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Injured on the Job: Standing, Federalism, and State Wage-and-Hour Laws

ABSTRACT. In *TransUnion LLC v. Ramirez*, the Supreme Court reinterpreted standing's injury-in-fact requirement to preclude jurisdiction in cases where a plaintiff alleges a statutory violation divorced from a traditionally recognized concrete harm. Scholars and courts have spilled endless ink examining how these standing developments either enforce or undermine the separation of powers. Yet, few have scrutinized how recent changes in standing doctrine implicate federalism when federal courts sit in diversity.

Through the prism of state wage-and-hour laws, this Note explicates how a stringent reading of standing's requirements imperils key federalism values. It finds that federal courts in New York have used a strict interpretation of *TransUnion*'s concrete-injury requirement to prevent workers from bringing certain state wage-and-hour claims in federal court. This version of standing robs state legislatures of their policymaking power, creating undesirable practical and normative outcomes. In contrast, California federal courts have adopted a more permissive stance that gives state legislatures their due and preserves workers' ability to access a federal forum to vindicate their state-law rights. This dichotomy highlights the divergent approaches federal courts may take when assessing standing in diversity jurisdiction cases in the wake of *TransUnion*. Given the discretion lower federal courts retain in deciding how to read *TransUnion*, this Note urges federal courts presiding over state wage-and-hour cases in other jurisdictions—as well as those hearing state-law claims generally—to follow the California approach and apply the concrete-injury requirement permissively.

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NOTE CONTENTS

INTRODUCTION

When Herlinda Francisco sued her employer as part of a wage-and-hour class action,[1] she likely thought that the federal court presiding over her claim would apply the New York Labor Law (NYLL) provision governing the dispute with relative ease, just as it had in virtually every similar case.[2] Instead, Francisco and the rest of her putative class were in for a surprise. Although the court considered the merits of class certification for their overtime and spread-of-hours claims, it dismissed their allegations that their employer had not provided them with the information about their pay, hours worked, and other employment conditions that New York law demanded. The court homed in on the precondition that litigants in federal court must have suffered a concrete injury in fact to satisfy Article III's standing requirements, finding that, although the plaintiffs had properly alleged violations of NYLL's wage-documentation provisions, it was "not clear" that there was "an 'injury' that can be recognized by a federal court."[3]

The court repeated this novel maneuver in an opinion issued the following day. In that instance, the plaintiff, You Qing Wang, persisted through an entire bench trial and had successfully proven that her employer had failed to provide her with the statutorily required information[4] before the court decided that she did not have standing to pursue her state wage-documentation claims in federal court.[5] Continuing the trend, the court issued yet another opinion the following day finding that a different set of plaintiff-employees lacked standing to obtain relief for their employer's wage-documentation violations.[6] In each of these cases, the court dismissed wage-documentation claims, which were nearly identical to prior successful claims, on the basis that they failed to address the court's novel interpretation of standing's concrete-injury requirement. This

1. *See* Francisco v. NY Tex Care, Inc., No. 19-CV-1649, 2022 WL 900603, at *1-2 (E.D.N.Y. Mar. 28, 2022).

2. *See, e.g.*, Chichinadze v. BG Bar Inc., 517 F. Supp. 3d 240, 255-59 (S.D.N.Y. 2021); Inclan v. N.Y. Hosp. Grp., Inc., 95 F. Supp. 3d 490, 497-506 (S.D.N.Y. 2015); Ying Ying Dai v. ABNS NY Inc., 490 F. Supp. 3d 645, 654-62 (E.D.N.Y. 2020); Atakhanova v. Home Fam. Care, Inc., No. 16-CV-6707, 2020 WL 4207437, at *2-11 (E.D.N.Y. July 22, 2020); Zivkovic v. Laura Christy LLC, 329 F.R.D. 61, 68-77 (S.D.N.Y. 2018).

3. *Francisco*, 2022 WL 900603, at *7.

4. "[T]he evidence establishes by a preponderance that Defendants failed to provide plaintiff with required notices under the NYLL." Wang v. XBB, Inc., No. 18-CV-7341, 2022 WL 912592, at *13 (E.D.N.Y. Mar. 29, 2022).

5. *Id.*

6. Sevilla v. House of Salads One LLC, No. 20-CV-6072, 2022 WL 954740, at *7 (E.D.N.Y. Mar. 30, 2022).

confounding outcome exemplifies the maxim that standing is "a word game played by secret rules."[7]

This departure from precedent was driven by the Supreme Court's 2021 decision in *TransUnion LLC v. Ramirez*,[8] which fundamentally altered the landscape of Article III standing doctrine. There, the Court held that all plaintiffs, even those asserting a statutorily created private right, must show that they suffered a concrete injury in fact.[9] Further, the Court narrowed the class of injuries that are sufficiently concrete to satisfy standing's "injury-in-fact" test, holding that the central inquiry under this test is whether the injury has a close historical or common-law analogue.[10] Finally, the Court held that in a class action, every individual class member must furnish evidence that they specifically suffered a concrete injury.[11] Combined, these developments have vastly curtailed plaintiffs' ability to access federal courts.

As federal courts have subsequently grappled with how expansively to read *TransUnion*, state wage-and-hour laws have become one of the primary battlegrounds for this debate. This Note provides the first account of how federal courts have applied *TransUnion* to these state laws. Examining nearly 100 cases, it finds that, while New York federal courts have utilized *TransUnion* to exclude litigants, California federal courts have opted for a more permissive approach. By scrutinizing the respective approaches in California and New York—the first two forums to apply *TransUnion* to state wage-and-hour law—this analysis illuminates how standing doctrine can hinder employees' access to relief for illegal employment practices.[12] Additionally, although courts and scholars traditionally consider only the separation of powers in developing and evaluating standing doctrine, these cases shed light on how standing implicates crucial federalism concerns.

This Note argues that using standing doctrine to exclude workers litigating state wage-and-hour claims is both practically harmful and normatively undesirable. Part I provides doctrinal background on the concrete-injury requirement and how *TransUnion* has changed the standing landscape. Part II investigates how federal courts in New York and California have applied the new concrete-

7. Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

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

9. *Id.* at 2205.

10. *Id.* at 2204.

11. *Id.* at 2208.

12. This Note focuses on New York and California primarily because federal courts in those states are the only so far to contemplate how to apply *TransUnion* to state wage-and-hour laws. However, given the prevalence of similar state laws, others are likely to follow. *See infra* note 89 (describing other states' wage-documentation laws); *infra* note 104 (describing other states' late-payment laws).

injury requirement to state wage-and-hour laws. The two states represent different ends of the spectrum; while California courts have applied the requirement sparingly, New York courts have used it to preclude wage-documentation and, in some instances, late-payment claims. Part III analyzes the effects of the New York federal courts' interpretation on various federalism values. In particular, it asserts that a strict application of the concrete-injury standard consolidates federal power at the cost of the states, undermines the role of states as laboratories of democracy by targeting innovative state laws, and contravenes the goals of federal diversity jurisdiction as articulated in *Erie Railroad Co. v. Tompkins*.[13] In the face of these dangers, federal courts ought to follow a more permissive approach similar to California's when applying *TransUnion* to wage-and-hour claims. This result is even more imperative in light of the practical outcomes for workers, many of whom are now locked out of federal court.

I. *SPOKEO*, *TRANSUNION*, AND THE NEW CONCRETE-INJURY REQUIREMENT

All plaintiffs litigating in federal court must show that they have standing.[14] This requirement is grounded in a reading of Article III's Case or Controversy Clause, which places an outer limit on federal courts' jurisdiction.[15] The modern test for Article III standing requires that (1) the plaintiff suffered an injury in fact that is (2) fairly traceable to the challenged conduct of the defendant and (3) likely to be redressed by a favorable judicial decision.[16] The first component, the injury-in-fact standard, requires a showing that the plaintiff experienced "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[17] As a result, a plaintiff litigating in a federal forum must show that they suffered both an invasion of a legally protected right (i.e., an injury in law) and a harm that the court considers

13. 304 U.S. 64, 74-79 (1938).

14. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 559-60 (1992); Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 180-81 (2000).

15. U.S. CONST. art. III, § 2.

16. *Lujan*, 504 U.S. at 560-61; Massachusetts v. EPA, 549 U.S. 497, 498 (2007) ("To demonstrate standing, a litigant must show that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that a favorable decision will likely redress that injury."); Carney v. Adams, 141 S. Ct. 493, 498 (2020) ("The doctrine of standing implements this requirement by insisting that a litigant 'prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision.'" (quoting Hollingsworth v. Perry, 570 U.S. 693, 704 (2013))).

17. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted).

an injury in fact.[18] Even when a dispute concerns state law, federal courts sitting in diversity jurisdiction regularly apply the same Article III standing requirements that would govern a dispute brought pursuant to federal law.[19]

Standing jurisprudence in general, and the injury-in-fact requirement specifically, have recently undergone a sweeping transformation in the wake of the Supreme Court's recent decisions in *Spokeo, Inc. v. Robins*[20] and *TransUnion LLC v. Ramirez*.[21] This evolution manifests in three ways: first, the injury-in-fact requirement now applies in the realm of congressionally created private rights held by a discrete group of individuals; second, fewer injuries qualify as "concrete"; and third, every individual plaintiff in a class action must now prove that they have suffered a concrete injury. Each of these developments ultimately limits access to federal courts.

To fully appreciate standing's recent metamorphosis, it is first necessary to understand the general distinction between private and public rights. Private rights are those "held by discrete individuals" such as "common law rights in property and bodily integrity, as well as in enforcing contracts."[22] Public rights, in contrast, are rights "that belong to the body politic," including "interests generally shared, such as those in the free navigation of waterways, passage on public highways, and general compliance with regulatory law."[23]

Until recently, plaintiffs vindicating statutorily created private rights have not had to prove that they suffered an injury in fact; they merely had to show that they endured an injury that was recognized by the relevant statute.[24]

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18. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021) ("Congress may enact legal prohibitions and obligations. . . . But under Article III, an injury in law is not an injury in fact.").

19. *See, e.g.*, Lee v. Am. Nat'l Ins. Co., 260 F.3d 997, 1001-02 (9th Cir. 2001) (applying federal standing requirements to a state-law claim).

20. 578 U.S. 330 (2016).

21. 141 S. Ct. 2190 (2021).

22. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 693 (2004); 3 WILLIAM BLACKSTONE, COMMENTARIES *2.

23. Woolhandler & Nelson, *supra* note 22, at 693; *see* 4 WILLIAM BLACKSTONE, COMMENTARIES *5.

24. *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982) (quoting Warth v. Seldin, 442 U.S. 490, 500 (1975)) ("[T]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"); *see also TransUnion*, 141 S. Ct. at 2217-18 (Thomas, J., dissenting) (tracing the development of the injury-in-fact requirement in the context of private rights). The Supreme Court had held pre-*TransUnion* that a statutory cause of action was not automatically sufficient to assert standing when vindicating *public* rights. *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 488 (2009); Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 168-69 (2000); Lujan v. Defs. of Wildlife, 504 U.S. 555, 555 (1992). However, it had not done so in the context of *private* rights.

However, in *Spokeo*, the Court began to indicate a shift away from this vision of standing. In that case, plaintiffs alleged that Spokeo had violated the Fair Credit Reporting Act of 1970 (FCRA) by failing to ensure the accuracy of consumer credit information available on its website.[25] While the Ninth Circuit had held that "the violation of a statutory right is usually a sufficient injury in fact to confer standing," and thus allowed the plaintiffs to proceed after demonstrating that a violation had occurred,[26] the Supreme Court took issue with this articulation of the injury-in-fact standard. Holding that the violation of a statute is not on its own sufficient to show that an injury in fact has occurred, it remanded the case for further analysis on the issue of whether the plaintiffs had demonstrated that their injury was sufficiently concrete to satisfy the injury-in-fact requirement.[27] However, the Court failed to clarify the scope of its holding, neglecting to indicate whether the injury-in-fact requirement ought to be applied only where a statute protects a public right (as FCRA arguably does in some contexts),[28] or whether it should apply to statutorily protected private rights as well. As a result, chaos ensued in lower courts as they attempted to make sense of *Spokeo*'s standing edict.[29]

The Court clarified this confusion and completed its transformation of standing doctrine in *TransUnion LLC v. Ramirez*, where it held that all plaintiffs in federal court, even those asserting private statutory rights, must prove that they suffered an injury in fact.[30] In *TransUnion*, a class of plaintiffs attempted to sue TransUnion, a credit reporting agency, for failing to comply with FCRA's requirement that credit reporting agencies use reasonable procedures to ensure the accuracy of credit files.[31] The class members' inaccurate credit files contained false alerts that they were potential terrorists, drug traffickers, or had committed

25. *Spokeo*, 578 U.S. at 333.

26. Robins v. Spokeo, Inc., 742 F.3d 409, 412 (9th Cir. 2014), *rev'd*, 578 U.S. 330 (2016).

27. *Spokeo*, 578 U.S. at 342–43.

28. *See Spokeo*, 578 U.S. at 348–49 (Thomas, J., concurring) (noting the ambiguity in whether the FCRA protects private or public rights).

29. *See* William Baude, *Standing in the Shadow of Congress*, 2016 Sup. Ct. Rev. 197, 216–28 (2016); Emily A. Martin, *Article III Standing but Add a Little Bit of 21st Century Spice: How Data Breaches Illuminate the Continuously Contradictory Rulings of the Supreme Court*, 83 La. L. Rev. 703, 717–19 (2023).

30. *TransUnion*, 141 S. Ct. at 2190, 2202–14; *see also* Steven J. Mulroy, *Baby & Bathwater: Standing in Election Cases After 2020*, 126 Dick. L. Rev. 9, 68 n.328 (2021) ("Until recently, it might have been assumed that if a statute clearly gave a party a private right of action to bring a particular claim, such a party had Article III standing. However, the Supreme Court [in *TransUnion*] clarified that this is not always the case."). For criticism of this expansion into private rights, see Elizabeth Earle Beske, *Charting a Course Past* Spokeo *and* TransUnion, 29 Geo. Mason L. Rev. 729, 733–35 (2022).

31. *TransUnion*, 141 S. Ct. at 2200.

other serious offenses.[32] The Court held that although the plaintiffs were seeking to vindicate a congressionally created private right, they had to show that they met the injury-in-fact requirement in order to have standing.[33] Applying the injury-in-fact test, the Court ultimately found that only the class members whose credit reports were distributed to third parties suffered a concrete injury sufficient for standing.[34] In doing so, the Court clarified that standing requirements, including the concrete-injury requirement, apply in equal force in all cases, regardless of the nature of the right at issue.[35]

The Court has invoked variations of standing doctrine throughout its history.[36] However, the directive that plaintiffs must show that they have suffered an injury in fact is a relatively new phenomenon, which arose in the context of litigation concerning public rights.[37] Prior to *TransUnion*, the injury-in-fact requirement was used as a limiting principle in cases asserting public rights, which

32. *Id.* at 2201.

33. *Id.* at 2207-10.

34. *Id.* at 2209-10.

35. *Id.* at 2207-08.

36. *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1417 (1988); Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 594-95 (2010).

37. "For the first 150 years of our country, standing did not exist as a separate doctrine. During that time, whether the federal court had power to hear a dispute depended on whether the plaintiff had invoked the appropriate form of action." F. Andrew Hessick, *Standing in Diversity*, 65 ALA. L. REV. 417, 419-20 (2013) [hereinafter Hessick, *Standing in Diversity*]. The term did not even originate in the realm of constitutional interpretation, but rather was first invoked in a 1955 law review article attempting to identify who could sue an agency under the APA. *See* Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 349 (2021); *see also* Kenneth Culp Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353, 365 (1955) (originating the idea of injury in fact). The Supreme Court's 1970 decision in *Data Processing* then imported the injury-in-fact requirement into standing doctrine in an attempt to expand the range of litigants with standing to sue over an alleged violation. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 151-54 (1970); *see also* Sunstein, *supra*, at 349-50 ("Over the course of the last half-century, the injury-in-fact test has been transformed from a bold effort to expand the category of persons entitled to bring suit into an equally bold effort to achieve the opposite goal . . . ."); Hessick, *Standing in Diversity*, *supra*, at 420 ("Even the current injury-in-fact test has evolved. Early cases defined injury broadly to expand access to courts."); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 293-95 (2008) [hereinafter Hessick, *Standing, Injury in Fact, and Private Rights*] (discussing the Supreme Court's *Data Processing* decision); Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 39 (1976) (noting that at the time the injury-in-fact requirement "represented a substantial broadening of access to the federal courts").

are owed not to a discrete group of individuals but rather to all citizens.[38] In cases seeking to enforce public rights, the injury-in-fact requirement serves important separation-of-powers ideals. While the Constitution allows courts to "decide on the rights of individuals,"[39] "[v]indicating the *public* interest . . . is the function of Congress and the Chief Executive."[40] The injury-in-fact requirement enforces this boundary, mandating that plaintiffs vindicating public rights must allege a specific factual injury beyond the "generally available" grievances that belong to "every citizen."[41] Thus, when applied to public rights, standing doctrine limits federal courts' jurisdiction to circumstances where litigants are impacted enough to have a real stake in the outcome of the dispute. Standing does not serve the same purpose in the context of private rights, which are held by a discrete group of individuals.[42] In that arena, there is little need for an additional check to ensure that courts are adjudicating the rights of individuals as opposed to vindicating the public interest because one can only bring a suit over a private right if they specifically have met the relevant statute's definition of harm.[43]

Beyond expanding the range of cases where the injury-in-fact requirement applies, *TransUnion*, and to some extent *Spokeo*,[44] mark a departure from the Court's prior approach to determining whether an injury is "concrete," creating

38. *See, e.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153-54 (1970); Lujan v. Defs. of Wildlife, 504 U.S. 555, 576-78 (1992); Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 180-81 (2000). The concrete-injury component of the injury-in-fact test was similarly limited to public rights. *See* Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009) ("It would exceed [Article III's] limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws." (quoting *Lujan*, 504 U.S. at 580-81)); Hessick, *Standing, Injury in Fact, and Private Rights*, *supra* note 37, at 301 ("[T]he Court developed the injury-in-fact test to permit standing in suits where the plaintiff could not point to the violation of a private right.").

39. *Lujan*, 504 U.S. at 576 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

40. *Id.* at 576.

41. *Id.* at 573.

42. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214-25 (2021) (Thomas, J., dissenting); *cf. id.* at 2225-26 (Kagan, J., dissenting) (arguing that the application of the injury-in-fact requirement in the context of congressionally created private rights actually serves to aggrandize the Court's power rather than limit it).

43. *TransUnion LLC*, 141 S. Ct. at 2214-25 (Thomas, J., dissenting).

44. Before *TransUnion* clarified the matter, *Spokeo*'s effect on this issue was muddied. Although *Spokeo* determined that the concrete-injury requirement ought to be applied to the matter at hand, it provided virtually no guidance for how to do so or what a concrete injury was, stating only that "both history and the judgment of Congress play important roles" in the analysis. Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016).

new limitations on the types of injuries that satisfy standing requirements.[45] The concreteness inquiry is now heavily couched in historical analysis: "Central to assessing concreteness is whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including . . . reputational harm."[46] However, questions remain as to how close the historical analogue must be, and elsewhere in the *TransUnion* opinion the Court implies that certain harms may be concrete regardless of whether they have a historical analogue.[47] Nonetheless, many lower courts have relied on the historical-analogue test in assessing the concreteness of an injury.[48]

Further, the Court also narrowed the number of instances where the risk of future harm qualifies as a concrete injury in *TransUnion*.[49] While the Court had long acknowledged that "the risk of real harm" can "satisfy the requirement of concreteness,"[50] it changed course in *TransUnion*, holding that a showing of

45. *See* Note, *Trademark Injury in Law and Fact: A Standing Defense to Modern Infringement*, 135 HARV. L. REV. 667, 673 (2021) ("Over the past five years, the Court has widened the divide between factual and legal injury by sharpening the concrete-harm requirement."). Although the Court did not articulate a clear test for whether an injury is concrete, it provided new guidance on the matter. *See infra* notes 46-59 and accompanying text.

46. *TransUnion*, 141 S. Ct. at 2200. For criticism of the Court's earlier iterations of the historical analogue requirement in standing doctrine, see Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 187 (1992) ("[T]he idea that standing should be reserved principally to people with common law interests and denied to people without such interests . . . reflects a *Lochner*-like conception of public law. It defines modern public law by reference to common law principles that appear nowhere in the Constitution." (footnote omitted)).

47. For example, in discussing intangible injuries, the Court states: "Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion LLC*, 141 S. Ct. at 2204 (2021). This statement implies that although those with historical analogues are most clearly concrete, intangible harms without a historical analogue may also satisfy the concreteness requirement. However, the Court does not provide guidance as to how nontraditional intangible injuries might satisfy the concreteness requirement. *Id.*

48. *See, e.g.*, Francisco v. NY Tex Care, Inc., No. 19-CV-1649, 2022 WL 900603, at *7 (E.D.N.Y. Mar. 28, 2022); Sevilla v. House of Salads One LLC, No. 20-CV-6072, 2022 WL 954740, at *7 (E.D.N.Y. Mar. 30, 2022); Wang v. XBB, Inc., No. 18-CV-7341, 2022 WL 912592, at *13 (E.D.N.Y. Mar. 29, 2022).

49. Notably, the Court maintained its stance that intangible injuries, such as "reputational harms, disclosure of private information, and intrusion upon seclusion" can be concrete, especially if related to a common law analogue. *TransUnion*, 141 S. Ct. at 2204.

50. Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) (endorsing the idea that risk of future harm is a concrete injury in a case involving damages).

future risk is only sufficient for prospective relief, such as an injunction, not for retrospective relief, such as damages.[51]

The Court made a similar precedent-departing move in the context of informational injuries.[52] The Court had previously held that plaintiffs suffer a concrete injury when they are denied information that they are statutorily entitled to obtain.[53] Under prior doctrine, the class in *TransUnion* suffered an informational injury sufficient to confer standing[54] because TransUnion had failed to provide class members with a full disclosure of their credit files and a statement of their rights as required by FCRA.[55] However, the Court determined that this injury alone was not sufficient for standing.[56] Although the Court recognized that TransUnion had violated FCRA's disclosure requirements, it nonetheless

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51. *TransUnion*, 141 S. Ct. at 2198, 2210-11; *see also Trademark Injury in Law and Fact: A Standing Defense to Modern Infringement*, 135 HARV. L. REV. 667, 675-76 (2021) (describing this doctrinal development). In his dissenting opinion rejecting this line of reasoning, Justice Thomas noted the inconsistency between the two cases, concluding: "The theory that risk of harm matters only for injunctive relief is thus squarely foreclosed by *Spokeo* itself." *TransUnion*, 141 S. Ct. at 2222-23 (Thomas, J., dissenting).

