder doctrine").

argument described above regarding intervention by the executive branch under Rule 24. Rule 19(a)(1) provides that a person "must be joined as a party" if (among other things) "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest."[157] In this way, Rule 19 "is designed to protect the interests of absent persons."[158]

As explained above, the underlying Article II theory is that litigation initiated by a private party who had not suffered a concrete, particularized injury could "infringe on the Executive Branch's Article II authority"—specifically, its interest in "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law."[159] Without an opportunity to participate in the litigation, that executive-branch interest may "as a practical matter" be "impair[ed] or impede[d]."[160] Rule 19 provides the opportunity for an existing party—presumably the private defendant—to insist that an executive-branch official or agency be joined in order to protect that interest.

Given the recent vintage of the Supreme Court's recognition of this interest, there is not much case law on the relationship between Rule 19 and federal executive-branch participation in litigation between private or other non-federal parties. Some courts have been skeptical of the theory. One federal district court, for example, rejected an argument that the U.S. Treasury Department's Office of Foreign Assets Control was a required party in an action seeking to execute a judgment against the Republic of Cuba, based on OFAC's general regulatory power over the accounts at issue in the execution action.[161] The court did not, however, consider the specific kind of executive-branch interest identified in *TransUnion*—that is, "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law."[162]

Other decisions have found executive-branch officials or agencies to be required parties under Rule 19, although they too are not entirely on all fours with the executive-branch interest at issue here. Some cases, for example, require such joinder where the lawsuit would necessarily call into question the validity of executive branch actions. In one notable decision, the Sixth Circuit found that the federal Department of Housing and Urban Development (HUD) was

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157. FED. R. CIV. P. 19(a)(1)(B)(i).

158. 7 CHARLES A. WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & HOWARD M. ERICHSON, FEDERAL PRACTICE AND PROCEDURE § 1602 (3d ed. 2025).

159. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021).

160. FED. R. CIV. P. 19(a)(1).

161. Hausler v. JP Morgan Chase Bank, N.A., 127 F. Supp. 3d 17, 57–58 (S.D.N.Y. 2015).

162. *TransUnion*, 141 S. Ct. at 2207.

required to be joined under Rule 19 in an action seeking to enjoin a project that HUD had approved.[163]

There are also a number of instructive decisions involving the federal wage and price control programs enacted under the Economic Stabilization Act of 1970. In actions between private parties arising from alleged violations of those price controls, the Temporary Emergency Court of Appeals repeatedly ordered joinder of the relevant federal agencies, noting that they have "expertise and responsibility with respect to interpreting, applying, and enforcing the statutes and the pricing regulations in controversy."[164] As that court explained, "the appropriate agency or officer of the United States should be made a party to the actions below so that the positions and views of those who administered the Act in connection with this controversy can be fully presented."[165]

These examples reveal that treating executive branch agencies or officials as required parties under Rule 19 would hardly be unprecedented. And the practical upshot of this approach would be a procedural structure that—in its initial stages— aligns with that of the current view of standing. When a private party lacks a concrete, particularized injury, the prevailing approach means that the defendant's Rule 12(b)(1) motion should be granted. Under this Article's theory, the lack of a concrete, particularized injury means that the defendant's Rule 12(b)(7) motion should be granted. In the parlance of Rule 19(a), an executive branch officer or agency is a "Person[] Required to be Joined if Feasible."[166]

This Article's approach differs, however, in that dismissal of the case is not the inexorable result when a court grants the Rule 12(b) motion. The executive branch is not an "indispensable" party for

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163. Boles v. Greeneville Hous. Auth., 468 F.2d 476, 478 (6th Cir. 1972); *see also* McCowen v. Jamieson, 724 F.2d 1421, 1423 (9th Cir. 1984) (requiring joinder of the Department of Agriculture when an action seeking injunctive relief against a state agency would have implicitly overridden a waiver the Department had provided to that agency).

164. Longview Ref. Co. v. Shore, 554 F.2d 1006, 1024 (Temp. Emer. Ct. App. 1977) (citing Associated Gen. Contractors of Am., Inc., Okla. Chapter Builder's Div. v. Laborers Int'l Union Loc. 612, 476 F.2d 1388, 1405–07 (Temp. Emer. Ct. App. 1973)). Although the *Longview* decision did not explicitly cite Rule 19, the cases on which it relied—including the *Associated General Contractors* case—did. *See Associated Gen. Contractors of Am.*, 476 F.2d at 1406 ("While the agencies in this case may not be regarded as being indispensable for every purpose so as to have required dismissal of the action in their absence, they should be made parties by reason of subdivision (a)(1) of Rule 19 before this litigation can be concluded.").

165. Air Prod. & Chems., Inc. v. United Gas Pipe Line Co., 503 F.2d 1060, 1062 (Temp. Emer. Ct. App. 1974) (citing FED. R. CIV. P. 19).

166. FED. R. CIV. P. 19(a).

purposes of Rule 19.[167] That is, the litigation may proceed if the executive branch chooses not to participate, as long as it has the opportunity to do so. It is the opportunity to participate that vindicates the Article II interest. The next Section explains how the application of Rule 19's other provisions accomplish this result.

