

IN RE BPS DIRECT, LLC: A NEW PERSPECTIVE ON ONLINE SHOPPING PRIVACY RIGHTS

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I. INTRODUCTION

The United States Constitution limits federal courts’ jurisdiction to “Cases” and “Controversies.”¹ Without standing, there is no case.² In *In re BPS Direct, LLC*, the United States Court of Appeals for the Third Circuit addressed whether eight plaintiffs in a class action suit had standing to bring claims against a company who utilized a session-replay code on their website to capture users’ mouse clicks, movements, keystrokes, and—for two plaintiffs who made purchases—credit and debit card information.³ The court held that the six non-purchasing plaintiffs did not have standing, while the two purchasing plaintiffs did.⁴ Prior cases solely involved non-purchasing plaintiffs,⁵ allowing the court to clearly and distinctively provide guidance on the harm required to bring such computer-based privacy claims through the

¹ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992) (citing U.S. CONST. art. III, § 2).

² See *id.* at 560 (“[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III.”); see also *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.”).

³ *In re BPS Direct, LLC; Cabela’s, LLC Wiretapping Litig.*, 175 F.4th 423, 426–28 (3d Cir. 2026).

⁴ *Id.* at 429.

⁵ See, e.g., *Cook v. GameStop, Inc.*, 148 F.4th 153, 156 (3d Cir. 2025) (plaintiff moved products to her cart but never made a purchase); *Popa v. Microsoft Corp.*, 153 F.4th 784, 786 (9th Cir. 2025) (plaintiff browsed and clicked on products but never made a purchase).

pleading stage.⁶

This Note addresses why the kind-of-harm approach is better suited than the element-based approach for assessing standing under the “close relationship” test.⁷ Part II of this Note will describe the background of the law on establishing standing in cases with intangible harm. Part III will discuss the factual and procedural history of *In re BPS Direct, LLC*. Part IV will analyze the Third Circuit’s decision, explain why the court was correct, and explain why the United States Supreme Court would likely affirm. Part V will conclude by discussing the consequences of the court’s decision.

II. BACKGROUND

A. Standing

To bring a lawsuit in federal court, a plaintiff must have Article III standing.⁸ Standing requires an injury in fact that is concrete, particularized, and actual or imminent; causally connected to the conduct complained of; and likely to be redressed by a favorable decision.⁹ Because computer-based privacy cases involve intangible injuries, these cases hinge on whether the alleged injuries are “concrete,” meaning they “actually exist.”¹⁰

The Supreme Court of the United States laid the modern framework required for determining concreteness for computer-based privacy cases in *Spokeo, Inc. v. Robins*. There, Spokeo, Inc. operated a search engine that allowed people to put in a name, e-mail address, or phone number to get information about that person.¹¹ Thomas Robins filed a class action complaint against Spokeo after a search on him returned incorrect information.¹² The district court dismissed the suit for lack of standing, but the Ninth Circuit reversed because Robins’s claims were particularized.¹³ The Supreme Court

⁶ See *In re BPS Direct, LLC*, 175 F.4th at 427.

⁷ Compare *Barclift v. Keystone Credit Servs., LLC*, 93 F.4th 136, 144–45 (3d Cir. 2024) (advocating for the kind of harm approach), with *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1249 (11th Cir. 2022) (advocating for the element-based approach).

⁸ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (“[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”).

⁹ *Id.* at 560–61.

¹⁰ *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016).

¹¹ *Id.* at 333.

¹² *Id.* at 333, 336.

¹³ *Id.* at 333–34 (reversing the district court’s decision because “Robins had alleged that Spokeo violated his statutory rights, not just the statutory rights of other people,” and

granted certiorari and subsequently remanded the case for the court to consider both aspects of injury in fact—specifically, concrete injury in fact.¹⁴ The Court held that intangible injuries can be concrete; however, they require a “close relationship” to a traditional common law cause of action.¹⁵ The requirement for a concrete injury in fact remains a central issue in computer-based privacy cases.¹⁶

In *TransUnion LLC v. Ramirez*, the Supreme Court applied this “close relationship” test to draw a distinction between plaintiffs who suffered injuries analogous to the tort of defamation and those who did not.¹⁷ There, TransUnion incorrectly identified thousands of Americans as terrorists, drug traffickers, or serious criminals when they shared a first and last name with one.¹⁸ Some class members’ names were reported to third-party businesses, while others were not.¹⁹ This distinction was crucial to the Court’s decision. The court held that the members whose names were reported “suffered a harm with a ‘close relationship’ to the harm associated with the tort of defamation.”²⁰ By contrast, class members whose information was not reported lacked standing because “[p]ublication is ‘essential to liability’ in a suit for defamation.”²¹ While courts “do not require an exact duplicate,” the harm must be sufficiently close.²²

Following the Supreme Court’s decisions in *Spokeo* and *TransUnion*, courts split on their interpretation of what is required to establish a “close relationship.” Some courts adopted an element-based approach in which each element from the comparator tort must be present.²³ In contrast, other courts

“Robins’s personal interests in the handling of his credit information are individualized rather than collective”).