52. An informational injury occurs when individuals are denied information that they are statutorily entitled to be provided. *See* FEC v. Akins, 524 U.S. 11, 24-25 (1998). For a broader discussion of the landscape of informational injuries, see Bruce Teicher, *Informational Injuries as a Basis for Standing*, 79 COLUM. L. REV. 366, 367-73 (1979) (tracing the early development of informational injuries); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 618-33 (1999) (describing the importance of statutes regulating information and early Supreme Court cases on informational injury).

53. *Id.* at 21; Public Citizen v. U.S. Dep't of Just., 491 U.S. 440, 449 (1989); Env't Def. Fund v. EPA, 922 F.3d 446, 452 (D.C. Cir. 2019) ("The law is settled that 'a denial of access to information' qualifies as an injury in fact 'where a statute (on the claimants' reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them.'" (quoting Friends of Animals v. Jewell, 824 F.3d 1033, 1040-41 (D.C. Cir. 2016))).

54. In order to reconcile the outcome in *TransUnion* with the Court's prior embrace of informational injuries, the Court cast the plaintiffs' injuries as "formatting errors." *TransUnion*, 141 S. Ct. at 2213. This characterization has been criticized. *See id.* at 2222 (Thomas, J., dissenting) ("I would not be so quick as to recharacterize these jury findings as mere 'formatting' errors."); Helen Hershkoff & Stephen Loffredo, *Standing for Democracy: Is Democracy a Procedural Right in Vacuo? A Democratic Perspective on Procedural Violations as a Basis for Article III Standing*, 70 BUFF. L. REV. 523, 612 n.208 (2022) ("The Court's implicit suggestion [in *TransUnion*] is that formatting errors are trivial technicalities without legal consequences. That view upends legislative efforts to counter the adverse effects of contractual 'fine print' by mandating the size and location of information disclosure in contracts and other documents affecting consumers, investors, tenants, and workers."); Peter Ormerod, *Making Privacy Injuries Concrete*, 79 WASH. & LEE L. REV. 101, 126 (2022) ("The Court recast *Ramirez*'s withholding injuries as mere formatting errors, and thus distinguished *Akins* and *Public Citizen v. DOJ*.").

55. *TransUnion*, 141 S. Ct. at 2213.

56. *Id.* at 2213-14.

held that the plaintiffs did not have standing because they had not endured a concrete injury in fact. In doing so, it invented a new requirement that plaintiffs alleging an informational injury must also show that they suffered a "downstream" consequence from the denial of information before the Court will consider their injury to be concrete.[57] Areas of law that have relied on the informational injury doctrine, such as "tester" cases under civil rights statutes[58] or privacy cases under a number of state and federal laws,[59] are now in free fall as lower courts attempt to reconcile the Supreme Court's downstream consequences requirement with prior cases finding an injury despite the absence of a downstream consequence.

The Court's analysis on the information disclosure claim further elucidates how *TransUnion* has made standing requirements more onerous for class action plaintiffs. The Court ultimately determined that only the lead plaintiff had suffered a concrete injury related to the disclosure violation, as he alone had testified

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57. *Id.* at 2214. As Cass Sunstein has stated, the Supreme Court's lack of coherence related to the informational injury doctrine is "baffling and anomalous." Sunstein, *supra* note 37, at 367; *see also* Elizabeth Earle Beske, *The Court and the Private Plaintiff*, 58 WAKE FOREST L. REV. 1, 37 n.320 (2023) ("The *TransUnion* majority did not grapple with the effects of its decision on cases like *FEC v. Akins* . . . or *Havens Realty Corp. v. Coleman*.").

58. The Supreme Court previously held that civil rights "testers" have standing when they are denied information that they are statutorily entitled to. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982) (holding that a Black woman given false information by a real estate development had standing to sue under the FHA even though she did not actually intend to rent or purchase an apartment). After *TransUnion*, circuit courts have scrambled to reconcile *TransUnion*'s edict with the Court's prior endorsement of standing in tester cases, with different circuits coming to different results. *Compare* Harty v. W. Point Realty, Inc., 28 F.4th 435, 444 (2d Cir. 2022) (finding no injury in fact in tester cases), *with* Laufer v. Arpan LLC, 29 F.4th 1268, 1274-75 (11th Cir. 2022) (finding an injury in fact in tester cases), *and* Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 270-71 (1st Cir. 2022) (finding an injury in fact in tester cases). In sum, "*Havens Realty*'s tester standing seems irreconcilable with *TransUnion*'s standing redefinition, yet both remain good law." Catherine Cole, *A Standoff:* Havens Realty v. Coleman *Tester Standing and* Transunion v. Ramirez *in the Circuit Courts*, 45 HARV. J.L. & PUB. POL'Y 1033, 1034 (2022).

59. Privacy laws often govern how and when information can be obtained, used, withheld, or disclosed. Peter C. Ormerod, *Privacy Injuries and Article III Concreteness*, 48 FLA. ST. U. L. REV. 133, 172-90 (2020) (discussing various state and federal privacy laws). While violations of these statutes used to be considered informational injuries, under *Spokeo* and *TransUnion*'s stricter standard for informational injuries, lower courts have been left to decide what injuries count. *See id.* at 172-90 (discussing how *Spokeo* diminished litigants' ability to enforce privacy rights); Ignacio Cofone, *Privacy Standing*, 2022 U. ILL. L. REV. 1367, 1376 (2022); John Black & James R. Steel, *Privacy Developments: Private Litigation, Enforcement Actions, and Settlements*, 73 BUS. LAW. 177 (2017); Ormerod, *supra* note 54, at 104; Peter Ormerod, *Privacy Qui Tam*, 98 NOTRE DAME L. REV. 267, 298-303 (2022) (describing how *TransUnion* has impacted the ability to litigate violations of privacy statutes).

at trial that the inaccurate disclosure had caused him confusion and distress.[60] Because the other 8,185 class members had not also testified that they were confused or otherwise harmed by the deficient disclosures, they did not meet their burden under the Court's new standing test.[61] The requirement that each individual class member must offer evidence that they personally suffered a concrete injury is not trivial[62]; in large classes, this new formulation of standing requires plaintiffs' counsel to gather and introduce testimony from potentially thousands of class members. And *TransUnion*'s requirement that all class members show that they suffered a concrete injury is as novel as it is burdensome. While prior Court decisions have held that named plaintiffs in class actions must meet standing requirements, the Court has never stipulated that every class member, even those who are unknown and unnamed, must prove they have suffered a concrete injury before the class may proceed with litigation.[63]

Each of these doctrinal developments imposes new burdens on plaintiffs and limits litigants' access to federal courts. This Note is not alone in finding fault with *TransUnion* and the injury-in-fact requirement generally. Scholars and courts alike have critiqued *TransUnion*'s reinterpretation of concreteness for creating a set of federal rights that are only enforceable in state courts;[64] for ignoring historical evidence that laws creating statutory damages without a showing of an actual injury were permissible during the Founding Era;[65] for the fact that the injury-in-fact requirement was made up whole cloth in *Association of Data Processing Service Organizations v. Camp* and was not part of standing doctrine for

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60. *TransUnion*, 141 S. Ct. at 2213-14.

61. *Id.* at 2214.

62. *See Article III Standing—Separation of Powers—Class Actions*—Transunion v. Ramirez, 135 HARV. L. REV. 333, 340 (2021) ("*TransUnion* makes it harder for class action plaintiffs to vindicate their federal rights in federal courts."); Michael P. Goodyear, *Returning to the Start? Federal BIPA Claims After* Transunion v. Ramirez, 2022 U. ILL. L. REV. ONLINE 10, 15 (2022) (describing challenges with bringing BIPA class actions in federal court after *TransUnion*).

63. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 338 n.6 (2016) (applying standing requirements only to "named plaintiffs who represent a class"); *see also* Warth v. Seldin, 422 U.S. 490, 502 (1975) ("Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."); Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 40 n.20 (1976).

64. *See* Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211, 1215 (2021).

65. Michael Freedman, *Injury-in-Fact, Historical Fiction: Contemporary Standing Doctrine and the Original Meaning of Article III*, 75 N.Y.U. ANN. SURV. AM. L. 317, 318 (2020) ("[F]ounding-era law was replete with statutes that authorized uninjured plaintiffs to sue and collect damages for violations of commercial law."); *TransUnion*, 141 S. Ct. at 2218-19 (Thomas, J., dissenting) (describing how the first Congress enacted a law that provided for statutory damages without a showing of actual injury).

the first two centuries of the Constitution's existence;[66] and for co-opting Congress's policymaking power to determine what is a legally cognizable injury,[67] among other complaints.

Despite the litany of critiques, the reality of *TransUnion*'s existence remains. However, lower federal courts retain discretion over how rigidly to interpret *TransUnion*. While there is little uncertainty around parts of *TransUnion*'s holding, such as the mandate that federal courts apply the injury-in-fact requirement in equal force to every case, other areas present more ambiguity. The concrete-injury requirement is especially undefined, and questions remain as to what downstream harms can make an informational injury concrete, how closely related a historical analogue must be to the asserted injury, and even whether a historical analogue is always necessary. The following Part explores how federal courts in New York and California have used this discretion in the context of state wage-and-hour laws and how their disparate approaches impact litigants' access to federal courts.

II. A BREAK IN THE DOCTRINE: ARTICLE III STANDING AND STATE WAGE-AND-HOUR LAWS

This Part first provides background on the purpose of state wage-and-hour laws, discussing their role in combatting wage theft. It then examines how federal courts in New York and California have applied *TransUnion*'s heightened concrete standard to state wage-and-hour laws, specifically wage-documentation and late-payment laws. Federal courts in New York and California are the first to tackle the issue of how *TransUnion* bears on these laws, and thus provide illuminating examples of the varied approaches federal courts may opt for. This analysis is especially salient for federal courts in other states with similar regulations that have not yet developed a body of precedent applying standing in similar cases.[68]

This Part finds that federal courts in New York and California have assumed radically different postures in applying *TransUnion*'s heightened concreteness standard to state wage-and-hour laws. In New York, federal courts have almost ubiquitously found that plaintiffs do not have a concrete injury and thus lack

66. *See* Sunstein, *supra* note 37, at 358-59; *TransUnion*, 141 S. Ct. at 2219 (Thomas, J., dissenting).

67. *See* Annefloor J. de Groot, Note, *No [Concrete] Harm, No Foul? Article III Standing in the Context of Consumer Financial Protection Laws*, 56 GA. L. REV. 819, 857-62 (2022).

68. *See infra* notes 89 (describing other states' wage-documentation laws), 104 (describing other states' late-payment laws).

standing to bring wage-documentation claims,[69] and have been split as to whether plaintiffs have standing to press their late-payment claims.[70] As a result of New York federal courts' stringent application of the concrete-injury requirement, employees—especially those suing as part of a class action—are unlikely to obtain relief for certain violations of state wage-and-hour law. In contrast, California federal courts have taken a more permissive approach. In the California cases, federal courts have applied the concrete-injury requirement to preclude standing only in cases of trivial wage-documentation violations[71] and have not used it to prevent plaintiffs from pressing late-payment claims.[72]

A. Wage Theft and State Prevention Efforts

To comprehend the full effect of federal courts' application of standing to state wage-and-hour laws, it is necessary to first examine the purpose of these provisions. These laws are primarily aimed at preventing and remediating "wage theft," which refers to a broad category of employment law violations in which an employer underpays their employees. Wage theft includes paying workers less than the minimum wage, failing to pay employees adequate overtime, requiring employees to work off the clock, denying workers legally required meal breaks, taking deductions from wages, withholding tips, not paying tipped workers minimum wage, and misclassifying workers as independent contractors or as overtime exempt.[73]

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69. *See, e.g.*, Beh v. Cmty. Care Companions Inc., No. 19-CV-01417, 2022 WL 5039391, at *7 (W.D.N.Y. Sept. 29, 2022); Metcalf v. TransPerfect Translations Int'l, Inc., 632 F. Supp. 3d 319, 340 (2022).

70. *See, e.g.*, Rosario v. Icon Burger Acquisition LLC, No. 21-CV-4313, 2022 WL 198503, at *3 (E.D.N.Y. Jan. 21, 2022) ("[A]bsent factual allegations that the plaintiff forewent the opportunity to invest or otherwise use the money to which he was legally entitled, he cannot plausibly claim he suffered a harm sufficiently concrete to establish Article III standing."); Levy v. Endeavor Air Inc., No. 21-CV-4387, 2022 WL 16645829, at *4 (E.D.N.Y. Nov. 1, 2022) (concluding that "deprivation of the time value of [plaintiffs'] wages . . . in violation of New York statutory law [was] enough to establish Article III standing").

71. *See, e.g.*, Boone v. Amazon.com Servs., LLC, 562 F. Supp. 3d 1103, 1125 (E.D. Cal. 2022).

72. *See, e.g.*, DiMercurio v. Equilon Enters. LLC, No. 19-CV-04029, 2022 WL 254345 at *4 (N.D. Cal. Jan. 27, 2022) (addressing standing in the context of whether plaintiffs could bring a specific type of late payment penalty known as a "waiting time" penalty, which is available when an employer fails to pay an employee's final paycheck in a timely manner).

73. Ihna Mangundayao, Celine McNicholas, Margaret Poydock & Ali Sait, *More than $3 Billion in Stolen Wages Recovered for Workers Between 2017 and 2020*, ECON. POL'Y INST. 3 (Dec. 22, 2021), https://files.epi.org/uploads/240542.pdf [https://perma.cc/95ZV-UYBG].

Wage theft has a tremendous impact on employees; it is estimated that American laborers lose roughly $50 billion in wage theft every year.[74] The U.S. Department of Labor, state departments of labor, state attorneys general, and private class action litigation recover roughly $1 billion from employers that have illegally withheld wages each year.[75] Private class actions are responsible for the majority of this recovery, underscoring the importance of nonstate litigation.[76] As is the case with most illegal employment practices, low-income workers bear the brunt of wage theft.[77] Estimates indicate that workers making less than $13 an hour have an astonishing $9.2 billion stolen from their paychecks annually.[78]

States and municipalities have enacted various laws to prevent and remediate wage theft.[79] For example, in 2011 the New York state legislature passed the Wage Theft Prevention Act.[80] Codified in New York Labor Law (NYLL), one provision of the Act requires that, at the time of hiring, employers must provide employees with a "wage notice" that includes, among other things, the regular rate of pay; the overtime rate of pay; the method of calculating payment (e.g., hourly, daily, salary, commission); and the employer's contact information.[81] Additionally, each time an employee is paid, the employer must provide the employee with a "wage statement" that lists the dates included in the pay period;

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74. Celine McNicholas, Zane Mokhiber & Adam Chaikof, *Two Billion Dollars in Stolen Wages Were Recovered for Workers in 2015 and 2016—and That's Just a Drop in the Bucket*, ECON. POL'Y INST. 3 (Dec. 13, 2017), https://files.epi.org/pdf/138995.pdf [https://perma.cc/TZ2N-TM9F]. For more on the effect of wage theft, see generally Press Release, Cal. Dep't of Indus. Rels., *Labor Commissioner's Office Cites RDV Construction $12 Million for Wage Theft Affecting More than 1,000 Workers* (Feb. 11, 2019), https://www.dir.ca.gov/DIRNews/2019/2019-16.html [https://perma.cc/4RFT-8CVE]; David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECON. POL'Y INST. (May 10, 2017), https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year [https://perma.cc/5LCD-XAEJ]; Nathaniel Goodell & Frank Manzo IV, *The Costs of Wage Theft and Payroll Fraud in the Construction Industries of Wisconsin, Minnesota, and Illinois: Impacts on Workers and Taxpayers*, MIDWEST ECON. POL'Y INST. (Jan. 14, 2021), https://midwestepi.files.wordpress.com/2020/10/mepi-ilepi-costs-of-payroll-fraud-in-wi-mn-il-final.pdf [https://perma.cc/Y3HJ-BQA6].

75. McNicholas et al., *supra* note 74, at 1.

76. *Id.*

77. *Id.*

78. Hugh Baran & Elisabeth Campbell, *Forced Arbitration Helped Employers Who Committed Wage Theft Pocket $9.2 Billion in 2019 from Workers in Low-Paid Jobs*, NAT'L EMP. L. PROJECT 1 (June 2021), https://s27147.pcdn.co/wp-content/uploads/Data-Brief-Forced-Arbitration-Wage-Theft-Losses-June-2021.pdf [https://perma.cc/Y9A6-WPEL].

79. Jennifer J. Lee & Annie Smith, *Regulating Wage Theft*, 94 WASH. L. REV. 759, 775-83 (2019) (discussing various strategies adopted by 141 wage-theft laws enacted between 2005-2017).

80. *See* Wage Theft Prevention Act 2010 N.Y. Laws 1.

81. N.Y. LAB. LAW § 195(1)(a) (McKinney 2023).

the regular rate of pay; the overtime pay rate; the number of regular and overtime hours worked; the method of calculating payment; gross wages; taxes and other deductions; and the employer's name and contact information.[82] An employer violates these wage-documentation provisions when they either fail to provide the required documentation or when they provide inaccurate documents.[83] Under the relevant statute, an employee can recover $50 per day (up to $5,000) for a wage-notice violation[84] and $250 a day (up to $5,000) for wage-statement violations.[85] Wage-documentation claims are almost always accompanied by allegations that an employer has violated another provision of NYLL, such as paying less than minimum wage or failing to pay the required overtime rate.[86]

California law contains similar provisions, enacted through its own Wage Theft Prevention Act. Like New York, California requires that employers provide employees with a wage statement each pay period detailing, among other things, gross and net wages earned, total hours worked, and the rate of pay.[87] California, however, does not require that the employer provide a wage notice at the beginning of the employment relationship.[88] California and New York are not

82. *Id.* § 195(3).

83. The accuracy of wage documentation is measured against what wages the employee is legally due, not what wages they are actually paid. That is, if an employer has misclassified an employee as exempt from overtime payment, pays them accordingly, and provides them a wage statement that reflects the amount the employee has been paid, the wage statement would violate the NYLL provision because it inaccurately lists the employee as overtime exempt and fails to list what overtime payment the employee is due. *See, e.g.*, Copper v. Cavalry Staffing, LLC, 132 F. Supp. 3d 460, 467-68 (E.D.N.Y. 2015) (finding a wage-statement violation where wage statements accurately reflected the amount employees were paid but did not accurately reflect the number of overtime hours employees worked).

84. If the employee has not received a wage notice ten business days after the start of employment, they can recover $50.00 for "each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars." N.Y. Lab. Law § 198(1-b) (McKinney 2021).

85. An employee who has not received a wage statement with their paycheck may obtain $250.00 for "each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars." *Id.* § 198(1-d).

86. *See, e.g.*, Inclan v. N.Y. Hosp. Grp., Inc., 95 F. Supp. 3d 490, 494 (S.D.N.Y. 2015) (litigating wage-documentation claims in addition to minimum-wage violations, overtime violations, and failure to pay spread-of-hours payments).

87. Cal. Lab. Code § 226(a) (West 2023).

88. *See id.*

anomalies, as many states and municipalities have enacted similar information-disclosure requirements to increase wage transparency.[89]

Wage-documentation laws like these combat wage theft by increasing pay transparency.[90] This occurs in three ways. First, by mandating that employers give employees information pertaining to their wages, these laws deter employers from engaging in wage theft.[91] Without wage-documentation requirements, employers have greater latitude to misclassify their employees as overtime exempt, pay below the minimum wage, or fail to pay them for all the hours they worked without fear of the employee discovering these violations.[92] Additionally, the statutory damages available for wage-documentation claims increase the damages an employer must pay for wage-and-hour violations, adding to the deterrent effect of laws prohibiting wage theft.[93]

Second, accurate wage documentation increases the likelihood that an employee discovers wage-theft violations or discovers violations earlier than they would otherwise.[94] By compelling employers to explicitly justify their basis for

89. *See, e.g.*, COLO. REV. STAT. § 8-4-103(4) (2023); NEB. REV. STAT. § 48-1230(2) (2023); TEX. CODE ANN. § 408.063 (West 2023); HAW. REV. STAT. ANN. § 388-7 (West 2023); SEATTLE, WASH., MUN. CODE § 14.20.025(D) (2019); OR. REV. STAT. § 658.440(1)(f) (2019). This list is non-exhaustive and is intended only to provide examples of similar laws in other jurisdictions. *See also* Lee & Smith, *supra* note 79, at 782 (identifying that roughly half of the wage-theft statutes analyzed contained provisions that "regulate information in an effort to increase awareness about wage and hour laws or to enhance transparency regarding an employer's payment of wages").

90. *See* Lauren K. Dasse, *Wage Theft in New York: The Wage Theft Prevention Act as a Counter to an Endemic Problem*, 16 CUNY L. REV. 97, 117-19 (2012) (discussing how improved wage documentation provisions sought to increase transparency and prevent wage theft).

91. *Cf.* Imbarrato v. Banta Mgmt. Servs., Inc., No. 18-CV-5422, 2020 WL 1330744, at *5 (S.D.N.Y. Mar. 20, 2020) ("[T]he New York legislature concluded that enacting wage notice provisions would 'far better protect workers' rights and interests' than existing penalties.").

92. *See id.* at *5 ("It is clear that the WTPA was enacted to further protect an employee's concrete interest in being paid what he or she is owed under the NYLL. The statute explicitly recognizes that this interest is put at risk when employees are 'mis- or un-informed regarding their rights and the responsibilities of their employers,' and seeks to guard against that harm by requiring employers to regularly apprise their employees of such information as the rate and basis for their wages and any allowances claimed by the employer.").

93. Empirical analysis has found that when states institute increased penalties for wage theft, there is a statistically significant decline in instances of underpayment. *See* Daniel J. Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSPS. ON POL. 324, 341 (2016) ("[I]n states where new wage-theft laws dramatically increased the expected costs of violating the law, the incidence of minimum wage noncompliance saw statistically significant declines. Stronger penalties, in short, appear to be quite effective in deterring this pernicious type of wage theft.").