2. *Rule 19 and the Executive Branch's Decision Not to Participate*

The court's initial finding that the executive branch has the kind of interest that satisfies Rule 19(a)(1) is not the end of the inquiry. The next step, under Rule 19(a)(2), is that "[i]f a person has not been joined as required, the court must order that the person be made a party."[168] And then Rule 19(b) instructs that "[i]f a person who is required to be joined if feasible *cannot* be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed."[169]

When the executive branch wishes to participate in the litigation, it may vindicate its interest by voluntarily appearing in the litigation—just as if it had taken the initiative to do so by seeking intervention under Rule 24.[170] But if it chooses not to participate, there could be a problem if Rule 19(b) compelled dismissal of the action as a result. That would go beyond the opportunity-to-participate norm that is reflected in the Supreme Court's case law, effectively making the executive branch an indispensable party. For two independent reasons, however, Rule 19 does not require that conclusion.

First, the executive branch's decision not to participate effectively obviates the initial finding under Rule 19(a)(1)(B)(i) that joinder was required to protect the executive branch's interest. Federal courts have long recognized that—when an absent party's decision to forgo participation indicates that it does *not* deem its interests to be "substantially threatened by the litigation"—the court should not "second-guess this determination."[171] Once that decision is made, it is no longer the case that the absent party (here, the executive branch) "*claims* an interest" in the litigation.[172] Accordingly, Rule 19 would no longer provide a basis for requiring joinder of an executive branch officer or agency.

This approach coheres with pre-*TransUnion* federal court decisions applying Rule 19 to executive branch officials and agencies.

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167. *See* FED. R. CIV. P. 19 advisory committee's note to 2007 amendment (describing the use of the term "indispensable" in earlier versions of Rule 19).

168. FED. R. CIV. P. 19(a)(2).

169. FED. R. CIV. P. 19(b) (emphasis added).

170. *See supra* Section III.A.

171. *E.g.*, United States v. San Juan Bay Marina, 239 F.3d 400, 406–07 (1st Cir. 2001).

172. FED. R. CIV. P. 19(a)(1)(B) (emphasis added).

In one case, the defendants in a housing discrimination suit moved to dismiss under Rule 12(b)(7) based on the plaintiffs' failure to join HUD.[173] In denying that motion, the court noted that HUD's "expressed unwillingness to become a party" necessarily meant that "Rule 19(a)'s concern for the interests of the allegedly necessary absent party will not be impaired."[174] The court also recognized—as suggested above—the agency's ability to intervene under Rule 24 in order to protect any interest that it *did* have in the litigation.[175]

Second—even if the executive branch's decision to refrain from participating does not obviate the initial finding under Rule 19(a)(1)(B)(i)—the operation of Rule 19(b) compels the conclusion that "the action *should* proceed among the existing parties."[176] When a federal government official or agency decides not to consent to participate in the litigation, sovereign immunity renders that party one that "cannot be joined" under Rule 19(b).[177] Sovereign immunity certainly qualifies as a reason why an otherwise required party cannot be joined.[178] As a threshold matter, sovereign immunity would apply to a federal officer or agency sued in its official capacity,[179] and there is no question that the executive-branch interest identified by Justice Kavanaugh in *TransUnion* is one that can be vindicated only by an officer acting in his or her official capacity.[180]

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173. Arthur v. Starrett City Assocs., 89 F.R.D. 542, 544 (E.D.N.Y. 1981).

174. *Id.* at 547–48 ("Rule 19(a)'s concern for the interests of the allegedly necessary absent party will not be impaired by the progress of this case without HUD. Because of its expressed unwillingness to become a party, the risk of prejudice to HUD by virtue of its absence is presumptively insignificant.").

175. *Id.* at 548 ("[E]ven assuming that HUD has an 'interest' relating to the subject matter of this action, it can protect that interest by seeking to intervene under Rule 24, or by seeking leave to file a brief as amicus curiae at some point during the course of this litigation." (footnote omitted)).

176. FED. R. CIV. P. 19(b) (emphasis added).

177. *Id.*

178. *See, e.g.*, Republic of Philippines v. Pimentel, 553 U.S. 851, 854 (2008) ("This case turns on the interpretation and proper application of Rule 19 of the Federal Rules of Civil Procedure and requires us to address the Rule's operation in the context of foreign sovereign immunity."). *See generally* 7 WRIGHT ET AL., *supra* note 158, § 1617.

179. *See, e.g.*, 33 CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD MURPHY, FEDERAL PRACTICE AND PROCEDURE § 8351 (2d ed. 2025) ("Sovereign immunity extends to suits against government officials acting in their official capacities, as these are really just suits against the government by another name.").

180. Sovereign immunity is not a fatal obstacle as to federal officials sued in their *individual* capacity. *See, e.g.*, 14 CHARLES A. WRIGHT, ARTHUR R. MILLER & HELEN HERSHKOFF, FEDERAL PRACTICE AND PROCEDURE § 3655 (4th ed. 2025) ("'[T]he fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him' in an individual capacity." (quoting Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 690 (1949))). Thus, sovereign immunity does not categorically bar actions against individual federal officers seeking monetary damages for constitutional

There are, of course, several situations as to which Congress has waived sovereign immunity for federal officers and agencies.[181] The Tucker Act, for example, waives sovereign immunity with respect to claims against the United States for monetary damages that are based on contractual or other theories "not sounding in tort."[182] The Federal Tort Claims Act waives sovereign immunity for money damages claims for injuries caused by federal employees' negligent or wrongful acts or omissions while acting in the scope of their office.[183] And the Administrative Procedure Act waives sovereign immunity for claims for injunctive or declaratory relief against federal officers or agencies.[184]

None of these common ways around sovereign immunity, however, would apply to a case in which the federal official's role was simply to participate in litigation between private parties to vindicate the executive branch's interest regarding how a particular private lawsuit aligns with the proper "prioritiz[ation]" of federal substantive-law enforcement. Therefore, unless the executive branch provides case-specific consent to participate, the court cannot compel that participation.