¹⁴ *Id.* at 334.

¹⁵ *Id.* at 340–41 (“Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.”).

¹⁶ *See, e.g., TransUnion LLC v. Ramirez*, 594 U.S. 413, 417 (2021) (“To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm.”).

¹⁷ *Id.* at 433.

¹⁸ *Id.* at 420.

¹⁹ *Id.* at 421.

²⁰ *Id.* at 432–33 (“[T]he harm from a misleading statement of this kind bears a sufficiently close relationship to the harm from a false and defamatory statement.”).

²¹ *Id.* at 433–34.

²² *Id.* at 433.

²³ *See, e.g., Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1249 (11th Cir. 2022) (holding the plaintiff did not have standing when his claim lacked an

adopted a kind-of-harm approach, requiring an analogous kind of harm caused by the comparator tort.²⁴ Regardless of the test applied, there must first be an analogous tort, and in computer-based privacy cases, reputation harms, disclosure of private facts, and intrusion upon seclusion are common.²⁵

B. Public Disclosure of Private Facts

To be liable for public disclosure of private facts, one must “give[] publicity to a matter concerning the private life of another,” and that matter must be “of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”²⁶ Because computer-based privacy cases often lack public disclosure, courts have consistently dismissed claims for lack of Article III standing under this tort.²⁷ Specifically, they lack the core harm of “the humiliation that accompanies the disclosure of sensitive or scandalizing private information to public scrutiny.”²⁸

C. Intrusion Upon Seclusion

Under intrusion upon seclusion, “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns” is liable “if the intrusion would be highly offensive to a reasonable person.”²⁹ Unlike public disclosure of private facts, the harm

essential element to the applicable comparator tort and therefore lacked a close relationship); *Nabozny v. Optio Sols. LLC*, 84 F.4th 731, 735 (7th Cir. 2023) (“[The plaintiff’s] attempt to analogize her case to this privacy tort falls apart on the threshold element of publicity.”).

²⁴ See, e.g., *Barclift v. Keystone Credit Servs., LLC*, 93 F.4th 136, 144–45 (3d Cir. 2024) (viewing the kind of harm approach as more faithful to *TransUnion*); *Shields v. Pro. Bureau of Collections of Md., Inc.*, 55 F.4th 823, 829 (10th Cir. 2022) (noting that the plaintiff did not need to plead and prove the comparator tort’s elements, but she did need to allege a similar harm).

²⁵ *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021).

²⁶ RESTATEMENT (SECOND) OF TORTS § 652D (1977); see also *In re BPS Direct, LLC; Cabela’s, LLC Wiretapping Litig.*, 175 F.4th 423, 429–30 (3d Cir. 2026).

²⁷ See, e.g., *Barclift*, 93 F.4th at 146 (holding the plaintiff lacked standing when a collection agency sent her personal information, including her name, address, and debt balance, to a mailing vendor without consent because the plaintiff could not “demonstrate that the injury resulting from [the collection agency’s] communication of her personal information to a third-party mailing vendor bears a close relationship to a harm traditionally recognized by American courts”); *Nabozny*, 84 F.4th at 735 (dismissing the plaintiff’s claim for lack of standing when she failed to prove the threshold element of publicity in analogizing her claim to public disclosure of private facts).

²⁸ *Barclift*, 93 F.4th at 144 (quoting *Nabozny*, 84 F.4th at 736).

²⁹ RESTATEMENT (SECOND) OF TORTS § 652B (1977); see also *In re BPS Direct, LLC*, 175 F.4th at 432.

from intrusion upon seclusion does not require publicity; it merely requires an invasion upon one's private seclusion.³⁰ This kind of harm is relatively broad, such that unwanted telephone communication may qualify.³¹ Still, the plaintiff's affairs must be reasonably private to meet the harm required under intrusion upon seclusion.³²

The Third Circuit directly applied intrusion upon seclusion as the comparator tort in a session-replay computer code³³ case in *Cook*.³⁴ Amber Cook visited GameStop's website, where her mouse movements, clicked links, searches, and products added to her cart were recorded.³⁵ However, Cook did not purchase anything from GameStop.³⁶ Cook subsequently brought a punitive class action suit against GameStop for intrusion upon seclusion and violations of the state wiretapping act,³⁷ arguing that "the mere fact that GameStop recorded any information about [her] visit to GameStop's website is injury enough to give her standing to sue."³⁸ The district court disagreed and dismissed her case for lack of standing.³⁹ The Third Circuit affirmed, holding that "Cook's alleged harm [was] not analogous to the harm associated with intrusion upon seclusion."⁴⁰ The court noted that "[m]ost of us understand that what we do on the Internet is not completely private."⁴¹ Even more, the information Cook entered was not personal or sensitive.⁴²

³⁰ *In re BPS Direct, LLC*, 175 F.4th at 432.