94. *See* Vidrio v. United Airlines, Inc., No. CV 15-7985, 2022 WL 1599918, at *6 (C.D. Cal. May 6, 2022) (describing California's wage-statement law as having a "core 'informational purpose,' designed to help workers determine whether they are paid properly").

determining employees' pay, employees can assess the accuracy of these calculations.[95] Without this type of documentation, employees may be left in the dark as to how many hours their employer is paying them for or whether they are receiving adequate overtime.[96] Additionally, even if an employee would have discovered these violations at some point, robust documentation requirements allow employees to find and litigate potential wage theft earlier than they would be able to otherwise. Earlier litigation means employees can (1) recover the wages due to them earlier and (2) potentially prevent subsequent underpayments, as the existence of a pending lawsuit is likely to deter employers from continuing to violate wage-and-hour laws. And, even if employees are paid correctly, these statutes help ameliorate confusion that employees may feel about how their wages are calculated.

Finally, wage documentation also serves an evidentiary purpose in proving that wage theft has occurred.[97] An accurate wage statement can serve as proof that an employee was underpaid during litigation,[98] arbitration, or informal negotiations with their employer.[99] Even inaccurate wage documentation can be useful proof. Because employers subject to these laws must show exactly how wages were calculated, these documents can help an employee explain to a factfinder with specificity exactly what kind of wage-and-hour violation occurred. For example, without such a document, an employee might not be able to prove

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95. *See New York State Senate Introducer's Memorandum in Support Submitted in Accordance with Senate Rule VI. Sec. 1*, N.Y. STATE SENATE (2010) [hereinafter *Sponsor Memo*], https://www.nysenate.gov/legislation/bills/2009/s8380 [https://perma.cc/3AMR-TMXZ] (describing the need to have employers "adequately inform their employees of their wages and how they are calculated in a language they can comprehend"); *see also* Hicks v. T.L. Cannon Mgmt. Corp., No. 13-CV-06455, 2018 WL 2440732, at *4 (W.D.N.Y. Mar. 13, 2018) (describing how New York's wage-documentation provisions are "specifically designed to guard against the concrete harm that workers are subject to when they are mis- or uninformed regarding their rights and the responsibilities of their employers").

96. Discovering wage theft is occurring is also helpful for taking remedial action that does not involve litigation, such as finding a different employer.

97. *See generally* 123 AMERICAN JURISPRUDENCE TRIALS 1 § 81 (2012) (describing how these records can aid in proving employee wage-theft claims); Brewer v. Premier Golf Props., LP, 86 Cal. Rptr. 3d 225, 233 (Ct. App. 2008) (showing how documentation of hours worked assists in proving wage-theft claims).

98. Landy v. Pettigrew Crewing, Inc., No. 19-cv-07474, 2019 WL 6245525, at *5 (C.D. Cal. Nov. 22, 2019) (identifying employees' wage statements as a source of evidence for their state and federal wage-and-hour claims); Hankey v. Home Depot USA, Inc., No. 19-cv-0413, 2020 WL 3060399, at *3 (E.D. Cal. June 9, 2020) (analyzing how a wage statement may help prove plaintiffs' wage-theft claims).

99. It is important to note that litigation is usually not the first step an employee takes to address wage theft. Rather, it is generally a last-resort option exercised only after an employee has discussed the issue with their employer. Wage documentation is also valuable in facilitating these initial conversations, giving employees a basis of proof for their wage-theft claims.

whether their underpayment is due to the employer not paying them for all hours worked, not paying them adequate overtime, or because the employer is committing another violation.

Another type of statute aimed at combatting wage theft are laws regulating the timing of payment. These late-payment provisions often allow employees to recover when their employer has not paid them weekly or biweekly as required by state law.[100] Further, they may provide for damages when an employer fails to pay an employee after the termination of the employment relationship. In New York, NYLL stipulates that when an employer fails to pay an employee with the required frequency, an employee may recover the amount of the underpayment as well as liquidated damages.[101] Even when the payments are eventually made and there are no outstanding wages owed to the employee, courts have read this provision as permitting employees to recover statutory damages.[102] Like New York, California also permits employees to recover in cases of late payment.[103] Similar legislation has been adopted in numerous states.[104]

Late-payment provisions similarly aim to deter wage theft.[105] The logic underlying these regulations is straightforward: they attempt to prevent employers from failing to pay their employees or paying them in an untimely fashion by delineating specific intervals by which employees must be paid and penalizing

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100. *See, e.g.*, N.Y. LAB. LAW §§ 191, 198(1-a) (McKinney 2023); CAL. LAB. CODE §§ 201-04 (West 2020).

101. The amount recoverable under the liquidated damages provision shall be "no more than one hundred percent of the total amount of wages found to be due . . . ." N.Y. LAB. LAW § 198(1-a) (McKinney 2023).

102. Underpayment occurs "[t]he moment that an employer fails to pay wages in compliance with [NYLL] section 191(1)(a) . . . . [P]ayment does not eviscerate the employee's statutory remedies." Vega v. CM & Assocs. Constr. Mgmt., LLC, 107 N.Y.S.3d 286, 288 (App. Div. 2019). Federal courts interpreting the late-payment provision have followed the state court's interpretation. *See* Caul v. Petco Animal Supplies, Inc., No. 20-CV-3534, 2021 WL 4407856, at *2-3 (E.D.N.Y. Sept. 27, 2021); Mabe v. Wal-Mart Assocs., Inc., No. 1:20-cv-00591, 2021 WL 1062566, at *4-7 (N.D.N.Y. Mar. 18, 2021); Sorto v. Diversified Maint. Sys., LLC, No. 20-CV-1302, 2020 WL 7693108, at *2-3 (E.D.N.Y. Dec. 28, 2020); Duverny v. Hercules Med. P.C., No. 18cv07652, 2020 WL 1033048, at *5-6 (S.D.N.Y. Mar. 3, 2020).

103. CAL. LAB. CODE § 204 (West 2020) (requiring timely payment of wages during employment); CAL. LAB. CODE §§ 201-03 (West 2020) (requiring timely payment of wages after employment has ended).

104. *See* Christopher A. Parsons & Edward D. Van Wesep, *The Timing of Pay*, 109 J. FIN. ECON. 373, 382 (2013) ("[R]egulators in 45 U.S. states require wages to be paid at a minimum frequency."); *see, e.g.*, COLO. REV. STAT. § 8-4-103 (2023); R.I. GEN. LAWS § 28-14-2.2(a) (2023); IND. CODE § 22-2-5-1 (2023). This list of legislation is nonexhaustive and is meant only to provide examples of other states' legislation.

105. *See Sponsor Memo*, *supra* note 95 (identifying that the WTPA's increase in penalties, which include penalties for late payments, will "better protect workers' rights and interests").

employers that do not comply.[106] Not only do they prevent these practices, but they also help remediate nonpayment. Without a contractual or statutory deadline by which payment is due, it is unclear when exactly an employee accrues a cause of action to recover unpaid wages. For example, without these laws, an employee who has not been paid a month after they performed the labor in question may be left in limbo as to whether their employer intends to pay them or not. By statutorily mandating weekly or biweekly payment, states ensure that employees can more quickly identify and remedy nonpayment.

Timely payment is especially important for low-income workers whose ability to pay for food, housing, and other necessities is contingent on receiving payment on a regular schedule.[107] As one scholar put it, "the vicissitudes of everyday life—a sudden toothache, a flat tire, a stain on their only clean work shirt—demand money, now."[108] The combination of this reality and the delay between paydays is the primary driver of predatory-lending practices such as payday loans, which usually impose astronomical interest rates and can trap low-income individuals in never-ending cycles of debt.[109] This dynamic is exacerbated when payment is even less frequent or when it comes at irregular intervals. In sum, for individuals living paycheck to paycheck, the timing of those paychecks is of great importance.

Given the importance of wage-documentation and late-payment laws, especially for low-income workers, it is vital that employees litigating against recalcitrant employers have a forum to bring their claims. However, as the next Section elucidates, some federal courts have begun applying *TransUnion* to find that employees do not have standing to sue for these harms.

B. Federal Courts' Application of TransUnion *to Wage-Documentation Claims*

Despite being state law, New York and California's wage-documentation provisions are often litigated in federal courts. The federal Fair Labor Standards Act (FLSA) has a number of provisions in common with these state wage-and-hour laws, and many plaintiffs litigate under state and federal statutes

106. *See* Galvin, *supra* note 93, at 341 (discussing the effectiveness of penalties in deterring wage theft).

107. *See Vega*, 107 N.Y.S.3d at 289 ("[T]he legislative purpose of § 191 . . . is to protect workers who are generally 'dependent upon their wages for sustenance.'").

108. Yonathan A. Arbel, *Payday*, 98 WASH. U. L. REV. 1, 3 (2020).

109. *Id.*; Neil Bhutta, Jacob Goldin & Tatiana Homonoff, *Consumer Borrowing After Payday Loan Bans*, 59 J.L. & ECON. 225, 240 (2016).

simultaneously.[110] Because of this commonality, federal courts hearing FLSA claims frequently exercise supplemental jurisdiction over state claims.[111] Even when plaintiffs do not simultaneously bring FLSA claims, they often satisfy the citizenship and amount-in-controversy requirements for diversity jurisdiction and opt to bring their claims in federal court.[112]

Given the popularity of litigating in a federal forum, New York and California federal courts have been forced to decide how to apply *TransUnion*'s new standing requirements to state wage-documentation claims. As described below, New York federal courts have interpreted *TransUnion* to largely prohibit bringing these claims. In contrast, California federal courts have taken a more measured approach, reading *TransUnion* to preclude only trivial violations while still allowing the majority of litigants to bring wage-documentation claims. Exploring the distinction in these approaches illuminates the interplay between standing and substantive rights.

1. New York

Prior to the Supreme Court's decision in *TransUnion*, New York federal courts regularly heard claims involving NYLL's wage-documentation provisions.[113] Even after *Spokeo*, New York federal courts still uniformly held that plaintiffs had standing to bring wage-documentation claims.[114] However,

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110. *See, e.g.*, Fermin v. Las Delicias Peruanas Rest., Inc., 93 F. Supp. 3d 19, 24 (E.D.N.Y. 2015); Inclan v. N.Y. Hosp. Grp., Inc., 95 F. Supp. 3d 490, 494 (S.D.N.Y. 2015); Maravilla v. Rosas Bros. Constr., Inc., 401 F. Supp. 3d 886, 892 (N.D. Cal. 2019); Van v. Language Line Servs., Inc., No. 14-CV-03791, 2016 WL 3143951, at *4 (N.D. Cal. June 6, 2016).

111. *See, e.g.*, Irizarry v. Catsimatidis, 722 F.3d 99, 102 (2d Cir. 2013); Gamero v. Koodo Sushi Corp., 272 F. Supp. 3d 481, 487 (S.D.N.Y. 2017); Santillan v. Henao, 822 F. Supp. 2d 284, 292 (E.D.N.Y. 2011); Ramirez v. Urion Constr. LLC, No. 22 Civ. 3342, 2023 WL 3570639, at *3 (S.D.N.Y. May 19, 2023).

112. *See generally* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. Rev. 233 (1988) (describing the normative value of allowing litigants to choose whether to be in state or federal court); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. Rev. 329 (1988) (contending that there is a normative value in litigants chosing between federal and state courts); Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977) (describing why litigants might opt for federal courts).

113. *See, e.g.*, Chichinadze v. BG Bar Inc., 517 F. Supp. 3d 240, 245 (S.D.N.Y. 2021); *Inclan*, 95 F. Supp. 3d at 502; Ying Ying Dai v. ABNS NY Inc., 490 F. Supp. 3d 645, 653 (E.D.N.Y. 2020); Atakhanova v. Home Fam. Care, Inc., No. 16-CV-6707, 2020 WL 4207437, at *2 (E.D.N.Y. July 22, 2020); Zivkovic v. Laura Christy LLC, 329 F.R.D. 61, 66 (S.D.N.Y. 2018).

114. *See* Imbarrato v. Banta Mgmt. Servs., Inc., No. 18-CV-5422, 2020 WL 1330744, at *5-9 (S.D.N.Y. Mar. 20, 2020); Hicks v. T.L. Cannon Mgmt. Corp., No. 13-CV-6455, 2018 WL

following *TransUnion*'s edict that all plaintiffs, even those litigating statutorily created private rights, must show that they have suffered a concrete injury, federal courts began to apply more scrutiny to NYLL claims. In March 2022, a trio of cases decided by Judge Pamela Chen in the Eastern District of New York commenced a trend of courts applying *TransUnion* to find that employees lacked standing to bring claims for wage-documentation violations in federal court. In the first of these cases, *Francisco v. NY Tex Care*, the class-action plaintiffs alleged, among other things, that they had not received wage notices and that their wage statements did not include necessary information, such as the employees' gross wages or deductions made to those wages.[115] Despite finding that these deficiencies constituted violations of the NYLL, the court held that the plaintiffs lacked standing to litigate them in federal court.[116] Specifically, the court determined that plaintiffs failed to meet the post-*TransUnion* injury-in-fact requirement, as they had neither described "a tangible injury [n]or something akin to a traditional cause of action" that resulted from the wage-documentation violations.[117]

The next day, Judge Chen ruled similarly in *Wang v. XBB*.[118] There, the court found that "[a]lthough the evidence establishes by a preponderance that Defendants failed to provide [P]laintiff with required notices under the NYLL, Plaintiff lacks standing to recover on those claims."[119] This lack of standing was again predicated on the argument that the plaintiff had not suffered an injury-in-fact linked to the wage-notice violation.[120] This reasoning was replicated in a case decided the following day, *Sevilla v. House of Salads One LLC*, where Chen again held that "[w]hile Defendants did not provide proper wage notice and statements to Plaintiffs, Plaintiffs lack standing to maintain these claims."[121] In each of these instances, the court read *TransUnion*'s articulation of the concrete-injury requirement to preclude employees from obtaining relief despite recognizing that the plaintiffs would have prevailed on the merits of their state-law claims.

Judge Chen's novel interpretation of *TransUnion* and its application to NYLL claims has proliferated throughout New York federal courts, both inside and

2440732, at *5 (W.D.N.Y. Mar. 13, 2018). *But see* Perez v. Postgraduate Ctr. for Mental Health, No. 19-CV-0931, 2021 WL 3667054, at *7 (E.D.N.Y. Aug. 18, 2021) (holding that under *Spokeo*'s articulation of injury, the defendant-employer's omission of "for Mental Health" in their name on plaintiff's wage statement did not cause a concrete injury).

115. No. 19-CV-1649, 2022 WL 900603, at *7 (E.D.N.Y. Mar. 28, 2022).

116. *Id.*

117. *Id.*

118. No. 18-CV-7341, 2022 WL 912592, at *13 (E.D.N.Y. Mar. 29, 2022).

119. *Id.*

120. *Id.*

121. No. 20-CV-6072, 2022 WL 954740, at *7 (E.D.N.Y. Mar. 30, 2022).

outside the Eastern District.[122] Among the courts that have considered the standing issue, almost all have adopted Chen's reasoning that *TransUnion* precludes recovery for wage-documentation violations in federal court.[123]

The terms of *TransUnion* do not necessitate this result. This initial trio of cases and those following failed to recognize that wage-documentation violations are informational injuries that facilitate an employer's other wage-and-hour violations. The Supreme Court has long acknowledged that the deprivation of information is an injury-in-fact sufficient for standing.[124] While the Court

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122. *See, e.g.*, Hernandez v. 99 Thai Playground LLC, No. 19-CV-01257, 2022 WL 18539303, at *7 (S.D.N.Y. Nov. 28, 2022) (relying heavily on Judge Chen's cases for the proposition that plaintiffs lack standing); Guthrie v. Rainbow Fencing Inc., No. 21-CV-5929, 2023 WL 2206568, at *6 (E.D.N.Y. Feb. 24, 2023); Beh v. Cmty. Care Companions Inc., No. 19-CV-01417, 2022 WL 5039391, at *7 (W.D.N.Y. Sept. 29, 2022); Metcalf v. TransPerfect Translations Int'l, Inc., 632 F. Supp. 3d 319, 329 (S.D.N.Y. 2022); Belliard v. Tarnovsky, No. 20-CV-1055, 2023 WL 3004963, at *6 (S.D.N.Y. Mar. 6, 2023), *report and recommendation adopted*, No. 20-CV-1055, 2023 WL 3304723 (S.D.N.Y. May 8, 2023).

123. *See, e.g.*, Pastrana v. Mr. Taco LLC, No. 18-CV-09374, 2022 WL 16857111, at *7 (S.D.N.Y. Sept. 23, 2022); Beh, 2022 WL 5039391, at *7; Sokolovsky v. Silver Lake Specialized Care Ctr., No. 21-CV-01598, 2023 WL 5977298, at *11 (E.D.N.Y. Sept. 14, 2023); Montalvo v. Paul Bar & Rest. Corp., No. 22-CV-1423, 2023 WL 5928361, at *3 (S.D.N.Y. Sept. 13, 2023); Echevarria v. ABC Corp., No. 21-CV-4959, 2023 WL 5880417, at *7 (E.D.N.Y. Sept. 11, 2023); Muratov v. Mama Shnitzel Inc., No. 22-CV-3785, 2023 WL 5152511, at *8 n.7 (E.D.N.Y. July 21, 2023); Chen v. Hunan Manor Enter., Inc., No. 17-CV-802, 2023 WL 5574854, at *13 (S.D.N.Y. Aug. 29, 2023); Grande v. 48 Rockefeller Corp., No. 21-CV-1593, 2023 WL 5162418, at *19 (S.D.N.Y. Aug. 11, 2023); Cisneros v. Zoe Constr. Corp., No. 21-CV-6579, 2023 WL 5978702, at *7 (E.D.N.Y. Aug. 10, 2023); Torres v. Golden Home Furniture Inc., No. 20-CV-4789, 2023 WL 3791807, at *1 (S.D.N.Y. June 2, 2023); Lucero v. Shaker Contractors, Corp., No. 21-CIV-8675, 2023 WL 4936225, at *3 (S.D.N.Y. July 27, 2023); Torres v. Golden Home Furniture Inc., No. 20-CV-04789, 2023 WL 3793850, at *2 (S.D.N.Y. May 10, 2023), *report and recommendation adopted*, No. 20-CV-4789, 2023 WL 3791807 (S.D.N.Y. June 2, 2023); Gao v. Umi Sushi, No. 18-CV-06439, 2023 WL 2118203, at *6 (S.D.N.Y. Jan. 31, 2023), *report and recommendation adopted* No. 18-CV-6439, 2023 WL 2118080 (S.D.N.Y. Feb. 17, 2023); Ramirez v. Urion Constr. LLC, No. 22-CIV-3342, 2023 WL 3570639, at *9 (S.D.N.Y. May 19, 2023); Kuan v. Notoriety Grp. LLC, No. 22-CV-1583, 2023 WL 3937317, at *10 (S.D.N.Y. May 22, 2023), *report and recommendation adopted*, No. 22-CV-01583, 2023 WL 3936749 (S.D.N.Y. June 9, 2023); Estrada v. Lagos Lounge Inc., No. 22-CIV-2123, 2023 WL 2748846, at *5 (S.D.N.Y. Apr. 3, 2023); Sanchez v. Trescly, No. 19-CV-4524, 2023 WL 2473070, at *1 (E.D.N.Y. Mar. 13, 2023); *see also* Zuniga v. Newmark Wood Working Grp. Inc., No. 20-CIV-2464, 2022 WL 3446331, at *9 (E.D.N.Y. Aug. 17, 2022) (requiring plaintiff to amend their complaint given the "open question here as to whether Plaintiff's pleading sufficiently alleges a causal relationship between the informational failure alleged and any harm Plaintiff allegedly suffered"); Huerta v. 101 N. Laundromat Inc., No. 21-CV-6127, 2023 WL 199699, at *2 (E.D.N.Y. Jan. 17, 2023) (ordering plaintiff to show cause to explain how the lack of a wage notice led to either "a tangible injury" or "that the harms addressed by the statute bear 'a close relationship to harms traditionally recognized as providing a basis for a lawsuit in American courts'").

124. *See* FEC v. Akins, 524 U.S. 11, 21 (1998); Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 449 (1989).

modified this position in *TransUnion* by mandating that an informational injury must cause a downstream harm to be concrete,[125] most wage-documentation violations constitute an informational injury even under this more stringent standard. As the state legislature recognized in passing the relevant NYLL provisions, requiring that employers provide accurate information about how they calculated their employees' wages helps ensure both that employees are receiving the wages to which they are entitled and that employees are able to more easily discover if they are not being paid adequately.[126] When an employer fails to provide this information, that nondisclosure facilitates other wage-and-hour violations that they may be committing. Without a wage statement describing how an employee's pay is calculated, it is vastly more challenging for an employee to discover a violation has occurred and advocate for it to be remedied.[127]

While the informational-injury argument was not addressed in any of the initial wage-documentation cases applying *TransUnion*, more recent cases have begun to address this theory of injury. A handful of New York courts have endorsed this approach, finding that standing requirements were met when plaintiffs pled that their lack of wage documentation allowed their employers to more easily commit wage theft.[128] In *Lipstein v. 20X Hospitality, LLC*, the plaintiffs detailed how their employer's wage-documentation violations prevented them from "(i) realizing their true hours worked; (ii) realizing they were underpaid;

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125. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021).

126. *See* Lipstein v. 20X Hospitality LLC, No. 22-CV-04812, 2023 WL 6124048, at *9 (S.D.N.Y. Sept. 19, 2023); Mateer v. Peloton Interactive, Inc., No. 22-CIV-740, 2022 WL 2751871, at *2 (S.D.N.Y. July 14, 2022).

127. *See supra* Section II.A.

