NOTES

State Attorneys General, You're My Only Hope: How to Fill the Enforcement Gap in Federal Consumer Protection Law with *Parens Patriae* Litigation

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* Georgetown University Law Center, J.D., expected June 2024; Columbia University, B.A. December 2019. Bennett Cho-Smith is the Managing Editor for the Georgetown Journal of Law and Public Policy, Volume 22. The author thanks Professor J. Maria Glover for convincing him that the Supreme Court's procedural decisions should also make front page news, Professor Daniel Wilf-Townsend for his guidance when this note was in its early stages, and Alan Wayne for his insightful feedback. The author dedicates this note to the memories of the late Kah Kyung Cho, Ph.D., and Tae Kyung Cho, Ph.D. May their contributions to the fields of philosophy and psychology continue long after their passing, and may they know that another generation of the Cho family has made his own contribution, however slight, to the academic community.

INTRODUCTION

Annoying robocalls, the sharing of personal health information, polluted water, the misleading marketing of credit rates by financial institutions. These are issues nearly every American faces.

To its credit, Congress has responded to (some of) these issues with (occasionally) robust consumer protection legislation. For example, the Telephone Consumer Protection Act—aimed at curbing robocalls—authorizes the recovery of $1,500 for a willing or knowing violation of the Act. Someone obtains your credit report under false pretenses? Consumers can recover $1,000 in statutory damages or actual damages, whichever is greater, thanks to the Fair Credit Reporting Act.

To increase enforcement of these statutes, Congress often granted "concurrent enforcement authority"—that is, enforcement actions can be brought by the federal government, private plaintiffs, and state governments. Concurrent enforcement authority serves the interests of consumers. Consumers with significant financial injuries can likely find individual private representation on contingency. Consumers with smaller financial injuries can join together in class actions to make private enforcement financially feasible. The federal government can take cases that private attorneys will not or cannot take, and state governments can fill in the rest.

But these federal consumer laws currently go under-enforced. Part I of this note describes how two decades of Supreme Court decisions have made it more difficult and more expensive for private plaintiffs to vindicate their rights as consumers. The federal government, limited in willpower and resources, hasn't stepped up.

Part II of this note suggests that State Attorneys General ("SAGs") are uniquely well-poised to become leading protectors of American consumers. They have concurrent enforcement authority, broad investigatory powers under state law, and the ability to scale-up enforcement proceedings by hiring third-party counsel.

Part III of this note highlights how SAGs, bringing enforcement actions in federal court under these federal laws, will have to justify Article III standing through the *parens patriae* standing doctrine. In *parens patriae* suits, the SAGs have not themselves directly suffered an injury in fact. Instead, SAGs utilize the cause of action—granted to them by the federal consumer laws—to bring litigation on behalf of aggrieved consumers as "parent[s] of the state."

Prior to *Spokeo* and *TransUnion*, courts assumed that *parens patriae* standing was coterminous with this cause of action. However, post-*TransUnion*, defendants in SAG-led enforcement actions are asserting in their motions to dismiss that SAGs must establish *parens patriae* standing independently of the statutory causes of action. This note aims to analyze core contested questions in *parens patriae* litigation in a post-*TransUnion* world, hoping to (1) identify the doctrinal requirements and open questions of *parens patriae* standing and (2) act as a resource for enterprising SAGs looking for creative ways to protect their home states' consumers through enforcing federal law.

Part III outlines the two types of *parens patriae* standing, describing the doctrinal requirements of what this note calls "statutory" and "common law" *parens patriae* standing. Part III then identifies open questions and attempts to resolve splits among the federal circuits, suggesting that SAGs should be able to recover significant statutory damages awards per federal consumer protection laws through *parens patriae* litigation.

Part IV identifies the federal consumer laws with concurrent enforcement authority for SAGs, noting which laws restrict enforcement actions to federal court and which laws authorize SAGs to bring suit in state court—authorization which enables SAGs to sidestep the Article III *parens patriae* analysis entirely.