³¹ *Dickson v. Direct Energy, LP*, 69 F.4th 338, 345 (6th Cir. 2023) (citing RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (1977)); see also *In re BPS Direct, LLC*, 175 F.4th at 432.

³² *In re BPS Direct, LLC*, 175 F.4th at 432.

³³

³⁴ Session-replay code is a computer script that allows companies to track user's interactions, including mouse movements, clicks, and keystrokes, with a website. *Cook v. GameStop, Inc.*, 148 F.4th 153, 156 (3d Cir. 2025). These interactions are then compiled into a video that allows the company to reenact each user's visit. *Id.* GameStop is one of many companies that utilize this technology.

³⁵ *Id.* at 156.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 159.

³⁹ *Id.* at 156, 159.

⁴⁰ *Id.* at 160.

⁴¹ *Id.* (quoting *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 266 (3d Cir. 2016)).

⁴² *Id.* at 159–60 ("[S]he did not share her name, contact information, address, or billing information while on GameStop's website.").

III. FACTS AND PROCEDURAL HISTORY OF *IN RE BPS DIRECT, LLC*

The Third Circuit recently identified credit or debit card numbers as sufficiently personal to establish standing through intrusion upon seclusion in *In re BPS Direct, LLC*. There, Bass Pro Shops and Cabela's (collectively, "BPS") utilized a session-replay code on its websites.⁴³ Eight plaintiffs⁴⁴ who had visited BPS websites filed a class action complaint,⁴⁵ alleging BPS violated two federal statutes and was liable under several state and common law causes of action.⁴⁶ Two plaintiffs made purchases, entering their name, address, and payment and billing information, while the remaining six plaintiffs neither made purchases nor entered such information.⁴⁷ The district court dismissed the complaint for lack of standing.⁴⁸ The six non-purchasing plaintiffs' claims were dismissed with prejudice, but the court dismissed the two purchasing plaintiffs' claims "without prejudice to their timely filing amended Complaints if they can truthfully allege [BPS] intercepted and shared highly sensitive personal information such as medical diagnosis information or financial data from banks or credit cards."⁴⁹ The purchasing plaintiffs did not amend their complaint; instead, all eight plaintiffs appealed.⁵⁰

The Third Circuit held that none of the plaintiffs had standing under public disclosure of private facts⁵¹ but drew a distinction between the purchasing and non-purchasing plaintiffs in relation to intrusion upon seclusion. The non-purchasing plaintiffs could not allege analogous harm because no personal information was entered, and their electronic browsing "was no more private than the physical browsing countless shoppers do daily in BPS's brick-and-mortar stores."⁵² On the other hand, the purchasing

⁴³ *In re BPS Direct, LLC; Cabela's, LLC Wiretapping Litig.*, 175 F.4th 423, 426 (3d Cir. 2026).

⁴⁴ The plaintiffs sued individually across the country, but their claims were transferred to the Eastern District of Pennsylvania, where they eventually filed a consolidated complaint.

⁴⁵ *Id.* at 428.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 428–29.

⁵¹ *Id.* at 430–31 (noting that even for the purchasing plaintiffs, "mere collection of that sensitive information . . . is not enough to make the injury here analogous to the harm caused by the comparator tort" of public disclosure of private facts, where "the harm occurs when sensitive information is disclosed publicly").

⁵² *Id.* at 433 (stating those interactions are not analogous to an invasion of private affairs).

plaintiffs entered personal information—notably, their credit and debit card numbers—when they made the purchases.⁵³ The court relied on a recent case, where individual choices about media consumption were deemed personal.⁵⁴ Therefore, “when BPS permitted its Session Replay Code Providers to surreptitiously record [the purchasing plaintiffs’] complete credit card or debit card numbers, it caused those plaintiffs harm closely analogous to that vindicated by the intrusion upon seclusion tort.”⁵⁵ So, the Third Circuit reversed and remanded the case for the two purchasing plaintiffs but affirmed the lower court’s ruling on the non-purchasing plaintiffs after modifying the order to dismiss without prejudice.⁵⁶