128. *See, e.g.*, *Lipstein*, 2023 WL 6124048, at *9 (S.D.N.Y. Sept. 19, 2023); *Mateer*, No. 22-CIV-740, 2022 WL 2751871, at *2 (S.D.N.Y. July 14, 2022); Stih v. Rockaway Farmers Mkt., Inc., No. 22-CV-3228, 2023 WL 2760492, at *7 (E.D.N.Y. Apr. 3, 2023) ("The gravamen of the complaint is that the denial of plaintiff's statutory right to these documents caused plaintiff to fail to realize that defendants were deducting certain benefits from his wages, resulting in his underpayment. This is sufficient to demonstrate a tangible injury resulting from the violation."); Thompson v. Elev8 Ctr. N.Y., LLC, No. 20-CV-9581, 2023 WL 4556045, at *9 (S.D.N.Y. July 17, 2023), *report and recommendation adopted*, No. 20-CIV-9581, 2023 WL 6311591 (S.D.N.Y. Sept. 28, 2023) ("Here, plaintiffs not only allege that defendants 'willfully operated their business with a policy of not providing' proper wage notices or wage statements, they specifically allege that these failures 'actually harmed' them by depriving them of the 'ability to contest [wage] calculations' and 'to further delay providing proper compensation to low wage earners,' resulting 'in delayed payment of all proper wages.' As the SAC sufficiently sets forth a 'monetary injury' stemming from the alleged statutory violations—i.e., 'delay' in 'proper compensation'—the Court has jurisdiction to consider these claims." (internal citations omitted)); *see also* Cuchimaque v. A. Ochoa Concrete Corp., No. 22-CV-6136, 2023 WL 5152336, at *5 (E.D.N.Y. July 18, 2023) (articulating precisely why the informational injuries in wage-documentation claims are distinct from those in *TransUnion*).

and (iii) taking appropriate action to obtain the payments due to them."[129] In another case, *Mateer v. Peloton Interactive, Inc.*, the plaintiffs simply alleged that the defendant's wage-documentation violations "resulted in the underpayment of wages."[130] In both, the court recognized that the downstream effects alleged—namely, the other wage-and-hour violations—constituted a "monetary injury" that was "a concrete harm sufficient for purposes of Article III standing."[131]

Other cases have indicated that a complaint alleging a causal relationship between the wage-documentation violation and an employee's underpayment *could* theoretically satisfy the concrete-injury requirement before ultimately concluding that the parties before the court did not have standing. For example, in *Metcalf v. TransPerfect Translations International, Inc.*, the court determined that the plaintiffs had not met the concrete-injury requirement but noted that "[i]f putative class members indeed reviewed the wage statements and, based on this review, wrongly believed that they were being paid fully and therefore failed to take action to correct the situation, this would likely constitute 'concrete harm' that is sufficient for standing."[132] Similarly, some cases indicate that plaintiffs

129. *Lipstein*, 2023 WL 6124048, at *9.

130. 2022 WL 2751871, at *2 (quoting First Amended Complaint ¶ 271, *Mateer*, 2022 WL 2751871 (No. 22-CV-00740)). Plaintiffs in *Mateer* alleged that the defendant failed to provide a wage notice and provided incomplete wage statements, often omitting "the basis for the rate of pay; the rate of pay itself; the number of regular hours worked; and the number of overtime hours worked." First Amended Complaint ¶ 266, *Mateer*, 2022 WL 2751871 (No. 22-cv-00740).

131. *Mateer*, 2022 WL 2751871, at *2; *Lipstein*, 2023 WL 6124048, at *9. Other courts explicitly disagree with this conclusion. *See* Quieju v. La Jugueria Inc., No. 23-CV-264, 2023 WL 3073518, at *1 (E.D.N.Y. Apr. 25, 2023) ("I respectfully disagree with *Mateer*.").

132. 632 F. Supp. 3d 319, 340 (S.D.N.Y. 2022). Other courts have held similarly. In *Beh v. Cmty. Care Companions Inc.*, the court held that although plaintiffs suggested potential harms that could flow from a lack of an accurate wage notice, they had not alleged that their lack of a wage notice had actually caused those harms. No. 19-CV-01417, 2022 WL 5039391, at *7 (W.D.N.Y. Sept. 29, 2022). Had the plaintiffs linked their other wage-and-hour violations to their lack of a wage notice by asserting that the lack of a wage notice caused an "inability to identify their employer to remedy compensation problems, or lack of knowledge about the rates or conditions of their pay," they may have satisfied the concrete-injury requirement. *Id.*; *see also* Sudilovskiy v. City WAV Corp., No. 22-CV-469, 2022 WL 4586307, at *5 (E.D.N.Y. Sept. 29, 2022) (finding that plaintiffs lacked standing because their pleading was "devoid of any allegation that the wage underpayment would not have occurred, or would have been reduced, had plaintiffs received a proper wage notice or wage statements"); Avila v. Velasquez Constr. Corp., No. 22-CV-2606, 2023 WL 5979180, at *7 (E.D.N.Y. June 30, 2023) (allowing plaintiff to replead his wage statement claims to "alleg[e] . . . specific harm which flowed from defendants' noncompliance" similar to that in Stih v. Rockaway Farmers Mkt., Inc., No. 22-CV-3228, 2023 WL 2760492, at *7 (E.D.N.Y. Apr. 3, 2023)); Sanchez v. Trescly, No. 19-CV-4524, 2023 WL 2473070, at *1 (E.D.N.Y. Mar. 13, 2023) (denying standing but noting that Plaintiffs would have standing if they were to allege harms like the plaintiff in a different case in which an employer willfully failed to provide wage notice and statements to disguise the

could satisfy the concrete-injury requirement by asserting that they suffered confusion or emotional distress as a result of their informational injury. For example, in finding the absence of a concrete injury, one court noted that "[t]he [second amended complaint] does not allege that Plaintiffs even read the wage statements or relied on them in any way, or that the wage statements caused Plaintiffs confusion or distress."[133] The negative inference from this holding is that if a plaintiff pled that they read their wage statements and that the inaccuracies caused the plaintiff confusion or distress, that emotional harm may be sufficient to satisfy standing.[134]

Despite these potentially promising holdings, the vast majority of cases have explicitly rejected the idea that a wage-documentation violation can be a concrete injury because it enabled other wage-and-hour violations.[135] In many of these

hours an employee worked and avoid paying them properly); Guthrie v. Rainbow Fencing Inc., No. 21-CV-5929, 2023 WL 2206568, at *6 (E.D.N.Y. Feb. 24, 2023) ("Although Plaintiff now seeks to recover damages related to wage and hour violations, he has still yet to link such alleged harms or deprivations to the claimed violations of NYLL §§ 195 and 198.").

133. Metcalf v. TransPerfect Translations Int'l, Inc., 632 F. Supp. 3d 319, 340 (S.D.N.Y. 2022); *see also* Wang v. JFD Sushi Rest. Inc., No. 22-CV-4401, 2023 WL 5048245, at *2 (S.D.N.Y. May 8, 2023) (finding standing for the wage-documentation claim because "Plaintiff Ye's allegation that he suffered emotional distress from his inability to rent apartments that require proof of income is sufficient to establish standing").

134. *TransUnion* recognizes the idea that confusion or distress from inaccurate information may constitute a concrete harm, although it takes no position on whether it is necessarily concrete. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2211 n.7 (2021) ("[A] plaintiff 's knowledge that he or she is exposed to a risk of future physical, monetary, or reputational harm could cause its own current emotional or psychological harm. We take no position on whether or how such an emotional or psychological harm could suffice for Article III purposes . . . ."). Judge Chen, who decided the initial trio of cases applying *TransUnion* to NYLL claims, later articulated a similar theory of how wage-documentation violations might lead to a concrete injury. Although ultimately denying standing in that case, Judge Chen noted, "This is not to say that a plaintiff could never have Article III standing to assert a wage statement claim" and explored the possibility that the inaccurate wage documentation might cause a concrete injury in the form of emotional distress. Sanchez v. Ms. Wine Shop Inc., No. 22-CV-2178, 2022 WL 17368867, at *9 n.5 (E.D.N.Y. Nov. 30, 2022); *see also* Ramirez v. Sake II Japanese Rest., Inc., No. 20-CV-9907, 2023 WL 3354881, at *9 (S.D.N.Y. Apr. 24, 2023), *report and recommendation adopted*, No. 120-CV-9907, 2023 WL 3346768 (S.D.N.Y. May 10, 2023) (finding plaintiffs lacked standing but recognizing the possibility that the injury-in-fact requirement could be met if plaintiff alleged the "lack of paystubs or written wage notices confused him about the manner in which his pay was computed").

135. *See, e.g.*, Cartagena v. Sixth Ave. W. Assocs. LLC, No. 23-CV-3611, 2023 WL 6318170, at *2 (S.D.N.Y. Sept. 28, 2023) ("[T]he Court will not infer that a [wage-documentation] violation caused concrete injury simply because the plaintiff alleged violations of the NYLL and the FLSA in the same complaint."); Pinzon v. 467 Star Deli Inc., No. 22-CV-6864, 2023 WL 5337617, at *11 (S.D.N.Y. July 31, 2023) ("Pinzon has not identified any informational injury giving rise to consequences other than this lawsuit."), *report and recommendation adopted*, No.

cases, the plaintiffs were denied standing despite specifically alleging various theories for how their employer's wage-documentation violations caused the other forms of wage theft involved in the dispute.[136] These allegations seem to be exactly the sort of downstream harm the court in cases like *Mateer* and *Lipstein* theorized would make an informational injury sufficiently concrete. However, New York federal courts now routinely find these allegations to be insufficient for standing, imposing the novel requirement that plaintiffs must "identif[y] an informational injury with consequences beyond this lawsuit."[137] For example,

22-CV-6864, 2023 WL 5334757 (S.D.N.Y. Aug. 18, 2023); Najera v. Lake Ave Pizza LLC, No. 21-CV-6753, 2023 WL 5752588, at *10 (S.D.N.Y. Aug. 3, 2023) ("[Plaintiff] does not allege any facts describing an injury sufficient to confer standing and [has] not demonstrated how [his] lack of notice resulted in an injury greater than Defendants' wage violations . . . . Further, he has not identified any informational injury giving rise to consequences other than this lawsuit." (cleaned up)), *report and recommendation adopted sub nom.* Hernandez v. Lake Ave Pizza LLC, No. 21-CV-6753, 2023 WL 5748117 (S.D.N.Y. Sept. 6, 2023); Munoz v. Grp. US Mgmt. LLC, No. 22-CV-04038, 2023 WL 5390204, at *6 (S.D.N.Y. Aug. 22, 2023) ("[T]he Complaint generically alleges that Defendants' policies 'deprived employees of the ability to contest Defendants' calculations, allowed Defendants to hide their wrong-doing, and necessitated the current litigation.' However, these vague allegations do not demonstrate how Munoz's lack of notice resulted in an injury greater than Defendants' . . . overtime . . . violations." (internal quotations omitted)); Jackson v. Proampac LLC, No. 22-CV-03120, 2023 WL 6215324, at *4 (S.D.N.Y. Sept. 25, 2023); Veintimilla v. Sunny Builders NY, No. 22-CV-1446, 2023 WL 2969385, at *11 (E.D.N.Y. Feb. 17, 2023); Chen v. Lilis 200 W. 57th Corp., No. 19-CV-7654, 2023 WL 2388728, at *8 (S.D.N.Y. Mar. 7, 2023); Neor v. Acacia Network, Inc., No. 22-CV-4814, 2023 WL 1797267, at *4 (S.D.N.Y. Feb. 7, 2023).

136. *See, e.g.*, Shi v. TL & CG Inc., No. 19-CV-08502, 2022 WL 2669156, at *9 (S.D.N.Y. July 11, 2022) (alleging that the employer's wage-documentation violations that "'facilitated' the underpayments at the heart of this case" were insufficient for standing); Chen v. Lilis 200 W. 57th Corp., No. 19-CV-7654, 2023 WL 2388728, at *8 (S.D.N.Y. Mar. 7, 2023) (rejecting pleadings for lack of standing despite plaintiff's allegations that defendant's wage-documentation violations "facilitated" and "obscured" their wage theft); Neor v. Acacia Network, Inc., No. 22-CV-4814, 2023 WL 1797267, at *4 (S.D.N.Y. Feb. 7, 2023) (rejecting standing when plaintiff pled that "failure to provide notices and paystubs listing all hours and rates of pay, including overtime hours and overtime rates, deprived employees of the ability to contest the Defendants' calculations, thus facilitating Defendants' wrongdoing" because there was "not a plausible injury").

137. *Shi*, 2022 WL 2669156 at *9. The court also challenged the idea that the plaintiff's informational injury caused their underpayment. *Id.* ("Plaintiff has not demonstrated how or why the amount of his wage underpayment is greater than it would have been if he had been given a proper wage notice or proper wage statements."). In recent months, others have picked up this phrasing to deny standing in similar cases. *See, e.g.*, Reyes v. Coppola's Tuscan Grill, LLC, No. 21-CV-07040, 2023 WL 4303943, at *6 (S.D.N.Y. June 13, 2023), *report and recommendation adopted*, No. 21-CIV-7040, 2023 WL 4304676 (S.D.N.Y. June 30, 2023) ("Plaintiff fails to allege an injury in fact sufficient to confer standing and has not demonstrated how his lack of notice resulted in an injury greater than Defendants' minimum wage, overtime, and spread-of-hours wage violations. Nor has Plaintiff identified an informational injury with

one court dismissed the plaintiff's theory of injury because "[b]eing able to challenge his underpayment sooner would have resulted in Plaintiff bringing the same lawsuit, just earlier," and therefore there was no injury with consequences beyond the lawsuit.[138] Other New York federal courts have unfortunately followed suit,[139] with one going so far as to state that "it is doubtful" that a violation

consequences beyond this lawsuit."); Miculax v. La Fonda Boricua Lounge, INC., No. 20-CV-04477, 2023 WL 6318625, at *6 (S.D.N.Y. May 4, 2023) ("Plaintiffs fail to allege an injury in fact sufficient to confer standing and have not demonstrated how their lack of notice resulted in an injury greater than Defendants' minimum wage, overtime, and spread-of-hours wage violations. Nor have Plaintiffs identified an informational injury with consequences beyond this lawsuit."); *see also supra* note 135 and accompanying text (discussing cases in which courts determined there was no standing even when wage-documentation violations enabled other wage-and-hour violations).

138. *Shi*, 2022 WL 2669156, at *9. In *Shi* and others holding similarly, the court confusingly relies on a Second Circuit ADA-tester case for the proposition that the plaintiff's "interest in using the information" must go "beyond bringing [his] lawsuit." *Id.* at *8 (quoting Harty v. W. Point Realty, Inc., 28 F.4th 435, 444 (2d Cir. 2022)). In *Harty*, the plaintiff sought to litigate the defendant hotel's failure to state what specific accessible features the hotel had on their website as required by federal regulations interpreting the ADA. *Harty*, 28 F.4th at 439. The Second Circuit held the plaintiff did not have standing because he had no discernable connection to the hotel. *Id.* at 443 ("Because Harty asserted no plans to visit West Point or the surrounding area, he cannot allege that his ability to travel was hampered by West Point Realty's website in a way that caused him concrete harm."). Rather, he was only viewing the website to determine whether it complied so that he could bring a lawsuit if it did not. *Id.* The court thus concluded that he had no use for or interest in the information beyond bring the suit, and thus the deprivation of that information did not cause a concrete injury. *Id.* at 444.

In contrast, the plaintiff's interest in correct wage documentation is not limited to their desire to sue for a violation of wage-documentation provisions. Rather, their interest in the information is also to use it to prevent and remediate *other* concrete downstream harms such as underpayment, lack of overtime compensation, and misclassification. To crystalize this distinction, consider two plaintiffs. The first has suffered only a wage-documentation violation. The second has suffered a wage-documentation violation which has allowed their employer to also pay them below the minimum wage. If the first argued that they had an interest in their wage statement in order to sue under the relevant NYLL provision, then that plaintiff would be making an argument analogous to that in *Harty.* In contrast, a plaintiff arguing that they had an interest in obtaining a wage statement so that they'd be able to discover and prevent their employer from paying them below the minimum wage has shown a concrete downstream harm from their informational injury. Unfortunately, in *Shi* and its progeny, the court lazily conflates these two distinct situations to deny plaintiffs standing when they have legitimately articulated a concrete downstream consequence. Neither the Second Circuit's holding in *Harty* nor any Supreme Court precedent on standing demand this result.

139. For example, in *Pastrana v. Mr. Taco LLC*, the plaintiffs specifically alleged that their employer's failure to provide wage statements or wage notices allowed the employer "to disguise the actual number of hours Plaintiffs worked, and to avoid paying Plaintiffs properly for their full hours worked." No. 18-CV-09374, 2022 WL 16857111, at *7 (S.D.N.Y. Sept. 23, 2022) (quoting Complaint at ¶ 94, *Pastrana*, 2022 WL 16857111 (No. 18-CV-09374)), *report and recommendation adopted*, No. 18-CV-9374, 2022 WL 16857107 (S.D.N.Y. Nov. 10, 2022). However,

of NYLL's wage-statement or wage-notice provisions "could ever give rise to accompanying injury sufficient for standing purposes."[140]

This conclusion confounds. The explicit purpose of wage-documentation laws is to prevent wage theft and aid employees in discovering wage theft when it does occur.[141] Yet, when the plaintiffs in this line of cases made *exactly* this argument—that their lack of wage documentation facilitated their employer's wage theft or made it more challenging for them to discover wage theft—New York federal courts conjured up a never-before-seen requirement that employees must allege an injury totally separate from any of the other wage-and-hour claims they bring. That is, not only must employees now prove a downstream injury resulting from wage-documentation violations, but it cannot be the type of downstream injury that the legislation was created to address in the first place. Notably, the requirement that the downstream harm of an informational injury must be unrelated to the litigation or the plaintiff's other claims appears nowhere in *TransUnion* or in the Supreme Court's standing jurisprudence.[142]

In recent months, a handful of New York federal courts have begun to argue that standing's second requirement, causation, precludes standing even when a deficient wage statement facilitated other forms of wage theft.[143] One judge denied standing on this basis, holding that it is too "speculative" to conclude that a lack of information about an employee's pay would cause them not to realize

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the court found that the plaintiffs hadn't met the concrete-injury requirement because they had not "demonstrated how their lack of notice resulted in an injury greater than Defendants' minimum wage, overtime, and spread-of-hours wage violations. Nor have Plaintiffs identified an informational injury with consequences beyond this lawsuit." *Id.*

140. Deng v. Frequency Elecs., Inc., No. 21-CV-6081, 2022 WL 16923999, at *9 (E.D.N.Y. Nov. 14, 2022). In *Deng*, the plaintiffs claimed that their lack of a wage statement, which is required to list the employer's identity and contact information, caused the plaintiff to expend additional resources in litigating the issue of what entity was the plaintiffs' legal employer. *Id.* at *9 n.9. This allegation would seem to satisfy *TransUnion*'s concrete-injury requirement as it presents an informational injury (lack of a wage statement identifying their legal employer) with a downstream concrete harm (additional money expended to discover who their legal employer was). However, the court rejected this argument on the theory that "[p]laintiff cannot rely on alleged injuries suffered in the course of litigating her claims to establish standing for those claims." *Id.*

141. *See supra* Section II.A.

142. *See supra* note 134 (tracing the origins of this requirement).

143. Freeland v. Findlay's Tall Timbers Distrib. Ctr., LLC, No. 22-CV-6415, 2023 WL 4457911, at *13 (W.D.N.Y. July 11, 2023) ("Although Defendant challenges this claim on the basis that Plaintiff has not established an injury in fact, the Court concludes that the real barrier to standing here is causation . . . ."); Quieju v. La Jugueria Inc., No. 23-CV-264, 2023 WL 3073518, at *2 (E.D.N.Y. Apr. 25, 2023); Melgar v. Pie Chatach 1776 LLC, No. 23-CV-917, 2023 WL 2868299, at *2 (E.D.N.Y. Apr. 10, 2023); Jackson v. Proampac LLC, No. 22-CV-03120, 2023 WL 6215324, at *4 (S.D.N.Y. Sept. 25, 2023).

that they were being paid below the minimum wage.[144] He went on, "[t]his hypothetical chain of events is not what the Supreme Court means by an 'injury fairly traceable to the allegedly unlawful conduct.'"[145] Other cases make the simplistic argument that defective wage documentation could not have caused the wage theft, as the wage theft itself caused the wage theft.[146] This reasoning fails to comprehend that an outcome can have multiple precipitating events, a basic principle of law taught in most first-year torts classes.[147]

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144. *Quieju*, 2023 WL 3073518, at *2. It is worth noting the incredibly high showing this stringent reading requires of plaintiffs at the pleading stage. The court in this case appears to be drawing all inferences *against* the plaintiffs, contrary to the directive that courts evaluating 12(b)(6) motions "accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant." Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994). Despite recognizing that "[m]aybe the chain of events would have unfolded the way plaintiff" alleges, the court chose to infer that it would not have. *Quieju*, 2023 WL 3073518, at *2. Under this analysis, it seems that not only must a plaintiff plead a reasonable causal connection, but they must also provide affirmative proof.

145. *Quieju*, 2023 WL 3073518, at *2 (quoting California v. Texas, 141 S. Ct. 2104, 2113 (2021)). The court's exercise in theorizing what a hypothetical Supreme Court would say about this chain of causation, while certainly imaginative, is difficult to square with prior cases where the Supreme Court has exercised jurisdiction. For example, in *Fisher v. University of Texas*, 59 US. 365 (2016), the Supreme Court allowed a white college applicant to challenge an affirmative action program, despite substantial evidence that her "injury," being rejected from the University of Texas at Austin, would have occurred even under race-neutral criteria. *See* Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 313 (2015). Such an outcome indicates that the "fairly traceable" requirement must be read permissively, as the plaintiff in *Fisher* made no showing close to proving that the affirmative action program was the reason for her rejection. The same is true of the plaintiffs standing in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). *See* Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1058 (2002) ("[A]mple facts were available . . . to show that Bakke would have been denied admission in 1973 and 1974 even if all sixteen seats in the special program had been available."). It cannot be that such meager showings of causation suffice in one context, yet plausible allegations of causation are insufficient in another.

146. *Melgar*, 2023 WL 2868299, at *2 ("The injury that plaintiff received by defendant's failure to pay him overtime is not an injury he sustained because of the lack of a notice and wage statements; it is because his employer violated its obligation to pay overtime . . . ."); *Jackson*, 2023 WL 6215324, at *4 ("Plaintiffs' monetary harm is better traced as an injury flowing from ProAmpac's rounding policy, not ProAmpac's inaccurate wage notices.").

147. "Often, events have multiple but-for causes. So, for example, if a car accident occurred both because the defendant ran a red light and because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision." Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020) (emphasis omitted); Loughman v. Consol-Pa. Coal Co., 6 F.3d 88, 106 (3d Cir. 1993) ("As both tort law and common sense tell us, there may be multiple but-for causes of a single loss . . . ."); Lucius T. Outlaw III, *Unsecured (Black) Bodies: How Baltimore Foreshadows the Dangers of Racially Targeted Dragnet Policing Let Loose by* Utah v. Strieff, 50 N.M. L. REV. 25, 33-34 (2020) ("That multiple but-for causes can exist is widely accepted

New York federal courts' increasing hostility to finding standing in these cases means that many employees will never obtain the relief that state law entitles them to. One might argue that plaintiffs retain the ability to litigate in state court,[148] as states are not bound by Article III standing requirements.[149] However, for class-action plaintiffs, this is not necessarily true. New York's procedural rules do not allow "statutory penalties" to be granted on a class basis.[150] Because New York state courts frequently find that damages in wage-documentation cases are statutory penalties for the purposes of this procedural rule, class-wide relief is unavailable in state courts.[151] As a result, class-action plaintiffs must either abandon their wage-documentation claims or bring them single file in state courts.