That conclusion prompts the next step in the Rule 19 inquiry: "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed."[185] Rule 19(b) provides a set of non-exhaustive factors for a court to consider in making this decision.[186] The most salient factor in this context is "the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties."[187] Under the Article II theory of standing, the potential prejudice is to the executive branch's interest in prioritizing the enforcement of federal substantive law. And if the executive branch declines to participate in a particular piece of litigation, it has made the decision that such private litigation does not undermine that interest.

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violations under *Bivens v. Six Unknown Federal Agents, of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

181. *See generally* 14 WRIGHT, MILLER & HERSHKOFF, *supra* note 180, § 3656.

182. 28 U.S.C. §§ 1346(a)(2), 1491. *See generally* 14 WRIGHT, MILLER & HERSHKOFF, *supra* note 180, § 3657.

183. 28 U.S.C. §§ 1346(b)(1), 2674. *See generally* 14 WRIGHT, MILLER & HERSHKOFF, *supra* note 180, § 3658.

184. 5 U.S.C. § 702 ("An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."). *See generally* 14 WRIGHT, MILLER & HERSHKOFF, *supra* note 180, § 3659.

185. FED. R. CIV. P. 19(b).

186. *See* FED. R. CIV. P. 19(b)(1)–(4).

187. FED. R. CIV. P. 19(b)(1).

For all these reasons, the proper remedy in the no-concrete-injury situation should not be dismissal of the action for lack of jurisdiction.[188] Rather, the proper remedy is that the defendant should have the opportunity to seek the joinder of the relevant executive-branch official or agency. Procedurally, this would be accomplished via Rule 19,[189] with the defendant arguing that the executive branch official or agency is a required party under Rule 19(a). But if the government declines to join the case, then the case should nonetheless be allowed to proceed.[190] Properly understood, it is the executive's opportunity to participate that is constitutionally required. Declining to participate reflects the executive's lack of desire to influence the private action, which should allow the private action to proceed.

C. Other Constraints on Legislatively Authorized Private Litigation

As mapped out in the preceding Sections, this Article's theory would not create an insurmountable constitutional obstacle to litigation brought between private parties simply because the plaintiff has not suffered an injury-in-fact. Other limitations may exist, however. This Section recognizes that the Due Process Clause may prohibit particularly abusive forms of private-party litigation.

In recent years, states have experimented with so-called "bounty hunter" enforcement regimes that are worlds apart from the kind of statutory-damages actions authorized by statutes like the FCRA. One such example, Texas's S.B. 8, generated significant controversy—as well as a trip to the Supreme Court in *Whole Woman's Health v. Jackson*.[191] Titled the Texas Heartbeat Act, S.B. 8 was enacted by the Texas legislature during a time that *Roe v. Wade*'s recognition of a constitutional right to abortion access was still good law.[192] As a substantive matter, S.B. 8 prohibited abortions once a fetal heartbeat could be detected.[193] As a procedural matter, however, it forbade

188. *See* FED. R. CIV. P. 12(b)(1) (allowing a motion to dismiss for lack of subject-matter jurisdiction).

189. FED. R. CIV. P. 19(a) (describing "Persons Required to be Joined if Feasible").

190. FED. R. CIV. P. 19(b) (allowing the court to decide "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed").

191. 142 S. Ct. 522 (2021). For scholarly discussion of S.B. 8, see generally Katherine Mims Crocker, *Constitutional Rights and Remedial Consistency*, 110 VA. L. REV. 521, 523–25 (2024); David A. Strauss, *Rights, Remedies, and Texas's S.B. 8*, 2022 SUP. CT. REV. 81 (2022); Ann Woolhandler, *State Separation of Powers and the Federal Courts*, 31 WM. & MARY BILL RTS. J. 633 (2023).

192. *Whole Woman's Health*, 142 S. Ct. at 530. In June 2022, six months after its *Whole Woman's Health* decision, the Supreme Court would overrule *Roe*. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

193. *Whole Woman's Health*, 142 S. Ct. at 530.

enforcement of this prohibition by state officials.[194] Rather, it authorized private persons to bring a civil action "against anyone who 'aids or abets,' or intends to aid or abet, an abortion performed after roughly six weeks"[195]—a definition that might include "a medical provider, a receptionist, a friend who books an appointment, or a ride-share driver who takes a woman to a clinic."[196] Plaintiffs in such actions "need not have any relationship to the woman, doctor, or procedure at issue,"[197] yet they can sue for statutory damages of at least $10,000, as well as injunctive relief.[198]

S.B. 8 also contained a host of remarkably one-sided procedural provisions. It "guarantees attorney's fees and costs to prevailing plaintiffs,"[199] but "it categorically denies them to prevailing defendants, so they must finance their own defenses no matter how frivolous the suits."[200] Defendants can "be haled into court in any county in which a plaintiff lives, even if that county has no relationship to the defendants or the abortion procedure at issue,"[201] with no opportunity for the defendant to seek a transfer of venue.[202] Defendants targeted in such actions may not use claim or issue preclusion to protect themselves from repetitive litigation, "meaning that that if they prevail, they remain vulnerable to suit by any other plaintiff anywhere in the State for the same conduct."[203]

As Justice Sotomayor put it, S.B. 8 made litigation "uniquely punitive for those sued,"[204] threatening abortion providers with "the prospect of essentially unlimited suits for damages, brought anywhere in Texas by private bounty hunters, for taking any action to assist women in exercising their constitutional right to choose."[205] The practical impact was a "chilling effect" that was "near total,

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194. *Id.*

195. *See id.* at 543 (Roberts, C.J., concurring in the judgment in part and dissenting in part) (citing TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (2021)). As Justice Sotomayor clarified, the six weeks begins to run not from conception but rather from the woman's last menstrual period prior to conception. *Id.* at 545 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

196. *Id.* at 546.