I. AN EMBATTLED CONSUMER LAW ENFORCEMENT REGIME

Congress has passed dozens of federal consumer protection laws. These laws run the gamut of substantive coverage and reflect bipartisan consensus that consumer issues were severe enough to warrant legislative intervention.

Democrats and Republicans managed to agree on dozens of these federal consumer protection statutes. What consumer rights do we want to protect? What counts as an injury? Who can sue whom, for what, and, importantly, for how much? Difficult line-drawing exercises were involved. But Congress somehow found common ground. Then, the President signed these protections into law.

These bills often give concurrent enforcement authority, authorizing multiple entities to bring enforcement actions.[1] When one entity retains sole enforcement power, Congress risks both under- *and* over-enforcement of the statutes. Individuals will likely only sue when it makes financial sense.[2] The differing policy priorities of Presidents from different political parties might cause overzealous federal enforcement in one administration and essentially no enforcement at all in the next.[3] State-level enforcers have different priorities.[4] Taken together, concurrent federal, state, and private enforcement actions should reduce the risk of politicization and capture, balance enforcement, and improve the chances that consumers can recover for their injuries.

A. The Supreme Court Has Hobbled the Private Enforcement Regime

The Roberts Court has made significant changes to its civil procedure jurisprudence in at least four ways that have made it much more difficult to bring consumer protection enforcement actions, especially actions for damages. Consumers struggle to enforce their rights as would-be private plaintiffs in federal court due to the "Arbitration Revolution," stricter requirements to show "injury-in-fact" in an Article III standing inquiry, elevated pleading standards, and heightened requirements for class certification in 23(b)(3) damage suits.

The four procedural changes have undermined the ability to aggregate claims. Claim aggregation is frequently a necessary prerequisite for consumer protection litigation. Without aggregation, litigants do not have sufficient legal know-how, financial resources, or bargaining power to recover for their injury. As an example, after would-be defendants adopted mandatory arbitration provisions in their

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1. Amy Widman & Prentiss Cox, *State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53, 54 (2011).

2. *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW, 390 (2004) ("If the hourly rate of a lawyer is, say, $250 and suit would require only 20 hours of the lawyer's time, the cost would be $5,000, excluding the consideration of the plaintiff's time, which could well be significant. Thus, even if individuals are certain to prevail in trials, they will not bring suit unless their losses surpass a fairly significant threshold.").

3. *See* Amy Widman, *Protecting Consumer Protection: Filling the Federal Enforcement Gap*, 69 BUFF. L. REV. 1157, 1160 (2021) ("The federal government, however, abandoned its enforcement role under the Trump Administration.").

4. *See id.* at 1158 ("[S]tates can be characterized by distinct strategies of consumer protection enforcement.").

employment contracts, thereby preventing aggregation, employment claims dropped 98%. This strongly suggests that individuals who might participate in class litigation are not bringing arbitration claims.[5] First, individuals might not have the knowledge to navigate the legal system, even with the help of an attorney.[6] Second, litigation can quickly become expensive, especially when experts are called,[7] so attorneys are more likely to take on consumer protection litigation when they can spread the litigation costs across clients.[8] Third, the aggregation of claims can "increase[] the plaintiffs' lawyer's bargaining leverage with the defendant"[9] such that the settlement value is increased.[10]

1. Mandatory Arbitration

Many consumers now cannot join together in aggregate litigation due to the "Arbitration Revolution." The Supreme Court has blessed adhesive contracts that contain class-action waivers and mandate arbitration,[11] preventing most consumers from ever participating in aggregate litigation[12] as potential defendants know

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5. J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1305 (2022) ("Eliminating aggregate claims also tends to eliminate claims generally. . . . [F]orced arbitration has eliminated more than 98% of employment claims."). *See* also Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 696–97 (2018), for a discussion of how mandatory arbitration has virtually eliminated employment claims.

6. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 116 (1974) ("[S]pecialists who service [one-shot plaintiffs] tend to have problems of mobilizing a clientele" due to "the low state of information among [one-shot plaintiffs].").

7. Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1952 (2017) (noting that science-heavy cases require expert testimony that can cost upwards of $250,000 to litigate up to trial).

8. Andrew Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 95 (2019).

9. *Id.*

10. *See, e.g.*, In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (explaining how defendants might experience "intense pressure to settle" as potential plaintiff class members aggregate); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1879–81 (2006) (presenting a type of "concern" about "the possibility of 'blackmail settlements' induced by a low probability of class-wide liability"); *but see* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1429–30 (2003) (refuting the "blackmail" argument).

11. *See* Glover, *supra* note 5, at 1292 (describing a pro-defendant "*arbitration revolution*"); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 665 (ruling that arbitrators cannot infer an implicit agreement to authorize class action arbitration from an agreement to arbitrate); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351–52 (2011) (holding that the Federal Arbitration Act "requires courts to honor parties' expectations" pursuant to the arbitration contracts, even if those contracts are adhesive and unconscionable under state law); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013) (reaffirming the rule that "courts must rigorously enforce arbitration agreements according to their terms") (internal quotation omitted).

12. There are two notable exceptions to this. First, if an individual has a "valuable" claim, they might bring their claim individually in federal court. If there are enough civil cases "involving one or more common questions of fact," the Judicial Panel on Multidistrict Litigation can transfer these cases to a single district court for all pre-trial proceedings. 28 U.S.C. § 1407(a). Second, in the last few years, enterprising and well-capitalized plaintiffs' firms have called defendants' bluff, paying the up-front arbitration filing fees to capitalize on the automatic fee-shifting provisions of these arbitration contracts.

that, due to time and resource constraints, no economically rational individual (in, say, a case of unpaid wage claims against Uber) would pay a $1,500 arbitration filing fee to pursue a claim worth less than $1,500.[13]

2. Heightened Standing Requirements

Even if a consumer retains their right to participate in a class action, the Supreme Court has kept consumers out of court by heightening the Article III requirements for standing. In *Spokeo*, the Court held that a bare procedural violation was alone insufficient to create a concrete injury.[14] *TransUnion* further heightened this requirement by holding that a procedural violation that caused a risk of future harm does not create a concrete injury for Article III standing.[15]

3. Heightened Pleading Requirements

Once a consumer has access to the federal judicial system, the Supreme Court has made it more difficult (or at least, more expensive) for them to survive a motion to dismiss by raising the pleading standard. Prior to *Twombly* and *Iqbal*, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[16] After *Twombly* and *Iqbal*, "only a complaint that states a plausible claim for relief survives a motion to dismiss."[17] In the years after *Twombly* and *Iqbal*—potentially, before attorneys became more "artful" pleaders—the percentage of successful 12(b)(6) motions to dismiss increased.[18] Debate rages over whether this increase in claim dismissal at the pleading stage is a positive development.[19] But scholars generally agree that the heightened

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See Glover, *supra* note 5, at 1340–41. But these arbitration contracts are quickly being revised, and it is unclear how long the fee-shifting provisions will last. *Id*. at 1364–65.

13. Glover, *supra* note 5, at 1288.

14. Spokeo, Inc. v. Robins, 578 U.S. 330, 342 (2016) (holding that one "cannot satisfy the demands of Article III by alleging a bare procedural violation").

15. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021). Concrete harms include tangible harms, "such as physical harms and monetary harms," and intangible harms that have a common law analogue, such as reputational harms and trespass. *Id*. The Court held that Congress could not "elevate" harms to "actionable legal status" unless they are "concrete" and "*de facto*." *Id*. at 2204–05. Thus, "an injury in law is not an injury in fact," even when the injury in law entailed erroneously listing consumers as potential narco-terrorists and could lead to lower credit scores, lost financing opportunities, and the embarrassment of being called a terrorist when trying to buy a car. *Id*. at 2205, 2208.

16. Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

17. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

18. Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(B)(6) Motions*, 46 U. RICH. L. REV. 603, 608–09 (2012).