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among courts and has been applied in a variety of case types."); *see also* Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the Des Cases*, 68 VA. L. REV. 713, 713 (1982) ("As every freshman student of tort law soon learns to his discomfort, 'causation' is an inscrutably vague notion, susceptible to endless philosophical argument . . . .").

148. *See, e.g.*, Kuan v. Notoriety Grp. LLC, No. 22-CV-1583, 2023 WL 3937317, at *10 n.5 (S.D.N.Y. May 22, 2023) (noting that the court's denial of standing "does not necessarily mean Plaintiff could not make out a claim in New York State Court, as the *TransUnion* analysis is specific to federal standing requirements"), *report and recommendation adopted*, No. 22-CV-01583, 2023 WL 3936749 (S.D.N.Y. June 9, 2023).

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

150. N.Y. C.P.L.R. 901 (MCKINNEY 2023). Laws limiting recovery of statutory damages are not exclusive to New York. *See, e.g.*, MICH. COMP. LAWS ANN. § 301.5(A)(5) (West 2020) ("An action for a penalty or minimum amount of recovery without regard to actual damages imposed or authorized by statute may not be maintained as a class action unless the statute specifically authorizes its recovery in a class action."). Other states limit class actions for statutory penalties in the context of specific types of actions. *See, e.g.*, FLA. STAT. ANN. § 768.734(2) (West 2023) (requiring that "in order to maintain a class action seeking statutory penalties . . . the class action claimants must allege and prove actual damages" when litigating under certain consumer protection laws); OHIO REV. CODE ANN. § 1345.09(b) (West 2023) (providing for recovery of statutory damages when a business engages in an unfair or deceptive trade practice, "but not in a class action"); CAL. CIV. CODE § 1786.50(a)(1) (West 2023) (prohibiting recovery of statutory damages for violations of a consumer reporting law).

151. New York state courts frequently find that liquidated damages are considered a penalty under N.Y. C.P.L.R. 901 and cannot be recovered under a class action. *See* Carter v. Frito-Lay, Inc., 425 N.Y.S.2d 115, 115 (App. Div. 1980); Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc., 799 N.Y.S.2d 795, 795 (App. Div. 2005). New York courts have applied this principle to preclude class actions to recover statutorily provided damages in wage-documentation claims. *See* Aponte v. Fedcap Rehab. Servs., No. 2022-30318, slip op. at ¶ 3 (N.Y. Sup. Ct. Jan. 31, 2022) (finding that plaintiffs cannot maintain a class action for their wage-documentation claims because they are seeking statutory penalties); Hunter v. Planned Bldg. Servs., Inc., No. 715053/2017, slip op. at ¶ 5 (N. Y. Sup. Ct. June 11, 2018) ("[P]laintiff's class action claim for liquidated damages [for their wage statement claims] are dismissed as the claim is a penalty precluded by CPLR § 901(b).").

While this does not place relief entirely out of reach, requiring employees to proceed individually does erect significant hurdles.[152] Many employees may not realize they are entitled to accurate wage documents or detect that the wage documents they have received are inaccurate. Even if they are aware a violation has occurred, individual litigation still requires each employee to bear the financial and psychological cost of litigating their claims alone, a factor that deters many from seeking legal recourse.[153] As a result, the majority of class action wage-documentation claims that are pushed out of federal court are unlikely to be vindicated in state courts.

Even if plaintiffs find their way to a state court, they are still harmed insofar as they lose their ability to opt for a federal forum. There are a number of reasons why plaintiffs in NYLL cases may prefer to have their claims heard in federal court. They may be simultaneously pressing FLSA claims and may want a federal judge to adjudicate their federal claims, for example.[154] They may have an out-of-state employer and wish to avoid getting caught up in complex personal jurisdiction disputes. The employees themselves may be domiciled out of state and have fears about state court bias against them. They may want to take advantage of a federal court system that has vastly more resources per case and can more carefully consider the merits of their claim.[155] Regardless of their reasons, many plaintiffs prefer federal courts; yet as New York federal courts increasingly refuse to enforce state wage-documentation laws, litigants are being pushed out of their chosen forum.[156]

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152. As many other scholars have noted, the inability to aggregate claims, especially when the amount in dispute per individual claimant is relatively low, is often an insurmountable barrier to recovery. *See generally* Paul D. Carrington, *Protecting the Right of Citizens to Aggregate Small Claims Against Businesses*, 46 U. MICH. J.L. REFORM 537 (2013) (describing this difficulty in the context of changes to Rule 23); Judith Resnik, Stephanie Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611 (2020) (describing the challenges to recovering when a small amount is at issue).

153. Elizabeth J. Cabraser, *The Class Abides: Class Actions and the "Roberts Court,"* 48 AKRON L. REV. 757, 766 (2015); Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 870-71 (2017).

154. NYLL claims are often packaged with FLSA claims because both statutes offer overlapping relief for several types of wage-and-hour violations. *See, e.g.*, Fermin v. Las Delicias Peruanas Rest., Inc., 93 F. Supp. 3d 19, 24 (E.D.N.Y. 2015); Gamero v. Koodo Sushi Corp., 272 F. Supp. 3d 481, 487 (S.D.N.Y. 2017).

155. *See* Neuborne, *supra* note 112 (describing why litigants might opt for federal courts).

156. To be sure, there are still instances of federal courts enforcing NYLL's wage-documentation provisions without commenting on the question of whether plaintiffs have standing. For example, in *Marine v. Vieja Quisqueya Restaurant Corp.*, the Eastern District of New York awarded plaintiff default judgment for the statutory maximum of $5,000 for his wage-

2. *California*

Federal courts in California have similarly grappled with how to apply *TransUnion* to California state wage-and-hour provisions. However, unlike in the New York cases, California courts have used *TransUnion* only to preclude relatively minor violations of wage-documentation claims, providing a model of post-*TransUnion* standing jurisprudence that vindicates employee claims.

Following *TransUnion*, California federal courts have taken a more permissive approach than their New York counterparts, finding that the concrete-injury requirement only precludes wage-statement violations when the violation involves trivial inaccuracies, such as a mistyped name or address.[157] For example, in one instance, the Ninth Circuit held that a plaintiff had no concrete injury when his employer's wage-statement violation entailed listing the address of the employer's parent company rather than the employer's address.[158] The court declared that the plaintiff was "aware of [his employer's] address—because he physically works there—even if his wage statement failed to list that address," and therefore had endured no confusion or experienced any other injury to support standing.[159] In a similar case, the court found plaintiffs had experienced no concrete injury when the wage-statement violation involved their employer's name mistakenly including "Inc." rather than "LLC."[160]

Meanwhile, federal courts in California have continued to hear wage-statement claims involving more substantive inaccuracies or omissions, such as incorrect hours or rates of pay. For example, in *Boone v. Amazon.com Services, LLC*, the court held that wage statements inaccurately stating the number of hours worked, hourly rates of pay, and total wages earned created a per se concrete injury.[161] In doing so, the court paid special attention to the goals of the California legislature, noting that the statutory history indicated that the state

statement claim and $5,000 for his wage-notice claim. No. 20CV4671, 2022 WL 17820084, at *8 (E.D.N.Y. Sept. 8, 2022). This decision was handed down in September 2022, long after the Supreme Court had decided *TransUnion* and after New York federal courts began applying *TransUnion* to deny plaintiffs standing in wage-notice and -statement cases. However, cases like *Marine* are likely to become increasingly rare as savvy defendants see the body of standing cases and begin making standing arguments in wage-documentation litigation.

157. *See, e.g.*, Castro v. PPG Indus., Inc., No. 21-55340, 2022 WL 3681305, at *1 (9th Cir. Aug. 25, 2022); Clayborn v. Amazon.com Servs. LLC, No. 20-cv-02368, 2021 WL 7707763, at *4-5 (C.D. Cal. Nov. 9, 2021).

158. *Castro*, 2022 WL 3681305, at *1.

159. *Id.*

160. *Clayborn*, 2021 WL 7707763, at *4-5; *see also* Mays v. Wal-Mart Stores, Inc., 804 F. App'x 641, 643-44 (9th Cir. 2020) (finding no concrete injury where the wage statement was missing one word from the employer's name).

161. 562 F. Supp. 3d 1103, 1124-25 (E.D. Cal. 2022).

legislature intended for the wage-statement law to apply especially in cases where employers omit or inaccurately state nontrivial information related to pay or the number of hours worked.[162] In finding that the plaintiffs' injury was concrete, the court relied on the Ninth Circuit's decision in *Magadia v. Wal-Mart*, which held that wage-statement violations present concrete injuries when the lack of required information leaves an employee unable to determine whether they have been adequately paid.[163]

The Northern District of California's decision in *Sarmiento v. Sealy, Inc.* exemplifies the dichotomy between trivial and nontrivial inaccuracies that California courts use to assess standing in these cases.[164] In *Sealy*, the court found that the plaintiffs lacked a concrete injury related to their allegation that the wage statement did not accurately state the name of their employer "because the alleged variation is too trivial a violation to support Article III standing."[165] However, the court did not hold that the plaintiffs' additional wage-statement claim—which asserted that the defendant did not include the hours worked at different pay rates for employees with multiple positions—was similarly barred on standing grounds.[166] Instead, the court went on to evaluate the merits of the claim and assess whether the defendant's conduct was covered by the statute.[167] Similarly, in a plethora of other instances, California federal courts have continued to decide wage-statement claims post-*TransUnion* without entertaining squabbles over standing.[168]

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162. *Id.* at 1124 (noting that the California law "was amended in 2013 to provide a presumption of injury when certain categories of information are omitted from an employee's wage statement"); *see also id.* (finding that the wage statement provision "protects employees' concrete interest in receiving accurate information about their wages in their pay statements" (quoting Magadia v. Wal-Mart Assocs., 999 F.3d 668, 679 (9th Cir. 2021))).

163. *Id.*; *see also Magadia*, 999 F.3d at 679-80 ("While Walmart claims that Magadia was not harmed because it did not underpay him, the lack of the required information runs the risk of leaving him and other employees unable to determine whether that is true . . . . We therefore hold that Magadia has standing . . . .").

164. No. 18-cv-01990, 2021 WL 4260646, at *5 (N.D. Cal. Aug. 26, 2021).

165. *Id.* (quoting Order Denying Motion for Class Certification at 10, *Sealy*, No. 18-cv-01990 (N.D. Cal. May 27, 2020), ECF No. 127).

166. *See id.* at *5.

167. *See id.* California federal courts have also implicitly endorsed the idea of standing in other wage-statement cases, while not addressing it directly. For example, in a case where plaintiffs alleged that their wage statements did not include an accurate number of hours worked or wages earned, the court applied *TransUnion* to one of the plaintiffs' other claims but did not apply it to preclude standing in the wage-statements claim. DiMercurio v. Equilon Enters. LLC, No. 19-CV-04029, 2022 WL 254345, at *3-5 (N.D. Cal. Jan. 27, 2022).

168. *See, e.g.*, Oman v. Delta Air Lines, Inc., 610 F. Supp. 3d 1257, 1271 (N.D. Cal. 2022); Vidrio v. United Airlines, Inc., No. CV 15-7985, 2022 WL 1599918, at *6 (C.D. Cal. May 6, 2022);

One case where a California federal court analyzed the plaintiffs' standing to bring NYLL claims crystalizes the distinction between the two states' approaches:

> [Defendant] relies on several decisions by one judge in the Eastern District of New York concluding that the wage notice requirements of NYLL are not cognizable in federal court under *TransUnion*. The Ninth Circuit, however, has reached the opposite conclusion in discussing California Labor Code violations, reasoning that California wage notice and pay stub violations create a significant enough risk that a worker cannot determine whether their wage statements are accurate to confer Article III standing. The Court cannot find, and Defendants did not identify, any material difference between New York and California labor laws that would warrant departing from [Ninth Circuit precedent]. The Court thus . . . conclude[s] that Plaintiff has standing to pursue the wage notice claims.[169]

In sum, by recognizing the purpose of wage-documentation laws and the harm that results when they are violated, California federal courts have been able to adopt an approach different from that of New York—one that vindicates the rights of workers while remaining consistent with the Supreme Court's precedent on standing.

C. Federal Courts' Application of TransUnion *to Late-Payment Claims*

Federal courts in New York and California have also addressed whether *TransUnion* precludes standing in late-payment claims. Mirroring their approaches in the wage-documentation context, New York federal courts have required a heightened showing to satisfy the concrete-injury requirement, while California federal courts have read *TransUnion* less expansively. Even more so than in the wage-documentation context, the application of TransUnion to preclude late-payment claims is deeply alarming. A late payment is exactly the type of monetary deprivation that has always, without question, been considered a concrete injury.[170] The idea that one might not have standing to contest a late payment exemplifies just how capacious standing doctrine has become.

Vvanti v. O'Reilly Auto Enters., LLC, No. 19-cv-02407, 2023 WL 4445531, at *14 (C.D. Cal. July 10, 2023).

169. DeRosa v. ViacomCBS, Inc., No. 20-cv-02965, 2022 WL 18938096, at *5 (C.D. Cal. Dec. 20, 2022) (citations omitted).

170. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021) (identifying that "monetary harm" is "a harm traditionally recognized as providing a basis for a lawsuit in American courts").

1. New York

As the rigid application of the concrete-injury requirement has proliferated in wage-documentation cases, federal courts in New York have also begun to scrutinize standing in cases involving NYLL's late-payment provision. These courts have come to varying conclusions when analyzing whether plaintiffs have standing to sue their employer for delayed, but no longer outstanding, payments in the wake of *TransUnion*. The fundamental dispute is about whether a late payment is itself a concrete harm and, if it is not, what factual allegations are necessary to show that the employee suffered a concrete harm in connection with their late payment. Courts addressing this issue generally come to one of three conclusions: (1) the plaintiffs have standing because a late payment is a per se concrete injury, meaning that plaintiffs do not need to make additional allegations describing how the late payment harmed them; [171] (2) a late payment is not a per se concrete injury, but the plaintiffs have standing because they made sufficiently detailed allegations about how the late payments harmed them; [172] or (3) a late payment is not a per se concrete injury, and the plaintiffs do not have standing because they did not provide specific-enough information as to how the late pay-ment harmed them.[173]

In the first group of cases, the court found that a late payment is a per se concrete injury because the employee loses the "time value" of their wages, as they are unable to invest or otherwise use their wages during the time that they are withheld.[174] Under this theory, a concrete injury occurs whenever there is a late payment because the employee has been deprived of the time value of the wages they are entitled to.[175] For example, in *Georgiou v. Harmon Stores*, the court

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171. *See, e.g.*, Georgiou v. Harmon Stores, Inc., No. 2:22-cv-02861-BMC, 2023 WL 112805, at *1 (E.D.N.Y. Jan. 5, 2023); Gillett v. Zara USA, Inc., No. 20 Civ. 3734, 2022 WL 3285275, at *6 (S.D.N.Y. Aug. 10, 2022).

172. *See, e.g.*, Harris v. Old Navy, LLC, No. 21 Civ. 9946, 2022 WL 16941712, at *5 (S.D.N.Y. Nov. 15, 2022); Espinal v. Sephora USA, Inc., No. 22 Civ. 03034, 2022 WL 16973328, at *4 (S.D.N.Y. Nov. 16, 2022).

173. *See, e.g.*, Rosario v. Icon Burger Acquisition LLC, No. 21-CV-4313, 2022 WL 198503, at *3 (E.D.N.Y. Jan. 21, 2022); Rath v. Jo-Ann Stores, LLC, No. 21-CV-791S, 2022 WL 3701163, at *7-8 (W.D.N.Y. Aug. 26, 2022).

174. This analysis relies on the idea that "[m]oney later is not the same as money now." *Georgiou*, 2023 WL 112805, at *1 (quoting Stephens v. U.S. Airways Grp., Inc., 644 F.3d 437, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring)). Notably, Justice Kavanaugh, who wrote for the majority in *TransUnion*, endorsed this theory of delayed payment qualifying as a concrete injury as a judge on the D.C. Circuit Court in his concurrence in *Stephens*. 644 F.3d at 442-43.

175. Notably, these holdings take into account the lived reality of many workers for whom the harm from a late wage payment "is especially acute" since those workers are "generally

found that the plaintiff was injured by her employer's late payment because "she was temporarily deprived of money owed to her, and she could not invest, earn interest on, or otherwise use these monies that were rightfully hers."[176] The court concluded that "the deprivation of money to which one is legally entitled is an actual and concrete injury per se."[177] Other cases are even more explicit in their rejection of a more specific pleading standard. In *Gillett v. Zara USA*, the court specified that neither "*TransUnion* [nor] any other binding precedent [requires] a plaintiff to specify how he intended to take advantage of the time value of his wages if they had not been improperly withheld for a period of time . . . . Plaintiff has suffered an injury in fact . . . regardless of his intentions with respect to the delayed funds."[178]

In the second set of cases, the court ultimately found that plaintiffs have standing, but refused to embrace the argument that a late payment is a per se concrete injury. Instead, the court imposed an additional requirement that plaintiffs describe how the late payment harmed them. Although in these cases the court ultimately found that the plaintiffs met standing requirements, it did so only because the plaintiffs alleged additional facts detailing how the late payment harmed them. For example, in *Harris v. Old Navy*, the plaintiff alleged in her complaint that because of her employer's late payments, she "was denied the time value of her money" and was "unable to invest, save, or purchase utilizing the wages she earned and was owed."[179] The court distinguished Harris's pleadings from those in cases where standing was denied by noting that in the latter

dependent upon their wages for sustenance." Caul v. Petco Animal Supplies, Inc., No. 20-CV-3534, 2021 WL 4407856, at *4 (E.D.N.Y. Sept. 27, 2021) (quoting Vega v. CM & Assocs. Constr. Mgmt., 107 N.Y.S.3d 286, 289 (App. Div. 2019)).

176. *Georgiou*, 2023 WL 112805, at *1.

177. *Id.* at *1 (emphasis omitted); *see also* Gillett v. Zara USA, Inc., No. 20 Civ. 3734, 2022 WL 3285275, at *6 (S.D.N.Y. Aug. 10, 2022) ("Plaintiff has alleged . . . [a] . . . monetary injury as a result of Defendants' withholding of his wages beyond when they were legally obligated to pay him. Even without any additional facts about how he would have used his wages if he had received them in a timely fashion, Plaintiff has alleged a concrete harm resulting from Defendants' alleged violation of [NYLL's late payment provision].").

178. 2022 WL 3285275, at *7; *see also* Jones v. NIKE Retail Servs., Inc., No. 22-cv-03343, 2022 WL 4007056, at *1 (E.D.N.Y. Aug. 30, 2022) ("The Court flatly rejects Defendant's argument that Plaintiffs must plead 'specific factual allegations pertaining to their financial strategies or investment practices' to establish standing . . . . That would impose a pleading standard far higher than anything articulated by the Supreme Court or Second Circuit." (quoting Reply Letter in Support of Motion to Dismiss at 2 (E.D.N.Y. Aug. 29, 2022), ECF No. 16); Levy v. Endeavor Air Inc., 638 F. Supp. 3d. 324, 330 (E.D.N.Y. Nov. 1, 2022) ("Plaintiffs need not, as defendant suggests, spell out how the time value of money, as an economic theory, applies to their case . . . . Nor need plaintiffs describe how they would have spent their wages had they been timely received.").

179. Harris v. Old Navy, LLC, No. 21 Civ. 9946, 2022 WL 16941712, at *3 (S.D.N.Y. Nov. 15, 2022) (quoting Complaint at ¶ 40).

instances, the plaintiffs only alleged that the violation happened, whereas Harris pled that the violation caused her to lose the opportunity to use her money.[180] Other cases endorse and replicate this reasoning.[181]

The final category of cases is comprised of instances where the court held that a late payment is not a per se concrete injury, and that the plaintiffs did not satisfy the concrete-injury standard because they did not allege with specificity how the late payment harmed them. For example, in *Rosario v. Icon Burger Acquisition*, the plaintiff's pleading stated that the "Defendant failed to pay Plaintiff and the Class on a timely basis as required by the NYLL" without any statement of the additional harm that arose because of the late payment.[182] As a result, the court found that the plaintiff had not alleged a concrete injury because they failed to include "factual allegations that the plaintiff forewent the opportunity to invest or otherwise use the money."[183] Other cases have reached a similar conclusion, requiring plaintiffs to detail the "consequence" of the late payment in their complaint in order to demonstrate that they were concretely injured.[184]

Under the line of cases rejecting the idea that a late payment is a per se concrete injury, it is ambiguous how detailed a plaintiff's pleadings must be. At best, this requirement imposes an unnecessary formalism, requiring plaintiffs to include an additional line in their complaint asserting that they lost out on the time value of their wages, which is presumably true for every employee who receives a late payment whether they include those particular words on the face of their complaint or not. At worst, it is a requirement that employees assert with great specificity what exactly they would have invested their wages in, providing ample ground for courts to deny plaintiffs relief when they have not included sufficient detail.

Even if courts only require plaintiffs to include a line stating that they lost the time value of their wages, there are several reasons to be concerned by the refusal to find that a late payment is in and of itself a concrete injury. Because plaintiffs must meet continuously escalating standing requirements as litigation progresses, even a minor requirement at the pleading stage might evolve into an

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180. *See id.* at *4.

181. *See, e.g.*, Confusione v. Autozoners, LLC, No. 21-CV-00001, 2022 WL 17585879, at *1 (E.D.N.Y. Dec. 12, 2022) ("[T]he SAC's allegations demonstrate that Plaintiffs were deprived of the time value of the money and suffered real-world, concrete injuries."); Espinal v. Sephora USA, Inc., No. 22 Civ. 03034, 2022 WL 16973328, at *4 (S.D.N.Y. Nov. 16, 2022) ("[A]t this stage it is enough that plaintiffs have pled injury through the allegation that they were denied the ability to 'invest, earn interest on, otherwise use' the money from the wages they were owed." (quoting Complaint at ¶¶ 11-12)).