197. *Id.*

198. *Id.*; *id.* at 530 (majority opinion).

199. *Id.* at 546 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (citing TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(3) (2021)).

200. *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 171.208(i) (2021)).

201. *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 171.210(a)(4) (2021)).

202. *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 171.210(b) (2021)).

203. *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(5) (2021)). Defendants are also barred "from relying on any nonbinding court decision, such as persuasive precedent from other trial courts." *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(4) (2021)).

204. *Id.*

205. *Id.* at 545.

depriving pregnant women in Texas of virtually all opportunity to seek abortion care within their home State after their sixth week of pregnancy."[206]

The particular issues before the Supreme Court in *Whole Woman's Health* are important ones, and this Article will turn to those in the final Part below.[207] The key point here, however, is that a regime like S.B. 8 provides a helpful—if troubling—illustration of federal standing doctrine. Under the current approach, a federal version of S.B. 8 would not satisfy federal standing requirements. The would-be bounty hunter who files such a lawsuit would lack the kind of concrete, particularized "injury-in-fact" required for standing.[208]

Under this Article's proposal, that constitutionally compelled jurisdictional obstacle to a hypothetical federal S.B. 8 would not exist. The defendant would be entitled to seek the participation of the relevant executive branch official or agency, but the litigation could proceed nonetheless. That does not, however, mean that Congress has free rein to put such extreme remedial schemes into effect. Rather, the Due Process Clause would limit Congress's power to unleash abusive forms of private litigation. Indeed, although the Supreme Court ultimately held that federal courts lacked power to consider a pre-enforcement challenge to S.B. 8,[209] one Texas state court judge found that S.B. 8's private-enforcement regime violated due process.[210] That conclusion hinged on S.B. 8's procedural and remedial framework—not its interference with the then-extant constitutional right to abortion access.[211]

Scholars have likewise endorsed the view that private enforcement regimes like S.B. 8 pose due process concerns that are distinct from both their substantive elements and the fact that such claims would fail the Article III standing requirements that apply in

206. *Id.*

207. *See infra* notes 237–51 and accompanying text.

208. A bounty-hunter may, however, be able to bring a hypothetical federal S.B. 8 action in *state* court. *See supra* notes 63–66 and accompanying text. As argued earlier, that result is hard to justify by any coherent approach to federalism. *See supra* notes 67–78 and accompanying text.

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

210. Order Declaring Certain Civil Procedures Unconstitutional and Issuing Declaratory Judgment at 1, 18–19, 43–47, Van Stean v. Texas Right to Life, No. D-1-GN-21-004179 (Tex. 98th Dist. Ct., Dec. 9, 2021) [hereinafter Van Stean D. Ct. Op.]. An appellate decision affirming the trial judge's refusal to grant the defendants' motion to dismiss did not address the substance of his due process analysis. *See* Texas Right to Life v. Van Stean, 704 S.W.3d 6, 8–9 (Tex. App. 2023).

211. Van Stean D. Ct. Op., *supra* note 210, at 4 ("The federal abortion issues have been left to the federal courts, and therefore this court will consider *only* SB 8's new and unique set of *civil procedures*.").

federal court under the prevailing approach.[212] There is further support for this notion in the Supreme Court's case law regarding when a punitive damages award comports with due process; the Court has made clear that the Due Process Clause "prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor,"[213] and requires courts to "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff."[214]

It is beyond the scope of this Article to delineate the precise content of the Due Process Clause's constraints on potentially abusive private-enforcement regimes.[215] But there is a world of difference between carefully crafted, proportionate statutory damages regimes (like the FCRA[216]) and bounty-hunter schemes like S.B. 8. The Due Process Clause can provide a meaningful check on such private-enforcement mechanisms, even if—as this Article argues—constitutional standing requirements cannot be counted on to block such lawsuits as a jurisdictional matter in federal court. Indeed, federal standing requirements were never a fitting solution to the abusive litigation problem. As detailed earlier,[217] federal standing

212. *See* Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1248 (2023) (arguing that "laws that mimic S.B. 8's enforcement structure are . . . more powerfully burdensome and thus more effective in . . . chilling and deterring the targeted conduct, speech, or behavior" and that "the more effective they are as tools of subordination and suppression, the more vulnerable they ought to be to due process challenges, irrespective of the laws' substantive merits"); Michael T. Morley, *Constitutional Tolling and Preenforcement Challenges to Private Rights of Action*, 97 NOTRE DAME L. REV. 1825, 1851 (2022) (describing Supreme Court case law holding that "when the government regulates private parties' conduct, the Due Process Clause requires it to provide a mechanism through which such parties may seek judicial review of the validity of those regulations without subjecting themselves to the risk of substantial penalties"); Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1502 (2022) (noting that laws like S.B. 8 "pose real due process concerns").

213. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562–63 (1996) (quoting TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 454 (1993)).

214. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003).

215. As explained in greater detail below, the Due Process Clause has a problematic legacy as a tool for undermining publicly beneficial regulatory goals. *See infra* note 263. The devil is in the details, of course. In endorsing some role for constitutional due process in this context, this Article does not support overreading that concept to forbid all manner of regulatory and enforcement regimes. *See, e.g.*, Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2049 (2023) (Alito, J., concurring) ("Requiring Norfolk Southern to defend against Mallory's suit in Pennsylvania, as opposed to in Virginia, is not so deeply unfair that it violates the railroad's constitutional right to due process.").