19. *Compare, e.g*., Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 899 (2009) (favorably noting how *Twombly* removed judicial discretion from the toolkit of trial court judges to deal with "litigation abuse"), *with* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 372 (2013) ("[Our aspirations] should not be to impede meaningful citizen access to our justice system or to impair the enforcement of our public policies and constitutional principles by constructing a procedural Great Wall of China or Maginot Line around the courtrooms in our courthouses.").

pleading standard imposes asymmetric informational,[20] and therefore financial,[21] costs on plaintiffs who bear the burden of showing more at the pleading stage. And when the salient information cannot be accessed without a corporate leak or discovery, many plaintiffs cannot sustain their evidentiary burden.[22]

4. Heightened Class Certification Requirements

Having survived a motion to dismiss, consumers still face an uphill battle to certify a class for damages, as the Roberts Court has heightened the commonality and predominance requirements for class certification.

Federal Rule 23(b)(3) actions for damages must satisfy four elements before the court can certify the class: numerosity, commonality, typicality, and predominance.[23]

The Court raised the commonality standard to require that "claims must depend upon a common contention" which "must be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[24] For decades, the commonality element required that class members "have suffered the same injury" such that "the class claims will share common questions of law or fact."[25]

The Supreme Court also raised the standard for a potential class to satisfy the "predominance" requirement of Rule 23(b)(3).[26] A few cases—*Amchem*,[27] *Dukes*,[28] and *Comcast*[29]—have made it more difficult for consumers to find relief through the class action device because, in a globalized economy with complicated supply chains in which harms are often diffuse and causation can

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20. *See* Bone, *supra* note 19, at 920 (2009).

21. *See, e.g.*, J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1732 (2012) ("The plausibility test now requires plaintiffs to expend potentially significant investigatory resources to formulate allegations imply to get into court. Those additional costs typically do not lead to any incremental disclosure of facts by defendants . . . ."); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 67–68 (2010) (discussing additional investigations required to satisfy *Twombly*).

22. Ramzi Kassem, *Implausible Realities:* Iqbal*'s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN. ST. L. REV. 1443, 1475 (2010) ("[A]s discriminatory animus or intent is rarely patent or explicit, seldom will such plaintiffs wield sufficient facts before discovery to allege a plausible claim under *Iqbal*.").

23. FED. R. CIV. P. 23(b)(3).

24. Wal-Mart Stores, Inc. v. Dukes, 564 U.S 338, 350 (2011). The Court held that a class of current and former female Wal-Mart employees who alleged sex discrimination in violation of Title VII lacked commonality because there was no official companywide policy of sex discrimination and that, thus, any discrimination would have been the behavior of *individual* Wal-Mart managers. *Id.* at 367.

25. Gen. Tel. Co. v. Falcon, 457 U.S. 147, 157 (1982).

26. William Rubenstein, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 4.62, Westlaw (database updated June 2023) ("[C]ommon issues are generally unlikely to predominate in most mass tort cases where plaintiffs have sustained significant personal injuries.").

27. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

28. *Wal-Mart Stores*, 564 U.S. 338.

29. Comcast Corp. v. Behrend, 569 U.S. 27 (2013).

be difficult to trace, a defendant can point to any number of intervening causes or individual questions to preclude certification.

B. Why It Matters that the Supreme Court Has Gutted the Private Enforcement Regime

These four procedural changes—mandatory arbitration, and heightened requirements for standing, pleading, and class certification—have further widened the enforcement "gap" between violations of consumer law and the actions to remedy them.[30]

The federal government has not filled in the gap.[31] The SEC and CFPB both lack sufficient resources to bring enforcement actions for every violation of federal consumer laws for which those two agencies have enforcement authority. Whereas the Department of Justice has over 100,000 attorneys and staff, the SEC has about 4,500 staff members and the CFPB has about 1,600, with only around 150 attorneys in the Enforcement Division.[32] In fiscal year 2022, the two agencies brought 760 and 82 enforcement actions, respectively.[33] While it is impossible to know the exact number of securities or consumer financial law violations, this note assumes that consumers suffer more than a few hundred annual violations of federal consumer protection law. The Federal Trade Commission has taken some big swings—and missed.[34] So now, in addition to resource constraints, the FTC's workplace morale is plummeting.[35] The Consumer Financial Protection Bureau is under constant legal attack and might lose its funding in an upcoming Supreme Court case.[36]