182. No. 21-CV-4313, 2022 WL 198503, at *3 (E.D.N.Y. Jan. 21, 2022).

183. *Id.*

184. Rath v. Jo-Ann Stores, No. 21-CV-791S, 2022 WL 3701163, at *8 (W.D.N.Y. Aug. 26, 2022).

onerous burden at the trial level. As *TransUnion* reaffirmed, plaintiffs must show that they have standing "at all stages of litigation,"[185] and must do so "with the manner and degree of evidence required at the successive stages of the litigation."[186] Thus, although it might be sufficient at the pleading stage for a plaintiff to make a vague allegation that they lost the chance to use their wages while they were withheld, they may be required to prove that allegation with increasingly specific evidence as litigation progresses.

In describing the specificity with which plaintiffs must allege that they lost the time value of their wages, New York federal courts have been cautious to include caveats that their holdings apply only at the pleading stage. For example, in *Harris*, the court was careful to note that "*at the pleading stage*," the plaintiff does not need to identify "specific interest-bearing accounts in which she would have invested" or "specific purchases she would have made" if she had been paid in a timely fashion.[187] In doing so, the court recognized that if the litigation proceeds, the plaintiff may need to muster this evidence. In contrast, if a late payment is a per se concrete injury, a plaintiff would not have to make this showing and would only need to prove the merits of their claim as litigation progresses.

The severity of this requirement is compounded in the class action context. As *TransUnion* made clear, every individual class member must prove that they have suffered a concrete injury.[188] *TransUnion* itself illustrates how demanding this evidentiary burden is, as it required every single class member to provide proof that their injury was concrete—a virtually unmeetable standard for large class actions. If a late payment is not a per se concrete injury, courts may require that every individual plaintiff in a class provide evidence of what they would have used their wages on had they been paid in a timely manner. Thus, even if the court only requires plaintiffs to make a meager showing during the pleading stage, that requirement may be burdensome during summary judgment or at trial. Given that many NYLL class actions include hundreds or even thousands of employees,[189] this standard raises immense logistical and financial challenges.

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185. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021).

186. Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).

187. Harris v. Old Navy, LLC, No. 21 Civ. 9946, 2022 WL 16941712, at *4 (S.D.N.Y. Nov. 15, 2022) (emphasis added); *see also* Espinal v. Sephora USA, Inc., No. 22 Civ. 03034, 2022 WL 16973328, at *4 ("[P]laintiffs need not describe the particularity of their alleged injury at length *at the pleading stage* . . . ." (emphasis added)). These holdings indicate that plaintiffs may need to include more specificity at later stages of litigation.

188. *TransUnion*, 141 S. Ct. at 2208 ("Every class member must have Article III standing in order to recover individual damages.").

189. *See, e.g.*, Hamelin v. Faxton-St. Luke's Healthcare, 274 F.R.D. 385, 394 (N.D.N.Y. 2011) (subclass class of 2,701 employees); Jacob v. Duane Reade, Inc., 289 F.R.D. 408, 413 (S.D.N.Y. 2013) (class of almost 750 employees); Damassia v. Duane Reade, Inc., 250 F.R.D. 152, 156 (S.D.N.Y. 2008) (class of at least 270 employees).

Additionally, as some of the NYLL late-payment cases show, even a relatively light pleading requirement may prevent litigants from bringing their claims if they are unaware that they must allege an additional injury to satisfy standing.[190] By imposing more prerequisites on plaintiffs' pleadings, this formalism may prevent litigants, especially those who are proceeding pro se, from accessing relief. Moreover, this requirement serves functionally no purpose insofar as any individual who is denied money to which they are legally entitled is injured by the loss of the time value of that money.

Further, as described in the context of wage-documentation claims, New York federal courts' interpretation of standing as it applies to late-payment claims may push plaintiffs into state court when they would have otherwise preferred a federal forum. Although some New York federal courts have found that plaintiffs have standing in late-payment cases, the uncertainty associated with what standing requirement the court will apply is likely to push litigants out of federal court. This loss of choice is harmful for the myriad reasons observed in the wage-documentation context.[191]

Plaintiffs are not the only ones robbed of choice under this scheme; this odd formalism can also frustrate defendants' right to access a federal forum.[192] For example, in cases where plaintiffs wish to be in state court but defendants seek to remove to federal court, plaintiffs can prevent removal by omitting allegations as to what they would have done with their late wage payment.[193] Because the well-pleaded complaint rule requires the basis for federal jurisdiction, including the basis for standing, to appear on the face of the complaint,[194] plaintiffs can ensure that defendants' right to removal is frustrated by artful pleading.

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190. Rosario v. Icon Burger Acquisition LLC, No. 21-CV-4313, 2022 WL 198503, at *1-3 (E.D.N.Y. Jan. 21, 2022); Rath v. Jo-Ann Stores, LLC, No. 21-CV-791S, 2022 WL 3701163, at *1 (W.D.N.Y. Aug. 26, 2022).

191. *See supra* notes 136-137 and accompanying text.

192. *Cf.* Wittbecker v. Cupertino Elec., Inc., No. 20-CV-06217, 2021 WL 1400959, at *5-6 (N.D. Cal. Apr. 14, 2021) (remanding the action to state court despite the defendant's preference for removal because the plaintiffs had not met the concrete injury standard).

193. A similar trend has occurred in the realm of standing decisions in the Illinois Biometric Privacy Act, where plaintiffs have defeated defendant's attempts at removal by arguing that they lack standing. *See* Sojung Lee, Note, *Give Up Your Face, and a Leg to Stand on Too: Biometric Privacy Violations and Article III Standing*, 90 GEO. WASH. L. REV. 795, 813 (2022).

194. *See* Pan Am. Petroleum Corp. v. Superior Ct. of Del., 366 U.S. 656, 663 (1961) ("[T]he controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.").

2. *California*

So far, no California federal courts have found that *TransUnion*'s heightened concrete-injury standard impedes employees' ability to press late-payment claims.[195] For example, in *DiMercurio v. Equilon Enterprises*, the court held that plaintiffs asserting that their former employer had not yet paid them for all hours that they spent working had standing to bring a late-payment claim.[196]

DiMercurio is an exception insofar as almost no California federal courts have even examined standing in late-payment cases, likely because the denial of timely payment is squarely within the realm of a concrete injury. This conclusion is supported by a number of opinions where the court has evaluated plaintiffs' standing over other claims, but not their late-payment claims. For example, in *Boone*, the court evaluated at length whether plaintiffs had suffered a concrete injury related to their wage-statement claim but did not apply any standing analysis to the plaintiffs' late-payment claims.[197] Instead, the court only evaluated an issue related to the merits of the late-payment claim: namely, whether the time employees spent observing COVID-19 procedures qualified as time worked.[198] Other cases similarly addressed standing with respect to other causes of action, but did not use it to prevent plaintiffs from proceeding with their late-payment claims.[199] This pattern suggests that federal courts in California, unlike those in New York, see late payments as clearly presenting a concrete injury for which an employee has standing to seek redress.

III. STANDING DOCTRINE'S FEDERALISM IMPLICATIONS

These developments in standing doctrine not only affect workers' ability to access relief in court, but also have ramifications for the distribution of power between federal and state governments. New York federal courts' reading of

195. California federal courts have continued to hear cases about late payments post-*TransUnion* without dismissing for lack of standing. *See, e.g.*, Oman v. Delta Air Lines, Inc., 610 F. Supp. 3d 1257, 1262-63 (N.D. Cal. 2022); Bernstein v. Virgin Am., Inc., No. 15-CV-02277, 2022 WL 17994018, at *4 (N.D. Cal. Dec. 29, 2022); Johnson v. Air Prod. & Chemicals, Inc., No. 22-CV-07327, 2023 WL 170550, at *2 (C.D. Cal. Jan. 12, 2023).

196. No. 19-CV-04029, 2022 WL 254345, at *4 (N.D. Cal. Jan. 27, 2022). This case addressed a specific type of late-payment penalty known as a "waiting time" penalty, which is available when an employer fails to pay an employee's final paycheck in a timely manner.

197. Boone v. Amazon.com Servs., LLC, 562 F. Supp. 3d 1103, 1115 (E.D. Cal. 2022).

198. *Id.*

199. *See, e.g.*, Barajas v. Blue Diamond Growers Inc., No. 20-CV-0679, 2022 WL 1103841, at *21 (E.D. Cal. Apr. 13, 2022); Rivera v. Jeld-Wen, Inc., No. 21-CV-01816, 2022 WL 3219411, at *6 (S.D. Cal. Aug. 9, 2022).

TransUnion and the concrete-injury requirement as applied to state wage-and-hour laws undermines several salient federalism values. Meanwhile, California's approach has the opposite effect. Although the impact of standing doctrine on the separation of powers has been widely discussed by scholars and courts,[200] its implications for federalism remain undertheorized. A constant refrain in Supreme Court cases addressing standing is that a rigorous enforcement of standing doctrine is vital to maintaining the separation of powers because it ensures that federal courts do not venture beyond their constitutionally created territory.[201] The *TransUnion* opinion itself justifies its outcome by invoking this theme: "The 'law of Art. III standing is built on a single basic idea—the idea of separation of powers.'"[202] Scholarship on standing echoes this sentiment, often evaluating new developments in standing doctrine based on whether they might achieve the proper balance of power between branches of the federal government.[203]

In contrast, the effect of standing doctrine on the balance of power between state governments and federal governments has been largely ignored, with a few notable exceptions.[204] Federalism concerns rarely animate the Supreme Court's

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200. *See infra* notes 201-203.

201. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 752 (1984) ("Art. III standing is built on a single basic idea—the idea of separation of powers."); Spokeo, Inc. v. Robins, 578 U.S. 330, 344 (2016) (Thomas, J., concurring) ("[Standing] limitations preserve separation of powers by preventing the judiciary's entanglement in disputes that are primarily political in nature."); Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998) ("The . . . constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers . . . .").

202. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021) (quoting Raines v. Byrd, 521 U.S. 811, 820 (1997)).

203. *See, e.g.*, F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. Rev. 673, 684-701 (2017) (discussing the separation-of-powers rationales for standing); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L. Rev. 393, 472-85 (1996) (tracing the history of the separation-of-powers justification for standing); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881, 890-99 (1983) (arguing that standing is an inseparable part of the separation of powers); Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 Case W. Rsrv. L. Rev. 1023 (2009) (analyzing whether standing serves separation-of-powers goals).

204. *See* Hessick, *Standing in Diversity*, *supra* note 37, at 430-32; F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 Nw. U. L. Rev. 57, 100-03 (2008); Grayson Wells, *What's the Harm? Federalism, the Separation of Powers, and Standing in Data Breach Litigation*, 96 Ind. L.J. 937, 962-64 (2021).

standing jurisprudence outside of cases where states themselves are parties.[205] However, as the wage-and-hour cases illustrate, standing doctrine has the ability to either curtail or fortify state law. In playing this role, standing alters the balance of power between federal and state governments. Concerns over standing's federalism implications are especially salient as federal courts' application of standing doctrine is growing increasingly aggressive in the wake of *TransUnion*, both in state wage-and-hour cases and in other contexts.[206] As standing requirements are imported into new domains of private rights and courts impose stricter requirements on plaintiffs,[207] a more critical view of how standing may frustrate federalism values is necessary.

This Part proceeds by describing how a heightened interpretation of the concrete-injury requirement creates several normatively undesirable outcomes from a federalism perspective. First, such an application redistributes power from state legislatures to federal courts, allowing federal courts to have the final word on the policy question of what types of harm ought to be legally cognizable. Second, it creates a dynamic where federal courts are hostile to innovative state laws, contravening states' function as laboratories of democracy. Finally, it violates the federalism norm articulated in *Erie Railroad Co. v. Tompkins* that federal courts should enforce the states' substantive laws as interpreted by state authorities. In order to avoid these outcomes, other lower courts considering how to apply *TransUnion* to state wage-and-hour laws ought to adopt an approach more akin to California's model than that of New York. This Part concludes by addressing why the concrete-injury requirement poses a normative threat that is unique

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205. Much of the scholarship analyzing standing's effects on federalism centers around whether more lenient standing requirements apply to states as parties under the doctrine of "special solicitude." *See, e.g.*, Bradford C. Mank, *State Standing in* United States v. Texas*: Opening the Floodgates to States Challenging the Federal Government, or Proper Federalism?*, 2018 U. ILL. L. REV. 211, 216, 225; Note, *An Abdication Approach to State Standing*, 132 HARV. L. REV. 1301, 1301-02 (2019); Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1239 (2019); Calvin Massey, *State Standing After* Massachusetts v. EPA, 61 FLA. L. REV. 249, 249-53 (2009); Matthew R. Cody, Comment, *Special Solicitude for States in the Standing Analysis: A New Type of Federalism*, 40 MCGEORGE L. REV. 149, 150 (2009); *see also* F. Andrew Hessick & William P. Marshall, *State Standing to Constrain the President*, 21 CHAP. L. REV. 83, 95-96 (2018) (arguing a related claim that "states have a federalism interest in challenging executive actions that violate the APA or other statutory procedures").

206. Beyond the examples described in the wage-and-hour context, federal courts post-*TransUnion* have also used standing to preclude other types of state-law actions. *See infra* note 296.

207. The overall effect of *TransUnion* is the construction of new barriers to litigation. *See supra* Part I. At worst, this looks like the strict reading of *TransUnion* adopted by New York courts. However, even when Courts apply *TransUnion* permissively, as exemplified in the California cases, this reading merely preserves the status quo; there is no loosening of standing requirements to counterbalance approaches, like New York's, that impose new requirements on litigants and restrict access to federal courts.

even amongst other doctrinal devices that one may argue similarly affront states' interests.

A. Transfer of Power from State Legislatures to Federal Courts

As the NYLL cases demonstrate, when federal courts sitting in diversity jurisdiction employ a strict interpretation of *TransUnion*'s heightened injury-in-fact requirement, they redistribute the power to define what qualifies as a cognizable harm from state legislatures to federal courts. Although couched in the objective language of "fact," the determination of what constitutes an injury in fact is an inherently subjective exercise.[208] What one person finds to be injurious conduct, another will not.[209] Similarly, one might judge the same deprivation to be a cognizable injury in one context but not in another.[210] What we consider to be harmful is inherently based on what standard of treatment we believe individuals are entitled to and what conduct threatens those entitlements. As a result, the determination of whether someone has been injured is not an objective, neutral inquiry, but rather a subjective one.[211] However, the subjectivity of injury

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208. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 231 (1988); Robert Dugan, *Standing to Sue: A Commentary on Injury in Fact*, 22 CASE W. RSRV. L. REV. 256, 261-62 (1971).

209. Hessick, *Standing in Diversity*, *supra* note 37, at 421. Take, for example, a hypothetical plaintiff alleging that their employer failed to list their overtime hours in their wage statement as is required under NYLL. Assuming the plaintiff is honest in their pleadings, the fact that they are litigating the matter at all is evidence that they believe they have suffered harm from their employer's oversight. Meanwhile, another party, say the judge overseeing the matter, may assess the situation and deem the plaintiff's injury insufficiently severe to be an injury in fact. Despite looking at the same set of facts, the two individuals have come to different conclusions about whether the plaintiff has really been injured. As Hessick articulated, any plaintiff who is sincere in their pleadings believes they have suffered a real injury, highlighting the subjectivity of the injury-in-fact test. *See id.* at 421.

210. Judge Fletcher's examples are particularly useful for elucidating this point. Consider an individual who is not a welfare recipient but who is deeply concerned by cutbacks to welfare programs. She may be so concerned that she gives her own money to food banks to feed the hungry and often loses sleep thinking about those who are going without. Now consider an example of an individual who lives next to a noisy dog whose barking keeps him up at night and requires him to invest in earplugs and a white noise machine. Both individuals have suffered the same factual harm: loss of money and loss of sleep. However, only the latter is likely to satisfy the Court's injury-in-fact inquiry. Fletcher, *supra* note 208, at 232. As this example shows, one's normative priors about the proper role of the legal system in adjudicating disputes tends to inform what injuries they recognize.

211. *Id.* at 229-33; Lee A. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1154 (1977) ("[G]eneralized articulations of injury isolated from the claim invite charges of inconsistency, selectivity, and ad hoc decisionmaking; judicial expressions of skepticism about the merits, predictably commonplace in such standing decisions,

does not mean that our legal system should not have a limiting principle on the types of injuries it will recognize. As Judge William Fletcher helpfully put it, "There is nothing wrong with a legal system imposing such external standards of injury . . . . However, in employing such standards, we measure something that is ascertainable only by reference to a normative structure."[212]

Given both the subjectivity and the necessity of imposing a limiting principle on cognizable injuries, the question becomes: who ought to make the normative decisions about what injuries merit redress? This policymaking role has traditionally belonged to the legislatures.[213] However, standing's injury-in-fact requirement gives federal judges the power to decide what it means to be harmed. When applied to federal statutes, federal judges' intuitions about what constitutes an injury in fact supplant Congress's policy decisions.[214] Similarly, when federal courts are asked to enforce state law but find there is no injury in fact,

provide further support for such charges."); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1743 (1999) ("The doctrinal elements of standing are nearly worthless as a basis for predicting whether a judge will grant individuals with differing interests access to the courts . . . . In each [of five illustrative Supreme Court] case[s], the Justices divided either five-to-four or six-to-three on the standing issue. In each case, the 'votes' of the Justices were as easy to predict as the votes of their ideological counterparts in the legislature. Liberals voted to grant access to the courts to environmentalists, employees, and prisoners, but not to banks. Conservatives voted to grant access to banks, but not to environmentalists, employees, or prisoners." (footnote omitted)); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977) ("[T]he law of standing lacks a rational conceptual framework . . . . Decisions on questions of standing are concealed decisions on the merits of the underlying constitutional claim."); William A. Fletcher, *Standing: Who Can Sue to Enforce A Legal Duty?*, 65 ALA. L. REV. 277, 280 (2013) ("In saying that a plaintiff does not have an injury in fact, the Court purports to be stating a neutral, factual proposition about that plaintiff's injury. But what the Court is actually doing is refusing to recognize an 'injury in fact' as a judicially cognizable injury.").

212. Fletcher, *supra* note 208, at 231.

213. William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 199 ("Legislatures create rights. Invasions of those rights are injuries."); Cassandra Barnum, *Injury in Fact, Then and Now (and Never Again):* Summers v. Earth Island Institute *and the Need for Change in Environmental Standing Law*, 17 MO. ENV'T L. & POL'Y REV. 1, 42 (noting that when "Congress has explicitly provided for citizen suits in a piece of legislation. . . . the policy underlying the suit has already been properly and democratically instituted by the political branches; the court is serving only to uphold and enforce the law as written"). *See generally* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

214. Fletcher, *supra* note 208, at 233 (noting that the injury-in-fact requirement "limit[s] the power of Congress to define and protect against certain kinds of injury that the Court thinks it improper to protect against").

they decide what substantive rights the law ought to protect, substituting their judgment for that of the state legislature.[215]

This redistribution of power is especially alarming given the modern justification for imposing standing requirements, which is that they ensure that federal courts do not seize more power than they are constitutionally allowed.[216] The traditional argument that standing limits federal courts' power relies on a narrow understanding of what power entails. It conceptualizes judicial power as being obtained solely through ruling on certain matters. However, there is also power in exercising discretion to decide which harms are and are not cognizable. In abdicating the ability to decide certain cases, federal courts carve out a type of veto on the legislative process, allowing themselves to refuse to enforce legislation that does not present what they consider a serious enough harm.[217] The ability to decline to enforce another governmental body's will is itself power; just as the federal executive branch wields this power by, for example, refusing to sign legislation into law, federal courts exercise this power in determining which statutorily created rights are not enforceable in federal courts.[218] In this way, the judicially created injury-in-fact requirement does not limit federal courts' power, but expands it.[219] And in the cases of courts sitting in diversity jurisdiction, this seized power is taken from the states.[220]

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215. Notably, because standing is couched in Article III, there is no ability for Congress (and even less of an ability for state legislatures) to override the Court's judgement as to what constitutes an injury.

216. *See* cases cited *supra* note 201. Scholars have also discussed how separation-of-powers concerns animate standing. *See* Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (But Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1399-1404 (2014); James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 8 (2001). Notably, standing doctrine was not always used to enforce the separation of powers; prior to the Burger Court's remaking of standing doctrine, it was primarily invoked to assess whether a litigant was the proper party to bring the claim at issue. *See* Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 643 (1985); Flast v. Cohen, 392 U.S. 83, 99-100 (1968).

217. *See generally* William N. Eskridge Jr., *Vetogates and American Public Law*, 31 J.L. ECON. & ORG. 756 (2012) (describing the "vetogates" theory and how the refusal to act gives government actors power).

218. *Id.*

219. *See* Fletcher, *supra* note 208, at 233; *see also* Jonathan R. Siegel, *What if the Universal Injury-in-Fact Test Already Is Normative?*, 65 ALA. L. REV. 403, 414 (2013) ("[T]he [injury-in-fact] doctrine limits the powers of Congress and expands the Court's own power to decline to hear cases it would prefer not to hear . . . .").

220. Although this Note is not necessarily advocating for state standing to supplant federal standing in diversity cases, it is relevant to note that the same harms do not inhere in state standing doctrines. As a threshold matter, state standing does not create the same conceptual difficulties

One might argue that the Supreme Court's attempt to define what an injury in fact is — by setting out that it must be concrete, particularized, and imminent — remedies this defect because these standards limit judicial discretion. Not so. Although they arguably diminish lower federal courts' ability to decide what qualifies as an injury in fact,[221] these judicially created constraints still represent an exercise in judicial, not legislative power. Far from giving power back to the state and federal legislatures to determine what qualifies as an injury, these standards simply relocate the power to define injury from lower federal courts to the Supreme Court.

Additionally, the requirement that an injury meet the Court's standards for concreteness, particularity, and imminentness actually serves to draw more power from state and federal legislatures. The more constraints courts place on what qualifies as an injury, the more frequently federal courts will refuse to enforce a statutorily created right for lack of standing. And, when the Supreme Court limited the types of injuries that qualify as concrete in *TransUnion*, it increased the number of instances where federal courts will essentially veto the decisions of a state legislature.