216. *See supra* note 28 and accompanying text (describing the remedies available under the FCRA).

217. *See supra* notes 63–66 and accompanying text.

limitations are powerless to address abusive private-enforcement schemes that can be invoked in state court. Due process, on the other hand, constrains state-law and federal-law regimes alike, and it applies regardless of whether such litigation is brought in state court or federal court.[218]

IV. BACK TO FEDERALISM: EXECUTIVE POWER AND THE STATES

As discussed above, situating standing doctrine in Article III—as under the prevailing approach—has bizarre federalism implications. It closes off the *federal* courts for actions proceeding under federal substantive law but permits such actions to be brought in state court—perhaps without even access to Supreme Court review of federal law issues on appeal from the state court system.[219] The Article III approach to standing also blocks federal courts from considering *state* law claims that fail the test for standing.[220] That feature poses less of a federalism concern; keeping such state law claims in state court makes sense from that perspective.[221]

This Part explores how a focus on executive-branch interests in the context of litigation between private parties would affect federalism dynamics. It examines what this Article's approach would mean for actions based on state law (whether in federal court or state court) and for actions in state court (whether based on state law or federal law). For some of these issues, the federalism implications are clear. For others, there would remain open questions, but this Part sketches some possible answers.

218. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."); *see also, e.g.*, Bloom v. Illinois, 391 U.S. 194, 195 (1968) ("The Fifth and Fourteenth Amendments forbid both the Federal Government and the States from depriving any person of 'life, liberty, or property, without due process of law.'").

219. *See supra* notes 63–66, 75–77 and accompanying text.

220. *See, e.g.*, Dinerstein v. Google, LLC, 73 F.4th 502, 512–19 (7th Cir. 2023) (finding a lack of Article III standing to pursue state law claims for privacy, breach of contract, consumer fraud, and tortious interference with contract).

221. One troubling scenario is when defendants remove state court actions to federal court and then ask the federal court to dismiss with prejudice for lack of standing. *See* Zachary D. Clopton & Alexandra D. Lahav, *Fraudulent Removal*, 135 HARV. L. REV. F. 87, 88 (2021) (describing Mocek v. Allsaints USA Ltd., 220 F. Supp. 3d 910 (N.D. Ill. 2016)). Scholars have justifiably criticized this move; if Article III standing is lacking, then removal is improper, and the action should not be dismissed but simply remanded to state court (perhaps with an award of attorney's fees against the removing defendant). *Id.* at 99–100.

A. Federal Claims in State Court

The prevailing Article III vision of standing—as exemplified by the *ASARCO* decision[222]—allows state courts to decide federal claims between private parties even if the plaintiff lacks the requisite concrete, particularized "injury in fact."[223] Article III, after all, purports to govern only the jurisdiction of the federal judiciary.[224] But if standing doctrine is grounded in the executive branch's Article II interests, this would no longer be the case. Private litigation in state court that violates Article II would flout the Constitution itself. And the Constitution is "the supreme Law of the Land," binding on "the Judges in every State."[225]

Accordingly, my proposed approach would require a rethinking of *ASARCO*. The interest of the federal executive branch in federal law claims is equally present with respect to state court litigation of federal claims. A defendant in such a state court action, therefore, could use state law rules to seek the participation of the federal executive branch in the action. As developed above, however, the opportunity to participate in the litigation is sufficient to vindicate that interest. So this Article's proposal would not create a categorical bar to private litigation of federal claims proceeding in state court.[226]

B. State Law Claims

Under the current Article III approach to standing, federal courts may not adjudicate state law claims if the plaintiff lacks a concrete, particularized "injury in fact."[227] That makes sense if one accepts the problematic view that such a lack of injury makes litigation something other than a "case" or "controversy."[228] If standing is based on the executive branch's interests under Article II, however, that rationale falls away. The federal executive branch has no power to gauge "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law"[229] when it comes to *state* substantive law. When state law claims are brought in state court, neither Article II nor Article III furnish a plausible basis for imposing federal standing requirements. The upshot is that the plaintiff's lack

222. 490 U.S. 605 (1989).

223. *See supra* notes 63–66 and accompanying text.

224. U.S. CONST. art. III.

225. U.S. CONST. art. VI.

226. Under a more aggressive reading of *TransUnion*'s Article II theory—which would mandate the *dismissal* of private litigation based on the interests of the executive branch, *see supra* notes 128–33 and accompanying text (discussing the non-delegation theory)—*ASARCO*'s holding regarding the viability of claims in state court would no longer be good law.

227. *See supra* notes 32–36 and accompanying text.

228. *See supra* note 55 and accompanying text (describing and criticizing this view).

229. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021).

of a concrete, particularized injury in fact should not block federal courts from adjudicating state law claims (as it might do based on diversity jurisdiction).[230]

For state law claims, however, it could be argued that *state* executive branch officials or agencies would have an interest analogous to the Article II interest that *TransUnion* endorsed for the federal executive branch. The structural provisions of the federal Constitution—Article II or Article III—say nothing about the interests of state government entities. The more nuanced approach proposed here, however, suggests that the Federal Rules of Civil Procedure can enable participation by state officials or agencies. The relevant state-level official or agency could intervene in federal litigation under Rule 24, using the same general argument described above with respect to the federal executive branch.[231] And the defendant in federal court litigation of a state law claim can invite participation by such a state official or agency via Rule 12(b)(7) and Rule 19.[232] Similar theories could work in state court litigation of state law claims, although it may depend on the precise nature of state procedural rules.[233]

Whether state law gives state executive branch officials an interest in private litigation may vary from state to state. But the ability of state executive branch officials to participate in litigation of state law claims can be significant for an additional reason. The next Section shows that recognizing a defendant's right to solicit participation by state executive branch officials can solve a particularly thorny problem that has arisen in federal court—a problem exemplified by S.B. 8 and the Supreme Court's decision in *Whole Woman's Health*.