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30. Practically, there will always be an "enforcement gap" because enforcers—whether the federal government, state government, or private actors—will never seek remedy for every violation of consumer law. True, there may be some "frivolous" actions for which it makes financial sense for the defendant entity to settle, rather than litigate, even though the plaintiff's case totally lacks merit.

31. Widman, *supra* note 1, at 1157 ("[T]he Trump Administration weakened enforcement on the federal level.").

32. Alan S. Kaplinsky, *CFPB Planning Significant Staff Increases; Number of Full-Time Enforcement Attorneys to Increase by 50%,* BALLARD SPAHR, L.L.P. (Oct. 16, 2023), https://www.consumerfinancemonitor.com/2023/10/16/cfpb-planning-significant-staff-increases-number-of-full-time-enforcement-attorneys-to-increase-by-50/ [https://perma.cc/6N6S-JG36]; *Strategic Plan: Fiscal Years 2022-2026*, U.S. Securities Exchange Commission, 4, https://www.sec.gov/files/sec_strategic_plan_fy22-fy26.pdf [https://perma.cc/GGP8-AJNG].

33. *SEC Announces Enforcement Results for FY22*, SEC, https://www.sec.gov/news/press-release/2022-206 [https://perma.cc/6PXR-KG4E] (reporting that the SEC only brought 760 enforcement actions the entire year); *CFTC Releases Annual Enforcement Results*, CFTC, https://www.cftc.gov/PressRoom/PressReleases/8613-22 [https://perma.cc/6AJL-UW5W] (reporting that the CFTC only brought 82 enforcement actions).

34. Cecilia Kang, *F.T.C.'s Court Loss Raises Fresh Questions About Its Chair's Strategy*, N.Y. TIMES (July 11, 2023), https://www.nytimes.com/2023/07/11/technology/lina-khan-ftc-strategy.html [https://perma.cc/EUU8-LVC5].

35. Cat Zakrzewski, *Sinking FTC Workplace Rankings Threaten Chair Lina Khan's Agenda*, WASH. POST (July 13, 2022, 12:05 AM), https://www.washingtonpost.com/technology/2022/07/13/ftc-lina-khan-rankings/ [https://perma.cc/YX6J-QX82].

36. Amy Howe, *Court will review constitutionality of consumer-watchdog agency's funding*, SCOTUSBLOG (Feb. 27, 2023, 11:27 AM), https://www.scotusblog.com/2023/02/supreme-court-will-review-constitutionality-of-consumer-watchdog-agencys-funding-cfpb/ [https://perma.cc/E4NA-JMHL].

II. HELP US, STATE ATTORNEYS GENERAL

If private and federal enforcement actions are unlikely, there is one more set of parties that have been granted concurrent enforcement authority: state attorneys general. This section suggests that the Supreme Court's recent decisions on pleading, class certification, and arbitration do not inhibit state attorneys general from becoming more active enforcers of federal consumer laws in federal court.

Some consumers might lack the factual information required to allege a plausible claim (with *Twombly* and *Iqbal* having raised the pleading standard) at the pleading stage. Though SAGs still must comply with the Federal Rules of Civil Procedure and are still bound by *Iqbal* and *Twombly*, many SAGs have a powerful statutory authority: prior to litigation, they can issue broad "civil investigatory demands" ("CIDs") that require entities to produce information relating to inquiries by the SAG.[37] The information gathered from CIDs can inform litigation strategy. The entity might be in compliance with consumer protection laws, so the SAG will not further pursue the matter. Noncompliance might not warrant litigation, so the SAG might require the entity to promise that it will be compliant going forward, otherwise the SAG will bring suit at a later date. But other times, the CID will produce material that will then be used in litigation—both by the State and by private litigants after the State discloses the CID-produced materials throughout the litigation process.[38] With this power to issue CIDs, SAGs can bring—and spawn—enforcement actions that could not have been brought by private, individual litigants because of the plausibility pleading standard.