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related to federalism because it does not involve balancing power between state and federal governments. At worst, state standing involves a reapportionment of power between state governmental bodies. But, as a practical matter, many state supreme courts have rejected the "injury-in-fact" approach, finding that an injury at law is sufficient for standing. *See* Rebekah G. Strotman, *No Harm, No Problem (in State Court): Why States Should Reject Injury in Fact*, 72 DUKE L.J. 1605, 1614 (2023) (describing North Carolina's recent rejection of the injury-in-fact requirement). In doing so, they have adopted an approach that gives state legislatures the power to define what a legally cognizable harm is. Further, because state standing rules are derived from state bodies of law (i.e., state common law, state statutes, or state constitutions), state legislatures either (1) play a role in shaping the applicable standing requirements, or (2) have the power to modify state standing requirements if they believe state courts are using standing to draw power from the state legislature. The same is not true with respect to federal standing, which state legislatures are powerless to modify or shape. Additionally, separation-of-powers concerns at the state level do not cleanly track those at the federal level. Although the federal system is organized around "the need to maintain 'high walls and clear distinctions' among the branches, rather than encouraging interbranch collaboration," state government "tends instead toward blended functions that allow for complementary and overlapping activity by the different branches and foci of power." Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1905-06 (2001) (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995)). As a result, the idea that state courts may be treading into policymaking territory presents less of a normative concern than the idea that federal courts may be displacing state legislatures' policy judgements. Finally, it is important to reiterate that this Note is not defending the position that state standing requirements are inherently preferable to federal requirements. Rather, it is exploring the practical and normative harms that arise from the application of a heightened injury-in-fact requirement to diversity cases.

221. This conclusion is itself debatable, as the question of what injuries are "concrete" or "imminent" may be just as subjective as the question of what counts as an injury.

This misappropriation of legislative power is not carried out by the Supreme Court alone. Despite the Court's delineation of more specific injury-in-fact requirements, lower federal courts also play a role in determining whether they will supplant legislative power. The state wage-and-hour cases present a potent example of how this dynamic functions and how federal district courts can choose to either exacerbate or ameliorate the strain that current standing doctrine places on federalism.

Looking first at the New York line of cases, it is clear how a narrow reading of what constitutes a concrete injury after *TransUnion* can frustrate the goals of state legislatures.[222] The State of New York has an interest in protecting the rights of its workers, and the New York state legislature has an interest in making policy determinations as to how to allocate rights to best achieve this goal. In drafting and enacting the wage-statement, wage-notice, and late-payment provisions of NYLL, the New York legislature made a normative determination that New York employees are entitled to certain information about their wages as well as timely payment of those wages.[223] The allocation of these rights to employees inherently involves a coordinate judgment that employees who are deprived of these rights have suffered an injury. The state legislature further exercised its power to choose how these rights will be enforced by including provisions granting employees the ability to recover statutory damages when their employer injures them.[224]

In cases where New York federal courts refuse to allow wage-documentation or late-payment claims to proceed for lack of standing, the court substitutes its discretion for that of the New York legislature by making its judgment of what constitutes a factual injury outcome determinative.[225] The same is true in the late-payment cases when the court refuses to find that a late payment is a per se injury. Even when courts find that plaintiffs have made the additional showing needed to meet the concrete-injury requirement (or at least meet it at the pleading stage), the court is still displacing the state legislature's policy decision that

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222. *See supra* Sections II.B and II.C describing New York federal courts' refusal to enforce New York wage-and-hour laws.

223. *See* Diane J. Savino, New York State Senate Introducer's Memorandum in Support, S.B. 8380, 2009-2010 Leg. Sess. (N.Y. 2010); *What Is the New York Wage Theft Prevention Act?*, Working: Now & Then (2023), https://www.workingnowandthen.com/new-york-wage-theft/wage-theft-prevention-act [https://perma.cc/TDJ7-4G74] (identifying that New York's wage-documentation law "provides critical protections against wage theft").

224. *See* N.Y. Lab. Law §§ 198(1-b), 198(1-d) (McKinney 2021) (allowing private enforcement for wage-documentation violations).

225. In one instance, a New York federal court explicitly recognized this dynamic. *See* Neor v. Acacia Network, Inc., No. 22-CV-4814, 2023 WL 1797267, at *4 (S.D.N.Y. Feb. 7, 2023) ("[R]eliance on the New York State Assembly's reasoning cannot be used for Article III standing as a legislature cannot create standing.").

all late payments meeting the conditions set out in NYLL are injuries deserving of redress.[226]

The New York legislature's policy judgments are further trammeled in the litany of cases like *Shi v. TL & CG Inc.* and *Pastrana v. Mr. Taco LLC*, where the court set out a narrow interpretation of what downstream harms are sufficient to make a lack of information a concrete injury. In *TransUnion*, the Supreme Court held that an informational injury is concrete for standing purposes if plaintiffs can show that the lack of information caused a downstream harm. In *Shi* and its peers, the court rejected the argument that the concrete-injury requirement is satisfied when a lack of wage documentation facilitates an employee's underpayment.[227] This fact pattern would seem to satisfy *TransUnion* insofar as it presents an informational injury (lack of wage documentation) that causes a downstream effect (underpayment). Nonetheless, the court in *Shi* and elsewhere held that it did not because the downstream harm from an informational injury must be one "with consequences . . . beyond [the plaintiff's] lawsuit."[228]

Naturally, one might ask: if the downstream harm from an informational injury cannot be the harm at issue in any of the plaintiff's other claims, what type of harm does suffice? Although the court provides no specific examples of what downstream effects would be sufficient, the only answer is that the downstream harm must be one for which the plaintiff has no cause of action, as those are the only harms that meet the court's criteria of having consequences beyond the immediate litigation. As a result, courts following this rule will only hear a claim where the plaintiff alleges a downstream consequence for which the state legislature *has not* provided a cause of action.

This result is notably perverse. Consider, for example, a state labor law scheme with the following provisions: (1) employers must provide wage statements, and employees have a private right of action to recover damages if their employer fails to do so; (2) employees have a right to a minimum wage and a cause of action to recover damages when that right is violated; and (3) employers must provide an overtime payment premium, but employees have no private

226. *See* N.Y. LAB. LAW § 198(1-d) (McKinney 2021).

227. Shi v. TL & CG Inc., No. 19-CV-08502, 2022 WL 2669156, at *8-9 (S.D.N.Y. July 11, 2022); Pastrana v. Mr. Taco LLC, No. 18-CV-9374, 2022 WL 16857111, at *7 (S.D.N.Y. Sept. 23, 2022), *report and recommendation adopted*, No. 18-CV-9374, 2022 WL 16857107 (S.D.N.Y. Nov. 10, 2022); *see also* sources cited *supra* note 135 (describing cases in which courts rejected the idea that wage-documentation violations established a concrete injury).

228. *Shi*, 2022 WL 2669156, at *8; *Pastrana*, 2022 WL 16857111, at *7; *see, e.g.*, Deng v. Frequency Elecs., Inc., 640 F. Supp. 3d 255, 267 & n.9 (E.D.N.Y. 2022) (similarly mandating that the plaintiff identify a downstream injury unrelated to her other wage-and-hour claims). As discussed *supra* note 138, this requirement appears nowhere in the Supreme Court's standing doctrine.

cause of action to enforce that right (perhaps this right is only enforceable by a state administrative agency). Now suppose there are two plaintiffs: A, whose employer violated the wage-statement and minimum-wage provisions, and B, whose employer violated the wage-statement and overtime-payment provisions. Assume A pleads that the wage-statement violation denied them the information necessary to notice and remedy the minimum-wage violation and additionally pleads a separate claim for the minimum-wage violation. Meanwhile, B alleges that the wage-statement violation denied them the information necessary to notice and remedy the lack of overtime payment but asserts no separate claim for the overtime violation, as they have no private cause of action to do so. Under the rule from *Shi*, a federal court only has standing to hear B's wage-statement claim and not A's, since A's "downstream" injury from the missing wage statement only has consequences related to the conduct underlying their other cause of action.[229]

As this hypothetical shows, the scheme employed in *Shi* and its contemporaries doubly insults state legislatures' role in making policy decisions about what legal rights its constituents hold and can enforce. First, it contravenes the state's interest in ensuring its employees have a right to certain information by refusing to enforce that right in most instances. Second, it ensures that a right can only be enforced when the alleged downstream harm of the informational injury is one that the state has not recognized as a right or where the state has not vested the employee with a private cause of action. In doing so, federal courts usurp the state legislatures' power by (1) inserting their own policy decisions about what constitutes an injury and (2) enforcing state law only when an informational injury leads to a downstream harm that the state has not recognized as

229. This hypothetical considers a case where the downstream harm denies B of something they have a right to but no ability to enforce; the same outcome results if B's downstream harm was the denial of something that the state had not recognized a right to. For example, if the state had a wage-statement requirement but no requirement that employees receive payment for their work, an argument that the lack of information caused the plaintiff not to be paid at all could satisfy the court in *Shi* despite the fact that the state has not given employees a right to be paid. The court in *Deng* provides a clearer example of how the downstream injury can be the deprivation of something that one has no legal entitlement to: "Suppose, for example, that a home purchaser makes a down payment on the assumption that she has a great credit rating. Unbeknownst to her, however, her credit report contains inaccurate information that materially disparages her credit to the point where she cannot get a mortgage and so loses both the home and her down payment. That informational injury is obviously sufficient to create standing." *Deng*, 640 F. Supp. 3d at 266-67. Although there is no legal entitlement to a home, the loss of a home that the plaintiffs would otherwise be able to purchase is a concrete downstream injury.

actionable.[230] Despite constituting a concerning redistribution of power between the state and federal governments, none of the opinions in the NYLL case line consider the federalism implications of their decisions.

Contrast this approach with the more permissive reading of *TransUnion* and the concrete-injury requirement thus far employed by California federal courts adjudicating California wage-and-hour laws. In those cases, the concrete-injury requirement has only been used to preclude enforcement of state law when the wage statements' inaccuracy is relatively trivial.[231] In doing so, the court both respects the state legislature's authority to protect workers' rights to information about their wages and complies with *TransUnion*'s holding that the injury-in-fact requirement precludes standing in cases litigating "bare procedural violation[s], divorced from any concrete harm."[232] While the court in these cases is still abrogating the California legislature's determination that trivial inaccuracies create a cognizable injury, it does so to a much lesser extent than the New York federal courts.

In sum, when federal courts refuse to apply state law for lack of a concrete injury, they affect the distribution of power between the federal government and states. Although the Supreme Court exacerbated this problem in *TransUnion* by imposing additional limitations on what harms constitute a concrete injury, lower federal courts still retain discretion over how to apply *TransUnion*. As the wage-and-hour cases demonstrate, a more lenient application of the concrete-injury requirement is both consistent with the text of *TransUnion* and works to limit the usurpation of state legislative authority.

B. States as Laboratories of Democracy

Worryingly, when federal courts employ a limited conception of what injuries are concrete for standing purposes—by, for example, narrowly interpreting what downstream effects of informational injuries are sufficient or by requiring a close comparator for *TransUnion*'s "traditionally recognized harm" test—they become most hostile to the very state laws that are most valuable to our federalist system of government. One of the primary values of maintaining separate, concurrent state and federal legal systems is that it allows states to serve as

230. The line of cases finding no standing on causation grounds similarly presents an insult to the state legislature's policy decisions. *See supra* note 143. Despite the legislature enacting wage-documentation laws for the express purpose of combatting wage theft, those cases reject the idea that insufficient wage documentation contributes to wage-and-hour violations.

231. *See* sources cited *supra* note 157.

232. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2213 (2021) (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)).

"laboratories of democracy," testing out legal innovations on a relatively smaller scale.[233] This experimentation provides for better policy outcomes through two mechanisms. First, the natural variation in how states choose to address different issues allows policymakers to gather data on the impacts of different policy choices. Second, competition between states incentivizes states to adopt policies that provide the best outcomes for the fewest tax dollars. Federal courts' hostility to innovative state laws threatens both of these features.

First, federalism allows policymakers and the populace to gather information about the efficacy of different legal regimes.[234] States confronting similar problems often adopt different policy solutions or determine that no policy intervention is necessary.[235] Other state governments, and even the federal government, can then observe what follows and determine which laws produce which results, adopting the legal regimes that align with their desired outcomes. This type of experimentation is relatively low risk when compared to the impact of innovating at the federal level, as the harm is contained only to the adopting state's legal order.[236] If the law has desirable outcomes, the federal government and other states can decide whether to adopt similar innovations for themselves, benefitting from the opportunity to observe how the law functioned in the initial state and whether solutions developed by other states are preferable.[237] Voters of other states also benefit from this type of experimentation, as it provides information about what the effect of different policy proposals will be.[238] This feature of federalism is transsubstantive; experimentation in state law is credited with providing the framework for landmark federal legal regimes across a variety of policy

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233. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

234. *See* Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1234 (1994); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 397-400 (1997); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 75-106 (1995).

235. Amar, *supra* note 234.

236. Jonathan H. Adler, *Interstate Competition and the Race to the Top*, 35 HARV. J.L. & PUB. POL'Y 89, 95 (2012); MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 195 (2012).

237. *See* Fed. Energy Regul. Comm'n v. Mississippi, 456 U.S. 742, 788 (1982) (describing the states' role as innovators of "new social, economic, and political ideas"); JENNA BEDNAR, THE ROBUST FEDERATION: PRINCIPLES OF DESIGN 31 (2009).

238. Amar, *supra* note 234, at 1234 ("[F]ederalism operates to edify and engage the citizenry. State laboratories are *educational* and *participatory*. They offer citizens clinical seminars in democratic self-government.").

areas, including social security,[239] the minimum wage,[240] and prohibitions on housing and employment discrimination.[241]

Second, the diversity of legal regimes inherent in a federalist system encourages innovation because states have an incentive to compete to attract individuals to move to their state.[242] Under this model, citizens are consumers of government resources. As suppliers competing for consumers, state governments have an incentive to evolve and innovate to attract citizens and retain their existing populace. This competition promotes efficiency in the sense that citizens will move to states where they gain the most benefits and carry the lowest tax burden.[243] Moreover, in cases where there is no objectively optimal policy solution, the variance in state legal regimes allows citizens to choose between different ways of living that might appeal to their individual value systems.[244]

Experimentation inherently relies on states enacting and enforcing innovative laws.[245] However, a broad reading of *TransUnion* denies standing in cases involving precisely the most innovative state laws.[246] After *TransUnion*, the

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239. *See* Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 373 n.27 (1996) ("Most of the programs in the Social Security Act had antecedents in earlier state programs. In fact, the public assistance programs in the Act were structured to provide federal funding to pre-existing state programs.").

240. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 9 (1988).

241. *Id.* Merritt also credits this function of federalism for the creation of unemployment compensation, public financing of political campaigns, no-fault insurance, and hospital-cost containment. *Id.*; *see also* SHAPIRO, *supra* note 234, at 87-88 nn.110-15 (describing the effect of state experiments in public education, health care, taxation, penology, and environmental protection); Friedman, *supra* note 234, at 399 (listing examples of "innovation" by state and local governments, including "bookmobiles, pre-election day 'early' voting, town meetings, televised court proceedings, greenways, community agenda programs, leadership programs").

242. *See* Bond v. United States, 564 U.S. 211, 221 (2011) ("The federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'") (quoting Gregory v. Ashcroft, 501 U.S. 452, 458, (1991)); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 423-24 (1956); Amar, *supra* note 234, at 1236-40.

243. *See* Tiebout, *supra* note 242, at 419-24 (providing a theoretical model predicting that competition between jurisdictions and high consumer mobility will lead to more optimal outcomes).

244. SHAPIRO, *supra* note 234, at 85-88; Amar, *supra* note 234, at 1237 ("[I]ndividuals may 'domicile shop' for the place with the most appealing bundle of local laws, customs, and attitudes.").

245. Friedman, *supra* note 234, at 397-400.

246. Others have identified how *TransUnion*'s predecessor, *Spokeo*, limited federal legislators from innovating. *See* Peter C. Ormerod, *Privacy Injuries and Article III Concreteness*, 48 FLA. ST. U. L. REV. 133, 133 (2020) ("The Court's approach—an unmoored judicial investigation into an informational injury's amorphous 'concreteness'—erodes Congress's ability to provide avenues of redress for new and novel harms.").

central question in deciding whether an injury is concrete is whether it has a "close relationship" to a "traditionally" recognized harm.[247] In order to have standing, plaintiffs must identify a "historical or common-law analogue for their asserted injury."[248] Tethering the concrete-injury requirement to historical analysis means that state laws creating innovative rights or innovative methods of enforcing certain rights are the least likely to satisfy the concrete-injury test and be enforced by federal courts.[249] This lack of enforcement frustrates the states' efforts to test out new policy ideas, especially when claims enforcing the state laws are often filed in federal courts. For example, NYLL claims are commonly brought in federal court because the facts underlying many NYLL claims also support FLSA claims.[250] Even when there is no FLSA claim at issue, NYLL claims are frequently litigated as class actions that satisfy the party-diversity and amount-in-controversy requirements for diversity jurisdiction. Without federal courts as an available forum to enforce state laws, it is more challenging to understand the full range of effects of innovative state laws.

Additionally, the requirement that an injury have a historical or common-law analogue may ex-ante affect the types of laws state legislatures pass.[251] Legislators looking to address certain harms may resort to traditional legal tools in

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247. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021) (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 340-41 (2016)).

248. *Id.* For criticism of this conclusion, see Cass Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 374 (describing this requirement as "disturbing and lawless").

249. *See, e.g.*, Castro v. PPG Indus., No. 21-55340, 2022 WL 3681305, at *1 (9th Cir. Aug. 25, 2022) ("In *TransUnion*, the Supreme Court held that to determine whether the concrete-harm requirement has been met, plaintiffs must identify a 'close historical or common law analogue for their asserted [statute-based] injury.' Here, Castro has failed to identify any common law analogue for Section 226(a)(8)'s wage statement law." (citation omitted) (quoting *TransUnion*, 141 S. Ct. at 2204)).

250. *See, e.g.*, Fermin v. Las Delicias Peruanas Rest., Inc., 93 F. Supp. 3d 19, 24 (E.D.N.Y. 2015); Gamero v. Koodo Sushi Corp., 272 F. Supp. 3d 481, 487 (S.D.N.Y. 2017). As these cases illustrate, NYLL and FLSA have overlapping minimum-wage, overtime, and equipment-cost provisions, among other similarities.

251. The phenomenon of legislators responding to court decisions has been well documented in a variety of contexts. *See generally* William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (providing empirical data showing that Congress responds to Supreme Court statutory interpretation decisions); Eric S. Fish, *Sentencing and Interbranch Dialogue*, 105 J. CRIM. L. & CRIMINOLOGY 549, 594-98 (2015) (describing how legislatures change sentencing statutes based on judicial sentencing patterns); Marilyn A. Hirth, *Systemic Reform, Equity, and School Finance Reform: Essential Policy Linkages*, 10 EDUC. POL'Y 468 (1996) (analyzing feedback mechanisms between courts, legislatures, and other institutions in the context of school finance reform). As each of these sources show, legislatures pay attention to court decisions in various arenas. These findings support the intuitive conclusion that policymakers have no incentive to waste effort or political capital in order to pass legislation that courts will not enforce.

addressing constituents' concerns for fear that federal courts may refuse to enforce more inventive laws.[252] Further, even if states continue to create innovative policies, the federal government is unlikely to adopt successful innovations, given that federal courts are unwilling to adjudicate them.[253] In sum, strictly tying the concept of a concrete injury to historical analysis ossifies prior conceptions of what constitutes an enforceable right and limits states' ability to experiment with laws that create new causes of action.[254]

Although lower federal courts are obligated to follow the historical-analogue test, they retain discretion to determine exactly how close the cause of action must be to a historical analogue. Federal courts can decide whether to interpret "close relationship" to necessitate that the causes of action be nearly identical to a historical analogue or merely share some features with it.[255] Choosing the former threatens states' ability to function as policy innovators; choosing the latter

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252. As used here, "traditional" laws are those that exist primarily to provide a remedy for a material deprivation that has been historically recognized, such as the deprivation of money. "Inventive" laws include those that seek to provide a remedy for deprivations that are not historically recognized as well as those aiming to provide some other social good. Wage-and-hour laws helpfully elucidate this dichotomy. In that context, laws imposing a penalty for underpaying employees or otherwise depriving an employee of a monetary benefit are "traditional" legal tools. That is, they seek to remedy a past harm and that past harm (i.e., a monetary harm) is one that has been long recognized in American jurisprudence. *See TransUnion*, 141 S. Ct. at 2200. In contrast, more inventive laws may seek to remedy a harm that is less recognized, such as the deprivation of information. Further, they may seek to *prevent* harm (as opposed to merely compensating for it after the fact), prove that a harm has occurred, or assist an individual with discovering that a harm has occurred. As described *supra* Section II.A, wage-documentation laws do all three: they deter employers from committing wage-and-hour violations, inform employees when wage-and-hour violations are occurring, and aid employees in proving in court, in arbitration, or during conversations with employers that a wage-and-hour violation has occurred. Ideally, both types of tools should be used to address problems of wage theft. However, a rigid interpretation of what qualifies as a concrete injury strips away the potential for legislators to implement more innovative methods of addressing societal issues. *See also supra* notes 58-59 (discussing other types of inventive laws that are stymied by a narrow interpretation of the concrete-injury requirement).

253. For example, although there have previously been efforts to amend the FLSA to include pay-stub provisions, such efforts may become less common if New York federal courts' reading of *TransUnion* proliferates. *See* Wage Theft Prevention and Wage Recovery Act of 2022 H.R. 7701, 117th Cong. § 101 (2022) (proposing to amend the FLSA to include a federal wage-documentation law).

254. *See* Daniel Townsend, *Who Should Define Injuries for Article III Standing?*, 68 STAN. L. REV. ONLINE 76, 80-81 (2015) (describing how the "traditionally recognized harm" standard limits the government's ability to recognize new rights and address modern harms).

255. *See* Jason Altabet, TransUnion v. Ramirez*: Levels of Generality and Originalist Analogies*, 45 HARV. J.L. & PUB. POL'Y 1077, 1084-90 (2022) (describing the ambiguity in how specific a "close relationship" must be and examining the different levels of generality applied even within the *TransUnion* opinion itself).

allows them to perform this function to the greatest extent possible under *TransUnion*. To be sure, state experimentation is not an unmitigated good that ought to outweigh all other considerations. However, in the context of the concrete-injury requirement, which serves little to no purpose in diversity-jurisdiction cases,[256] federal courts ought to consider the value of state experimentation as they determine how to apply standing doctrine.

The wage-and-hour examples showcase this effect. When the historical-analogue test is applied strictly, New York's more innovative wage-and-hour laws requiring robust wage documentation and weekly wage payments are least likely to be enforced. Meanwhile, courts find that more traditional New York wage-and-hour laws, such as those requiring overtime payment or implementing a minimum wage, meet standing requirements without question.[257] In contrast, California federal courts give effect to innovative state laws when they interpret standing to permit them to hear cases enforcing California's analogous provisions. In doing so, the California approach serves as a model for how courts can apply *TransUnion* in a manner that mitigates its damage to federalism functions.