C. S.B. 8 and the Whole Woman's Health *Conundrum*

The previous Part closed with a discussion of Texas's S.B. 8, and the problematic consequences of its private-enforcement regime.[234] As discussed above, the potential for abusive litigation by private parties may constitute a due process violation—whether those enforcement regimes are created at the state or federal level.[235] S.B. 8 itself carried an additional constitutional infirmity: its enforcement regime

230. *See* 28 U.S.C. § 1332.

231. *See supra* Section III.A.

232. *See supra* Section III.B.

233. If state law does *not* support the line of argument that this Article develops with respect to the federal executive branch, constitutional due process may give civil defendants—whether in state court or federal court—an opportunity to invite participation of relevant state officials. That due process theory is described in greater detail below. *See infra* notes 258–63 and accompanying text.

234. *See supra* notes 192–206 and accompanying text (describing S.B. 8).

235. *See supra* notes 209–18 and accompanying text.

targeted substantive conduct (the right to abortion access) that at the time was constitutionally protected from state interference.[236]

1. The Supreme Court's Whole Woman's Health *Decision*

When litigation over S.B. 8 reached the Supreme Court, it was not to decide the merits of the constitutional challenges to that statute. Rather, the Supreme Court had to decide whether a viable method even existed to mount a pre-enforcement challenge to S.B. 8.[237] The litigation unfolded as follows: Given that the abortion ban was flatly unconstitutional under *Roe v. Wade*, abortion providers filed suit in federal court seeking an injunction against enforcement of the statute.[238] They named numerous defendants in the lawsuit: (1) a private individual in Texas who the plaintiffs alleged had made "a credible threat that he will sue them under S.B. 8";[239] (2) Texas state court clerks and judges, as to whom the plaintiffs planned to certify a defendant class action;[240] (3) the Texas state attorney general;[241] and (4) various Texas state licensing officials.[242]

Ultimately, a range of doctrines combined to block the federal lawsuit as to every one of these defendants, leaving abortion providers with a choice between (a) complying with the substantively unconstitutional law, or (b) risking a deluge of private lawsuits. Here is what happened with respect to each of the defendants named in the providers' lawsuit: For the one private defendant, the Supreme Court found that the plaintiffs lacked standing because that individual provided a sworn declaration that "he possesses no intention to file an S.B. 8 suit against them."[243] As for the governmental defendants, the key problem was sovereign immunity—since all of them were state officers being sued in their official capacity.[244] Because of *Ex parte Young*,[245] sovereign immunity usually does not pose a fatal obstacle to suits seeking injunctions against unconstitutional

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236. *See supra* note 192 and accompanying text.

237. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 529–30 (2021).

238. Complaint for Declaratory and Injunctive Relief — Class Action at 2, 6–7, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021), (No. 21-cv-00616).

239. Whole Woman's Health v. Jackson, 13 F.4th 434, 447 (5th Cir. 2021) (quoting Complaint for Declaratory and Injunctive Relief — Class Action at 16, Whole Woman's Health v. Jackson, 142 S. Ct. 552, (No. 21-cv-00616)).

240. *Whole Woman's Health*, 142 S. Ct. at 531–32 ("While this lawsuit names only one state-court judge and one state-court clerk as defendants, the petitioners explain that they hope eventually to win certification of a class including all Texas state-court judges and clerks as defendants.").

241. *Id.* at 534.

242. *Id.* at 535.

243. *Id.* at 537.

244. *Id.* at 531–32.

245. 209 U.S. 123 (1908).

policies.[246] But S.B. 8's private-enforcement regime left no purchase on which *Ex parte Young* could stand, for several reasons.

First, the Supreme Court held that *Ex parte Young* provided no exception from sovereign immunity for claims against state court judges and clerks.[247] As to the Texas attorney general, the problem was this: "While *Ex parte Young* authorizes federal courts to enjoin certain state officials from enforcing state laws, the petitioners do not direct this Court to any enforcement authority the attorney general possesses in connection with S.B. 8 that a federal court might enjoin him from exercising."[248] The Supreme Court did leave open the possibility that *Ex parte Young* would allow an action against various state licensing officials, noting that the plaintiffs had made sufficient allegations (for purposes of the motion-to-dismiss stage) that those officials had the authority to enforce S.B. 8's substantive provisions.[249] But that door closed when, on remand, the Fifth Circuit certified the question of the licensing officials' enforcement authority

246. *Ex parte Young* famously found that "individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." *Id.* at 155–56. The rationale was that if the act to be enforced was indeed unconstitutional, then "the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity." *Id.* at 159.

247. *Whole Woman's Health*, 142 S. Ct. at 532 (stating that the *Ex parte Young* "exception does not normally permit federal courts to issue injunctions against state-court judges or clerks" and that "'an injunction against a state court' or its 'machinery' 'would be a violation of the whole scheme of our Government'" (quoting *Ex parte Young*, 209 U.S. at 163)).