The Supreme Court's heightened commonality and predominance requirements at the class certification stage make class actions unlikely.[39] For a class to be certified for damages in federal court, there must be common questions of law and fact that are capable of class-wide resolution, and these common questions must predominate over individual questions.[40] If the predominance requirement extends to the calculation of damages outside the context of antitrust enforcement,[41] with the calculation of compensation to injured consumers requiring

37. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 15.10(b) (1983) ("Whenever the attorney general has reason to believe that any person may be in possession, custody, or control of any documentary material or may have any information relevant to a civil . . . investigation, the attorney general may, prior to the institution of a civil proceeding, issue in writing and serve upon such person a civil investigative demand requiring the person to produce such documentary material for inspection and copying, to answer in writing written interrogatories, to give oral testimony, or to provide any combination of such material, answers, and testimony . . . .").

38. *See*, as an example of how CIDs can influence enforcement of consumer protection laws, In re Mem'l Hermann Healthcare Sys., 274 S.W.3d 195, 197 (Tex. App. 2008) (ordering that the defendant hospital system, having turned over 87,000 responsive documents to the State through a CID, must also hand over those responsive documents to private litigants upon request).

39. Assuming that all parties meet the requisite standard for injury-in-fact.

40. Wal-Mart Stores, Inc. v. Dukes, 564 U.S 338, 350 (2011).

41. *See* Tershakovec v. Ford Motor Co., 546 F. Supp. 3d 1348 (S.D. Fla. 2021), for an example of how federal district courts do not always apply "the *Comcast* Court's specific concerns . . . outside of the antitrust context." *Id.* at 1378.

"questions of individual damage calculations,"[42] then class certification might also be barred when looking at the damage remedy.[43]

Because Rule 23 does not apply to SAGs, SAGs can likely bring representative litigation on behalf of individuals who *never would have been part of a certified class* due to standing or Rule 23 issues. Rule 23 of the Federal Rules of Civil Procedure covers class actions, not *parens patriae* suits,[44] potentially enabling SAGs to represent individuals who, due to predominance issues, would never be part of a certified class. For example, imagine a theoretical federal statute that authorized actual damage awards for those who had been exposed to asbestos while serving the U.S. military and gave SAGs a cause of action to "bring a civil action on behalf of its residents … to recover for actual monetary loss."[45] As *Amchem* pointed out, the predominance requirement would not be satisfied "by class members' shared experience of asbestos exposure, given the greater number of questions peculiar … to individuals … and the significance of those uncommon questions."[46] While 23(b)(3)'s predominance requirement would likely stand in the way of class certification, this procedural hurdle does not stand in the way of SAGs.

Furthermore, SAGs could likely bring *parens patriae* actions on behalf of state citizens who would lack Article III standing if those citizens were part of a class action suit. In *TransUnion,* the Supreme Court held that thousands of individuals lacked a concrete injury, and thus failed Article III's injury-in-fact requirement, when the defendant credit bureau erroneously noted on the individuals' credit reports that the individual might be on the Treasury Department's list of terrorists and drug traffickers, but the individuals had not yet had their credit report pulled.[47] The Supreme Court made itself clear: "Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court."[48] And the violation of a statutory right is alone insufficient to establish a concrete harm.[49] So, the individuals who suffered statutory harms but *not* concrete harms (in the eyes of the majority opinion) lacked standing and thus could not be included in the class.[50]

It seems likely that SAGs will not need to establish standing for all the citizens on behalf of whom the SAG is suing. Take the Fair Credit Reporting Act

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42. Comcast Corp. v. Behrend, 569 U.S. 27, 34 (2013).

43. When suing for statutory damages—or when a statute enables a private right of action to recover actual damages or statutory damages, whichever is greater—*Comcast* should not bar certification because damages do not require an individualized calculation.