IV. ANALYSIS OF THE *IN RE BPS DIRECT, LLC* DECISION AND PREDICTION OF SUPREME COURT DISPOSITION

The Third Circuit’s opinion was not only correct, but also crucial in two ways. First, the opinion leaves open a door that was nearly shut. Prior cases have been devoid of plaintiffs who made any purchases.⁵⁷ As such, computer-based privacy claims have been consistently dismissed. However, with its decision, the Third Circuit clarified that these dismissals are for the insufficient type of harm alleged, not for the action itself. In other words, the court clarified that session-replay computer codes on websites are subject to privacy claims, but only when those claims allege harm sufficiently personal.⁵⁸

Second—and more importantly—the decision relies on the kind of harm approach.⁵⁹ While the element-based approach has merit from the Supreme Court’s decision in *TransUnion* that “[p]ublication is ‘essential to liability’ in

⁵³ *Id.* (“[T]hat information is rightly viewed as highly sensitive.”).

⁵⁴ *Id.* at 433–34 (“‘An individual’s choices about media consumption can communicate sensitive and historically private interests,’ so when the news publication transmitted Pileggi’s video viewing history to Meta without Pileggi’s knowledge or consent, it caused an intrusion that would offend a reasonable person.” (quoting *Pileggi v. Wash. Newspaper Publ’g Co., LLC*, 146 F.4th 1219, 1228 (D.C. Cir. 2025))).

⁵⁵ *Id.*

⁵⁶ *Id.* at 427 (modifying the order because “dismissals for lack of standing should be without prejudice”).

⁵⁷ *See, e.g.,* *Popa v. Microsoft Corp.*, 153 F.4th 784, 786, 791 (9th Cir. 2025) (holding the plaintiff lacked standing when she visited a website with session-replay code but never purchased anything).

⁵⁸ *See In re BPS Direct, LLC*, 175 F.4th at 433.

⁵⁹ *See id.* at 434 (“Because of how sensitive that information is, the harm resulting from its nonconsensual interception and examination closely resembles ‘the same interests implicated in the traditional common law cause of action of intrusion upon seclusion.’” (quoting *Cook v. GameStop, Inc.*, 148 F.4th 153, 160 (3d Cir. 2025))).

a suit for defamation,”⁶⁰ the kind of harm approach overtakes this argument in the same opinion in two ways. First, the Supreme Court stated that “we do not require an exact duplicate.”⁶¹ Second, the court decided that although defamation requires a false statement, the harm from a misleading statement was sufficiently close.⁶² If the Supreme Court had intended the type of element-based approach adopted in some jurisdictions, it would have required a false statement in *TransUnion*. In fact, even the *Hunstein* court—a court devoted to the element-based approach—noted that the type of harm approach may be better suited to cases overall.⁶³

For the reasons discussed above, the United States Supreme Court would likely affirm the Third Circuit’s decision. Specifically, the Supreme Court made clear that an “exact duplicate” is not required, and a misleading statement bears a sufficiently close relationship to a false statement in defamation.⁶⁴ In fact, the Court requires a “close relationship *to a harm*” traditionally recognized at common law, not to the cause of action.⁶⁵ Simply put, a plain reading of the court’s language more closely aligns with the kind of harm approach.

V. CONCLUSION

The court’s decision effectively applies the kind of harm approach likely to be favored by the Supreme Court.⁶⁶ By distinguishing *In re BPS Direct, LLC* from prior cases involving no personal data,⁶⁷ the Third Circuit maintained precedent while preserving the right to sue for invasion of privacy when sensitive data is involved.⁶⁸ Website holders will need to re-evaluate their session-replay programs in light of the court’s decision. While companies remain able to capture all browsing up to the point of purchase, they will need to implement a way for the code to stop running once a user

⁶⁰ *TransUnion LLC v. Ramirez*, 594 U.S. 413, 432 (2021).

⁶¹ *Id.* at 433.

⁶² *Id.* (“[T]he harm from a misleading statement of this kind bears a sufficiently close relationship to the harm from a false and defamatory statement.”).

⁶³ See *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1249 (11th Cir. 2022) (“Indeed, the degree-of-harm inquiry so thoroughly endorsed in the dissent may well be a helpful explanatory tool in other cases—just not the one we have here.”).

⁶⁴ *TransUnion LLC v. Ramirez*, 594 U.S. 413, 433 (2021).

⁶⁵ *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) (emphasis added).

⁶⁶ See *In re BPS Direct, LLC*; *Cabela’s, LLC Wiretapping Litig.*, 175 F.4th 423, 434 (3d Cir. 2026).

⁶⁷ See *Cook v. GameStop, Inc.*, 148 F.4th 153, 156 (3d Cir. 2025).

⁶⁸ *In re BPS Direct, LLC*, 175 F.4th at 427.

begins to input personal information. The decision provides a crucial step in drawing the line between technology's advancement and the protection of individual privacy rights.