248. *Id.* at 534. The Supreme Court also identified obstacles beyond sovereign immunity and *Ex parte Young* that would prevent federal court adjudication of the plaintiffs' substantive constitutional claims. For the state court clerks and judges, there was a potential Article III problem because of a lack of adverseness between the abortion providers and those judicial officers. *Id.* at 532 ("Clerks serve to file cases as they arrive, not to participate as adversaries in those disputes. Judges exist to resolve controversies about a law's meaning or its conformance to the Federal and State Constitutions, not to wage battle as contestants in the parties' litigation."). As to the other state officers, the Court observed that even if they had some enforcement authority that would allow a suit in federal court under *Ex parte Young*, a court could not "parlay that authority . . . into an injunction against any and all unnamed private persons who might seek to bring their own S.B. 8 suits." *Id.* at 535.

249. *Id.* at 537 ("[T]hey have identified provisions of state law that appear to impose a duty on the licensing-official defendants to bring disciplinary actions against them if they violate S. B. 8. . . . [T]his is enough at the motion to dismiss stage to suggest the petitioners will be the target of an enforcement action and thus allow this suit to proceed.").

to the Texas Supreme Court,[250] which in turn ruled that those officials lacked authority to enforce S.B. 8.[251]

2. How a State-Level Executive-Branch Participation Norm Enables Federal Court Review

As argued above,[252] the same logic that supports a federal executive-branch participation norm (with respect to certain kinds of federal law claims) can also support a state executive-branch participation norm with respect to state law claims like S.B. 8. If so, a hypothetical defendant in an S.B. 8 action (the abortion provider or the range of "aiders and abettors" who also find themselves in the crosshairs of S.B. 8)[253] may invite participation of the relevant Texas official or agency. That potential participation by some Texas governmental official or agency can also provide a solution to the problem exemplified by *Whole Woman's Health*—where an individual or entity wishes to challenge the constitutionality of a private enforcement scheme like S.B. 8 *before* that scheme is deployed against them.

Here is how it would unfold. An abortion provider could file a lawsuit in federal court against the Texas official or agency seeking declaratory or injunctive relief regarding that official or agency's support of future S.B. 8 lawsuits brought by private parties. The argument would not be that the official *itself* has the authority to enforce S.B. 8; rather, the argument would be that the official has the authority to *participate* in private S.B. 8 litigation when such litigation is initiated. *Ex parte Young* made clear that it permits a lawsuit to "restrain[] the state officer from taking *any steps* towards the enforcement of an unconstitutional enactment."[254]

This preemptive lawsuit by the abortion provider would enable the federal courts to evaluate the constitutionality of the S.B. 8 regime—on the theory that Texas officials would be violating the Constitution if they were to lend their imprimatur in state court to an unconstitutional remedial regime. The remedy would be a limited one, because even if the federal court agrees with the abortion provider's constitutional argument, its remedy vis-à-vis Texas government officials would not be formally binding on private parties

250. Whole Woman's Health v. Jackson, 23 F.4th 380, 383–84 (5th Cir. 2022).

251. Whole Woman's Health v. Jackson, 642 S.W.3d 569, 583 (Tex. 2022). After receiving this answer, the Fifth Circuit instructed the federal district court to dismiss the entire case. Whole Woman's Health v. Jackson, 31 F.4th 1004, 1006 (5th Cir. 2022). The Supreme Court decided *Dobbs* two months later. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

252. *See supra* notes 231–33 and accompanying text.

253. *See Whole Woman's Health*, 142 S. Ct. at 543 (2021) (Roberts, C.J., concurring in the judgment in part and dissenting in part) (citing TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (2021)).

254. *Ex parte* Young, 209 U.S. 123, 159 (1908) (emphasis added).

who might wish to bring an S.B. 8 action in the future.[255] But it would open the door to federal court adjudication of the federal constitutional challenges to S.B. 8, which could create authoritative precedent that *is* binding on state courts.[256]

One objection to this proposal is that a regime like Texas's S.B. 8 was designed explicitly to prevent the ability of pre-enforcement review by federal courts. As Chief Justice Roberts put it in his dissenting opinion, "Texas has employed an array of stratagems designed to shield its unconstitutional law from judicial review."[257] Arguably, then, S.B. 8 could be read to cut off the ability of Texas executive branch officials to participate—or be invited to participate—in private S.B. 8 actions.[258] It is possible, however, that a state cannot unilaterally close off that option, because the Due Process Clause of the Fourteenth Amendment guarantees an S.B. 8 defendant's right to insist that the State of Texas have an opportunity to participate in any S.B. 8 action brought against them by a private

255. *See Whole Woman's Health*, 142 S. Ct. at 535 ("[A] federal court exercising its equitable authority may enjoin named defendants from taking specified unlawful actions. But under traditional equitable principles, no court may 'lawfully enjoin the world at large' or purport to enjoin challenged 'laws themselves.'" (first quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930); then quoting *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021))).

256. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States . . . .").

257. *Whole Woman's Health*, 142 S. Ct. at 543 (Roberts, C.J., concurring in the judgment in part and dissenting in part). During the *Whole Woman's Health* oral argument, Justice Kagan observed that "the entire point of this law, its purpose and its effect, is to find the chink in the armor of *Ex parte Young*" and suggested that S.B. 8's constitutionality should not be insulated from review by federal courts simply because "some geniuses came up with a way to evade the commands of that decision, as well as . . . the even broader principle that states are not to nullify federal constitutional rights." Transcript of Oral Argument at 57–58, *Whole Woman's Health*, 142 S. Ct. 522 (No. 21-cv-00616), https://perma.cc/MFF5-RSZ8.