C. Erie *and the Enforcement of Substantive State Rights in Federal Courts*

As the wage-and-hour cases illustrate, a stringent interpretation of standing's concrete-injury requirement creates a schism between the relief that is offered in state and federal courts, contravening the federalism principle recognized in *Erie* that the same substantive law should apply in both state and federal courts.[258] In *Erie*, the Court famously pronounced that there was "no federal general common law" and that federal courts sitting in diversity should apply substantive state law.[259] In doing so, the *Erie* doctrine aims to ensure that federal courts are true and equal alternatives to state courts such that diversity jurisdiction can effectively "prevent apprehended discrimination in state courts against those not citizens of the State."[260] If state and federal courts offer different substantive rights, diversity jurisdiction's goal of offering an unbiased alternative

256. *See* Hessick, *Standing in Diversity*, *supra* note 37, at 423-29.

257. The same effects may be seen in other realms, such as in the context of state privacy laws or state consumer-data protections. *See* sources cited *infra* note 296.

258. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 65-66 (1938).

259. *Id.* at 78.

260. *Id.* at 74; *see also* Bank of the U.S. v. Deveaux, 9 U.S. 61, 67 (1809) (emphasizing the value of "preserv[ing] the real equality of citizens throughout the union, by guarding against fraudulent laws and local prejudices, in particular states").

forum is frustrated.[261] Additionally, beyond the practical concerns for individual litigants, *Erie* also represents a normative commitment to states that their laws will be enforced in federal courts.[262]

The different approaches taken in wage-and-hour cases illuminate how different interpretations of the injury-in-fact requirement implicate the *Erie* doctrine. New York federal courts' narrow reading of what qualifies as a concrete injury has expanded the number of instances where federal courts will refuse to apply state law,[263] limiting diverse parties' ability to access an unbiased federal forum. The resulting scheme is one in which a plaintiff may recover thousands of dollars in damages in state court but cannot even have their case heard in federal court, and many plaintiffs are increasingly having their cases dismissed or remanded to state court.[264] This dynamic harms both plaintiffs and defendants, as either may fear bias from a hostile state court. To be sure, California federal courts' approach does create some disparity between the relief available in state and federal courts in instances where the wage-documentation error is relatively trivial such as a mistyped name.[265] However, it involves comparatively fewer instances where federal courts will refuse to enforce state laws while still working within the bounds of the Supreme Court's standing doctrine. Additionally, this approach denies standing only in cases where the stakes for litigants are comparatively low—such as when an employer omits part of their name in the wage document—compared to New York's approach, which denies standing for even the most egregious wage-documentation violations.

This harm is not limited to cases where a federal court rules to dismiss or remand a given case to state court; it is also embodied in instances where a plaintiff files in state court originally for fear that federal courts will deny them standing. Diversity jurisdiction seeks to provide diverse parties with an option to litigate in federal court when they fear state courts may be biased.[266] However, when different substantive laws are applied in different forums, litigants cannot fully exercise this choice. Rather, their selection of forum is colored by strategic concerns over which court is more likely to enforce state substantive law. Thus, even if they are not actually forced out of federal court by a ruling finding that

261. *See* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 556 (1988); George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 659 (1993).

262. Brown, *supra* note 261, at 708-09.

263. *See supra* Section II.B.1.

264. *See, e.g.*, Francisco v. NY Tex Care, Inc., No. 19-CV-1649, 2022 WL 900603, at *7 (E.D.N.Y. Mar. 28, 2022) (holding that claims of improper wage-and-hour notice and wage statements are not "'injur[ies]' that can be recognized by a federal court").

265. *See* sources cited *supra* note 157.

266. *See supra* note 261.

there is no concrete injury, litigants may be informally pushed out by the fear that the court will refuse to enforce their state law rights.

New York federal courts' approach also contravenes *Erie*'s broader normative commitment to a specific distribution of power between the state and federal systems. The Court in *Erie* recognized that federal courts' choice of whether or not to enforce substantive state law affects the balance of power between state and federal governments:

> Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.[267]

In refusing to enforce certain provisions of state wage-and-hour laws, New York federal courts have engaged in exactly the interference that the *Erie* Court prohibited and violated the normative commitments inherent in the *Erie* decision. Meanwhile, California federal courts have done the opposite, preserving states' authority to the extent possible under *TransUnion*.

D. Concrete Injury as Distinct from Other Potential Affronts to State Law in Federal Court

Although federalism concerns should guide how federal courts proceed in diversity cases, this Note does not maintain that federalism values ought to always win the day. Rather, it contends that courts determining how to construe standing rules should consider federalism as one factor in their analysis. These concerns should be weighed against the competing values that alternative rules would provide. In instances where the concrete-injury requirement serves little practical or normative value, such as in the state wage-and-hour cases,[268] this balancing is relatively easy: the preservation of a state's substantive laws likely outweighs the de minimis value of stringently applying standing requirements. However, it is not always the case that respect for state power should prevail. This Section analyzes why this balancing yields a different normative outcome in the context of the concrete-injury requirement than it does in the context of

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267. *Erie*, 304 U.S. at 79 (quoting Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

268. *See supra* Part I (describing how the concrete-injury requirement serves little value in the context of private causes of action); *supra* Part II (describing the practical harms for workers when they cannot exercise their rights under state labor laws).

other doctrinal devices, such as subject-matter jurisdiction and federal class-action rules.

1. *Concrete Injury and Subject-Matter Jurisdiction Compared*

One might ask why an expansive concrete-injury requirement is any different from other legal devices, such as subject-matter jurisdiction,[269] which allow federal courts to refuse to hear matters that are cognizable in state courts. That is to say, if it offends federalism when federal courts refuse to enforce state laws, does subject-matter jurisdiction not also cause affront? While it is the case that subject-matter-jurisdiction rules reject state-law claims unless diversity and amount-in-controversy requirements are met,[270] subject-matter jurisdiction is less objectionable than the concrete-injury requirement for two reasons. First, the contours of current subject-matter-jurisdiction rules have a more robust constitutional nexus. Second, the inquiry underlying subject-matter-jurisdiction determinations does not require the same type of normative policy evaluation that the concrete-injury analysis demands.

Although the concept of subject-matter jurisdiction inherently limits access to federal courts for state causes of action, this limitation is less objectionable than the concrete-injury requirement's comparable effect considering the relative strength of the constitutional basis for each doctrine. Although nominally rooted in Article III's language that federal courts may only hear "cases" or "controversies,"[271] the specific requirements of modern standing doctrine are deeply attenuated from the actual text of Article III. Article III makes no mention of any standing requirement, much less a requirement of an injury in fact, and it certainly does not mention that plaintiffs must show a concrete injury analogous to those existing at the time of the Founding. Although one could argue—and in

269. Subject-matter jurisdiction is sometimes considered to include standing requirements. *See* 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 1350 (3d ed.), Westlaw (database updated Apr. 2023) ("[T]he Rule 12(b)(1) motion to dismiss for a lack of subject matter jurisdiction also may be appropriate . . . when the plaintiff lacks standing to bring the particular suit before the district court."). For ease of reference, this Note uses the phrase "subject-matter jurisdiction" to include only the principle that a case must present either a federal question or meet diversity jurisdiction requirements before a federal court can hear it. Standing is analyzed as a distinct concept.

270. 28 U.S.C. § 1332(a) (2022).

271. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (identifying standing as rooted in Article III's language of "Cases" or "Controversies"); *see also* Nunez v. Exec. Le Soleil New York LLC, No. 22 CIV. 4262, 2023 WL 3319613, at *3 (S.D.N.Y. May 9, 2023) (making an ahistorical claim that the injury-in-fact requirement "is not new" and *TransUnion* merely "reaffirmed" it because it is based in Article III's limitations on the judiciary's power).

fact the Supreme Court does argue[272]—that these requirements may be inferred from the text of Article III, the link between the two is at best strained and at worst nonexistent.[273]

In contrast, subject-matter jurisdiction requirements are drawn directly from the language of Article III. Article III explicitly lists what cases federal courts may entertain, including those "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," mirroring the requirements for federal-question jurisdiction.[274] Similarly, one can find the basis for diversity jurisdiction in Article III's stipulation that federal courts have power to hear suits "between Citizens of different States," paralleling diversity jurisdiction's foundational requirement of diverse parties.[275] Although the amount-in-controversy requirement for diversity jurisdiction does not appear in the text of Article III, the amount-in-controversy idea is not a creature of judicial invention, unlike the concrete-injury requirement. Rather, it is imposed by Congress pursuant to its constitutional power to limit federal courts' jurisdiction.[276] As a result, when federal courts enforce subject-matter-jurisdiction requirements, they are doing so pursuant to clear and direct constitutional and congressional mandates. In contrast, when the Court dismisses private, statutorily created state causes of action for being insufficiently concrete, it does so pursuant to its own contrived determinations of what it means for a legal dispute to be a "case." In light of this disparity, the concrete-injury requirement has a much less compelling justification for the potential harms it may do to federalism values.

Further, subject-matter jurisdiction merely demands that federal courts rotely enforce relatively straightforward requirements, whereas the inquiry underlying concreteness requires federal courts to make subjective policy decisions about which harms are actually harmful.[277] That is, establishing whether a state-

272. *See Lujan*, 504 U.S. at 560.

273. *See* Michael Freedman, *Injury-in-Fact, Historical Fiction: Contemporary Standing Doctrine and the Original Meaning of Article III*, 75 N.Y.U. ANN. SURV. AM. L. 317, 321 (2020) ("[T]he text of Article III, as it would have been understood in the founding era, neither clearly conveys nor clearly refutes the proposition that federal judicial power extended only to suits brought by injured plaintiffs.").

274. U.S. CONST. art. III, § 2.

275. *Id.* While it is true that Article III does not mandate complete diversity, merely minimal diversity, *see* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967), the diversity requirement is at least drawn from the language of Article III.

276. 28 U.S.C. § 1332(a); U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

277. *See supra* Section III.A.

law case satisfies diversity jurisdiction does not compel federal courts to assess whether a certain law regulates conduct causing a harm worthy of redress. It merely entails an assessment of domicile and a determination of the amount in controversy. As a result, subject-matter jurisdiction determinations do not tread on the (state and federal) legislature's policymaking power in the same fashion as the concrete-injury requirement. Similarly, because subject-matter jurisdiction treats all state laws identically, it does not target innovative state laws like the concrete-injury requirement does. Thus, although subject-matter jurisdiction has a similar effect of keeping certain state-law claims out of federal court, it does not raise the same federalism concerns that a wide-reaching concrete-injury requirement does.

2. *Concrete Injury and* Shady Grove *Compared*

If federalism values are undermined by federal courts refusing to hear state-law claims for lack of a concrete injury, one might wonder why those principles are not similarly threatened by other instances in which federal courts apply federal rules instead of state rules after conducting an *Erie* analysis.[278] This Section explores this question through the example of *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[279] In *Shady Grove*, the Court administered its evolving *Erie* analysis to conclude that federal class-action rules should apply to a diversity case bringing claims under New York substantive law.[280] Federal class-action procedures permitted the *Shady Grove* class to proceed, whereas the application of New York class-action rules would have prevented plaintiffs from litigating as a class.[281] Why does the Court's decision to choose federal rules over state rules, thereby altering the relief one might obtain, not present the same federalism concerns as a broad reading of the concrete-injury requirement?

As a threshold matter, it is important to distinguish the choice courts face in *Erie* cases like *Shady Grove* from the choice federal courts face in applying the concrete-injury requirement. In cases like *Shady Grove*, the court is deciding whether to apply a state rule or a federal rule when both govern arguably procedural issues. In contrast, this Note is not advocating that federal courts apply state standing doctrine; rather, it is making a claim about the optimal mode of formulating federal standing requirements. Namely, it argues that given the

278. *See* 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS §§ 4503-4520 (3d ed.), Westlaw (database updated Apr. 2023) (describing the process federal courts use in cases like *Shady Grove* to resolve conflicts between arguably procedural federal and state laws under *Erie*).

279. 559 U.S. 393 (2010).

280. *Id.* at 416.

281. *Id.* at 401-02.

impact of certain facets of federal standing doctrine on diversity claims, federal courts should, within the bounds of Supreme Court precedent, apply the concrete-injury requirement loosely in order to avoid negative federalism implications. As a result, the values at stake and the choices that inhere in each scenario are fundamentally distinct.

In fact, far from insulting federalism values, cases like *Shady Grove* exemplify the type of federalism analysis that this Note calls for in the context of standing. Because *Shady Grove* arose under *Erie* and its progeny, the Court's central focus was how to balance state and federal concerns. For example, the Court discussed at length whether the choice of class-action rules would "abridge, enlarge or modify any substantive right."[282] Further, the Court dissected and evaluated New York's interest in having its class-action rule followed, considering whether the specific features of the state law indicated that it was intended to create a substantive right to be free from class-action litigation.[283] This Note argues that this type of careful consideration of federalism implications is exactly the kind of reasoning that ought to be applied when interpreting the concrete-injury requirement. Although a state's interest may not always triumph when there are practical issues of administrability or other concerns, as was the case in *Shady Grove*, federalism values ought to be given at least some weight in the calculation. However, instead of conducting this inquiry, the Supreme Court in *TransUnion* failed to evaluate the federalism implications of its doctrinal interpretations. And, in construing the concrete-injury requirement broadly in state wage-and-hour cases, New York federal courts have replicated this error.

CONCLUSION

Justice Scalia once summarized standing as asking: "What's it to you?"[284] For workers who have endured wage-and-hour violations, the answer to this question is obvious.[285] An employee whose employer failed to give them a wage notice or provided an inaccurate wage statement has an interest in litigation because they were denied information that is critical to ensuring that they are paid

282. *Id.* at 406-08.

283. *Id.* at 408-09. Additionally, to the extent that *Shady Grove* argues that the purpose of the state law is irrelevant, it makes this determination only after considering the affront to the state law as weighed against factors like uniformity. *See id.* at 411-12 (describing the "impracticability" of administering a rule based on the particularities of state law given the lack of uniformity).

284. Scalia, *supra* note 203, at 882.

285. *See* Imbarrato v. Banta Mgmt. Servs., Inc., No. 18-CV-5422, 2020 WL 1330744, at *5 (S.D.N.Y. Mar. 20, 2020) ("Plaintiffs sue to vindicate interests particular to them — specifically, access to disclosures regarding their wage rights — as persons alleging deprivation of adequate wages consistent with the NYLL.").

all that they are due. Similarly, an employee who was not paid on time has an interest in recovering because they did not receive their wages at the time they were entitled to them. And, unlike in cases enforcing broad public rights where standing is most conceptually relevant, the rights enforced in wage-and-hour litigation are held by a specific set of individuals (workers) and enforced against a specific set of entities (employers).

Yet, as the NYLL cases show, some courts' stringent application of standing's concrete-injury requirement is increasingly preventing litigants from obtaining relief. While this trend is partially driven by the Supreme Court's decision in *TransUnion*, lower federal courts also shoulder some responsibility insofar as they have the ability to decide how to interpret *TransUnion*'s new concrete-injury requirement. When they interpret it permissively, as the California courts have, the law largely works as the state legislature intended, allowing employees to recover when they have been wronged. In contrast, the more stringent application that pervades the New York cases frustrates employees' rights and contravenes the state legislatures' policymaking decisions.

The language of the *TransUnion* holding does not oblige federal courts to follow New York's approach. *TransUnion* left a number of ambiguities in terms of what injuries are concrete,[286] presenting many avenues for lower federal courts to find that plaintiffs vindicating state rights have met standing requirements. In the context of state wage-documentation laws, *TransUnion* leaves open the informational injury route. Although *TransUnion* is clear that informational injuries alone are not concrete, they are concrete if they lead to downstream harms.[287] In conjunction with the Supreme Court's prior informational injury decisions in *FEC v. Akins* and *Public Citizen v. U.S. Department of Justice*, there is a plausible argument that this is a lenient standard and that vague descriptions of the downstream harm are sufficient.[288] In *Public Citizen*, the plaintiffs argued that the information about how the Executive consults with the ABA committee about judicial nominees would help them "participate more effectively in the judicial selection process."[289] Similarly, the plaintiff voters in *Akins* claimed that they were denied information that "would help them (and others to whom they would communicate it) to evaluate candidates for public office."[290] In both of these instances, the Court held that the plaintiffs were able to concretize their

286. *See* de Groot, *supra* note 67, at 853-57 (describing different circuits' interpretations of the concrete-injury requirement in federal Fair Debt Collection Practices Act cases).

287. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021).

288. FEC v. Akins, 524 U.S. 11, 21 (1998); Public Citizen v. U.S. Dep't of Just., 491 U.S. 440, 449 (1989).

289. *Public Citizen*, 491 U.S. at 449.

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

informational injury with only vague statements about how the absence of the relevant information harmed them.

Under the Supreme Court's informational-injury doctrine, substantive wage-documentation violations may be properly conceptualized as informational injuries that have downstream effects, especially given the lenient standard for demonstrating a downstream injury endorsed in *Public Citizen* and *Akins*. Because wage-documentation claims are often accompanied by other wage-and-hour violations, lower federal courts can use the informational-injury theory to find that the concrete-injury requirement is met.[291] In contrast, when wage-documentation violations are nonsubstantive, such as those involving minor typos or errors in one of the parties' names, federal courts looking to comply with Supreme Court precedent ought to follow the approach of federal courts in California and deny standing. By adhering to the California model, federal courts can ensure they are not adjudicating the "bare procedural violations" that *TransUnion* forbids, while simultaneously continuing to redress more substantive wage-documentation violations.[292]

The argument for how late payments constitute concrete injuries under *TransUnion* is even simpler. As a few New York federal courts have recognized, late payments are per se concrete injuries because they deprive workers of the time value of their wages.[293] "Money later is not the same as money now,"[294] and when an employer fails to pay an employee on a timely basis, they deny the employee the full value of their wages. Even under *TransUnion*'s heightened standard, this injury is concrete, as the Supreme Court in that case reaffirmed that a monetary deprivation is one of the prototypical examples of a concrete injury.[295]

The NYLL cases have implications beyond individual workers; they also show how a rigid enforcement of the concrete-injury requirement imperils key federalism values. When a federal judge refuses to hear a case concerning state law because they believe that the plaintiff has not suffered an injury in fact, they

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291. *See supra* Section II.A (describing how wage documentation aids in preventing and remediating wage theft).

292. *TransUnion*, 141 S. Ct. at 2213.

293. A handful of cases in New York have recognized this fact. *See, e.g.*, Gillett v. Zara USA, Inc., No. 20 CIV. 3734, 2022 WL 3285275, at *7 (S.D.N.Y. Aug. 10, 2022) ("This Court does not read *TransUnion* or any other binding precedent to require a plaintiff to specify how he intended to take advantage of the time value of his wages if they had not been improperly withheld for a period of time. . . . Plaintiff has suffered an injury in fact for which he may seek redress in federal court, regardless of his intentions with respect to the delayed funds."); Harris v. Old Navy, LLC, No. 21 Civ. 9946, 2022 WL 16941712, at *5 (S.D.N.Y. Nov. 15, 2022).

294. Stephens v. U.S. Airways Grp., 644 F.3d 437, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring). The concurring opinion in *Stephens* was penned by then-Judge Kavanaugh, who went on to write the majority in *TransUnion*.

295. *TransUnion*, 141 S. Ct. at 2206.

usurp the state legislature's power to articulate what injuries the law ought to recognize. Additionally, because the post-*TransUnion* concrete-injury test requires plaintiffs to identify a historical analogue for their harm, rigid enforcement of this rule risks underenforcing novel or innovative state laws, weakening the states' function as laboratories of democracy. Finally, when federal courts use standing to abdicate jurisdiction over certain state causes of action, they create a system in which litigants have substantively different rights in federal and state courts. Although this outcome may be permissible when it is necessary to vindicate other normative values or achieve important practical outcomes, there is no such justification supporting a stringent application of the concrete-injury requirement in diversity cases.

These repercussions are not exclusive to state wage-and-hour laws. As others have described, many areas of state law are increasingly jeopardized by recent developments in federal standing doctrine.[296] The importance of examining how federal courts treat state-law claims is underscored by the fact that federal courts frequently find themselves enforcing state law. Of the cases filed in federal district courts in 2022, 45.5% were diversity-jurisdiction cases, meaning that almost half of cases in federal court that year required interpreting state law.[297] Given the prominence of diversity cases on the federal docket, federal courts must think critically about how their application of standing doctrine implicates federalism. Accounting for federalism values will often involve interpreting the concrete-injury requirement permissively in the context of state laws, giving deference to the state legislature's determination of what injuries ought to be cognizable.

Contrary to popular wisdom, the normative stakes of standing doctrine transcend the enforcement of the separation of powers. It is time for federal courts to consider federalism values in formulating and applying standing doctrine. And, while lower federal courts are bound by *TransUnion*, they are not powerless in determining what injuries satisfy standing. In applying standing

296. Although the focus of this Conclusion is on how the heightened concrete-injury requirement ought to apply to state employment laws, there are many other arenas where such a requirement may stymie enforcement of other types of state laws. *See, e.g.*, Grayson Wells, Comment, *What's the Harm? Federalism, the Separation of Powers, and Standing in Data Breach Litigation*, 96 IND. L.J. 937, 940 (2021) (arguing that the requirements for standing in data-breach litigations should be deferential to statutory and common-law authority); Elisa Cardano Perez, Note, *Patchwork: Addressing Inconsistencies in Biometric Privacy Regulation*, 74 FED. COMMC'NS L.J. 27, 42-43 (2021) (describing how *TransUnion* has been applied to the Illinois Biometric Information Privacy Act); Hunter Kahn, Note, *Article III, Class Actions, and Statutory Biometric Rights*, 30 GEO. MASON L. REV. 349, 373-78 (2022) (same).

297. *See 2022 Year-End Report on the Federal Judiciary*, SUP. CT. 6 (2022), https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf [https://perma.cc/2C38-VX4X] (reporting that, of all the cases heard in federal district courts during the 2022 fiscal year, 131,131 were federal-question cases compared to 105,212 diversity cases). These figures do not include cases where the United States was a party.

doctrine to state-law cases, federal courts ought to give federalism values their due, and, where possible, defer to the legislature's determination of what constitutes an injury.