258. Whether that is the correct interpretation of S.B. 8 has yet to be addressed by state or federal courts. Although one provision states that Texas officials "may not intervene" in such a privately-initiated S.B. 8 action, that provision explicitly does *not* prohibit such an official from participating by "filing an amicus curiae brief in the action." TEX. HEALTH & SAFETY CODE ANN. § 171.208(h) (2021). Nor does that provision rule out the possibility that Texas officials could participate when the defendant in an S.B. 8 action has moved to require joinder of such an official based on the theory developed in this Article. *Id.*

party. That is to say: *TransUnion*'s reliance on Article II in discussing the ability of the federal executive branch "to prioritize and how aggressively to pursue legal actions against defendants who violate the law"[259] may also sound in due process. If so, that federal constitutional right would take precedence over any state law refusal to permit public enforcement of its substantive provisions.

Although it is beyond the scope of this Article to explore fully this potential due process argument, the theory has plausible support. As Gillian Metzger has written, unhindered delegation to private parties may violate the Due Process Clauses "because it fails to ensure a sufficient level of constitutional accountability."[260] This notion is also reflected in cases calling into question the use of private prosecutors, at least when the executive branch "fail[s] to supervise the case."[261] On this account, when a defendant is facing a monetary damages award in an action by plaintiffs who themselves suffered no injury, it violates the defendant's due process rights to have that action proceed without the input of the relevant public official or agency. The lack of a concrete injury makes such an action one that seeks a fundamentally public remedy, as to which the branch responsible for public law enforcement must have a say.[262]

To accept that the Due Process Clause is implicated when a private damages action is used to accomplish public goals beyond compensation for past injuries is not to question the desirability or legitimacy of the notion that private litigation may indeed serve public regulatory ends. It can and should.[263] Unfortunately, federal

259. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021).

260. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1461 (2003) (noting that this concern "finds a textual home in the Due Process Clauses because allowing exercises of government power outside of constitutional constraints is a violation of the clauses' prohibition on arbitrary government action").

261. Michael Edmund O'Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 687 (2010) (describing the federal appellate court's reasoning in *Polo Fashions, Inc. v. Stock Buyers Int'l, Inc.*, 760 F.2d 698 (6th Cir. 1985)); *see also* Woolhandler & Nelson, *supra* note 56, at 733 & n.203 (noting that standing doctrine may implicate "the demands of due process" and drawing an analogy to private prosecutions).

262. Adopting a greater role for the Due Process Clause in this context would not necessarily constitute an endorsement of that clause's checkered history. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905). The current state of affairs, however, has had the troubling consequence of giving state governments free rein to deploy bounty-hunter private damages actions in ways that can make it effectively impossible to air legitimate constitutional challenges to such schemes. Recognizing a due process right of private defendants to invite the participation of executive branch officials can solve this problem without making any aspect of the current regime worse.

263. *See generally* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); Baronia, Lucky & Zambrano, *supra* note 14, at 12–13; Stephen B. Burbank & Sean Farhang, *Litigation Reform: An*

standing doctrine currently insists on an "injury in fact" as the price of admission for such private litigation, and a plaintiff's lack of a concrete, particularized injury makes them entirely ineligible to spearhead such litigation.[264] This Article's proposal would allow such actions to proceed subject to an opportunity for public governmental involvement.

Accordingly, embracing a due process argument that would apply to state law claims in state court has few practical downsides compared to the current doctrinal landscape. And it has a potential upside with respect to the kind of bounty-hunter state law described earlier. The private enforcement regime created by S.B. 8 made it impossible to challenge S.B. 8's substantive unconstitutionality,[265] as the Supreme Court held in its 5-4 *Whole Woman's Health* decision. The due process argument described here, however, provides a way to mount such substantive challenges.

CONCLUSION

"We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it."[266] This observation from the Supreme Court four decades ago rings even more true today. And questions have compounded now that the Court has embraced an Article II theory of standing that holds sway even in cases arising exclusively between private parties.

This new focus on the interests of the executive branch, however, opens the door to a more coherent theory of standing that does not purport to define the *jurisdiction* of federal courts. Rather,

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Institutional Approach, 162 U. PA. L. REV. 1543, 1547–50 (2014) (describing the importance of private lawsuits to implement federal substantive law).

264. In this sense, of course, there is a remarkable disconnect between the Supreme Court's approach to the *TransUnion* scenario and its approach to the S.B. 8 scenario. In the *TransUnion* decision, the Court rejected a claim by plaintiffs whose own information—information about the plaintiffs' themselves—was mishandled by the defendant in violation of federal law. The logic, as explained above, was that the defendant's mishandling of that information had not caused a sufficiently "concrete" injury. Even though the governing substantive law explicitly provided for a damages remedy—including minimum statutory damages of $100—a federal action was foreclosed. By contrast, the *Whole Woman's Health* decision gave the green light to claims by *any* plaintiff to enforce state substantive law—including the right to obtain minimum statutory damages awards of at least $10,000. Yet the actions authorized by S.B. 8 do not require that the plaintiff suffered any injury that is traceable to the defendant's conduct or has any connection at all to the defendants they have targeted.

265. That feature also made it impossible to mount the kind of due-process challenge to excessive private-damages remedial regimes that this Article identifies in Section III.C *supra*.

266. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982).

constitutional standing doctrine dictates when the executive branch must have an opportunity to *join* in the litigation. This Article's proposal can avoid some of the anti-adjudicative pitfalls of the current framework while both vindicating legitimate separation-of-powers concerns and better serving federalism values.