44. *E.g.*, Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 446 (2018) ("[P]ublic suits are not subject to certification under Federal Rule 23.").

45. *See* the Telephone Consumer Protection Act, 47 U.S.C. § 227(g)(1) for an example of typical statutory language for concurrent enforcement provisions in federal consumer protection laws.

46. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 594 (1997).

47. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2209 (2021).

48. *Id.* at 2205.

49. *Id.*

50. *Id.* at 2209.

("FCRA") as an example.[51] In private litigation, one who violates FCRA "with respect to any consumer is liable *to that consumer* in an amount equal to the sum of" actual damages or statutory damages, not less than $100 but not greater than $1,000.[52] Any individual whose legal rights under FCRA were violated has a private cause of action to sue for statutory damages.[53] But per *TransUnion*, only those with concrete harms have Article III standing.[54] A certified class would only include individuals with both a cause of action and standing.[55] The statutory damage award reflects the number of violations suffered *by class members* multiplied by the award per violation.[56]

When the SAG brings an enforcement action, the State must have "reason to believe" that the defendant "has violated or is violating" FCRA.[57] The SAG can then "bring an action on behalf of residents of the State to recover" *either* "damages for which the person is liable to such residents" under the private cause of action provision (described in the previous paragraph) *or* "damages of not more than $1,000 for each willful or negligent violation."[58] Under the first remedy, the court would need to determine *to whom* the defendant is liable. But under the second remedy, the court does not consider to whom the defendant is liable —rather, the question is simply "how many violations occurred?"

The difference between "up to $1,000 per violation" and "up to $1,000 per violation suffered by class members" is subtle but key when the Supreme Court creates procedural hurdles between consumers and class membership. In *TransUnion*, the Supreme Court decided who had suffered a concrete harm, and those with no concrete harm could not be in the class because they lacked standing. Thus, post-*TransUnion*, defendants can attempt to minimize liability for statutory damages by arguing that proposed class members did not suffer a concrete harm.

As the following two tables show, total liability owed to consumers in SAG enforcement actions can be much larger than liability in class actions. The "concrete harm" requirement and Rule 23 exclude consumers—and their injuries under federal consumer law—from participating in litigation. SAGs can bring *parens patriae* litigation on behalf of these consumers who cannot participate in class action litigation.

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51. *See, generally*, the Fair Credit Reporting Act, 15 U.S.C. § 1681.

52. § 1681n(a) (emphasis added).

53. *E.g.*, TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2197 (2021) ("The [Fair Credit Reporting] Act [] creates a cause of action for consumers to sue and recover damages for certain violations.").

54. *Id.*

55. *See id.* at 2205 ("Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III.").

56. *E.g.*, *id.* at 2202 ("The jury awarded each class member $984.22 in statutory damages.")

57. Fair Credit Reporting Act, 15 U.S.C. § 1681s(c)(1).

58. *Id.*

TABLE 1

Hypothetical # of Legal Violations	Damages Per Violation	Total Liability Recoverable by SAG
100,000	$500	$50,000,000

TABLE 2

Hypothetical # of Legal Violations	Avg. # of Legal Violations per Consumer	# of Consumers who Suffered a Legal Violation	# of Consumers who Suffered a Concrete Injury	# of Consumers Whose Injuries Satisfy a 23 (b)(3) Inquiry	Damages per Violation	Average Available Damages per Consumer in the Class	Total Liability Owed to Class Members
100,000	2.5	40,000	30,000	15,000	$500	$1,250	$18,750,000

Potential damage award in a class action: (Number of consumers whose injuries can satisfy a 23(b)(3) inquiry) * (available damages per consumer) = 15,000 consumers * $1,250/consumer = $18,750,000
Potential damage award in SAG enforcement action: (Number of legal violations) * (available damages per violation) = 100,000 violations * $500/violation = $50,000,000

If SAGs can establish that the State has *parens patriae* standing to sue in federal court, the SAG can sidestep the *TransUnion* requirement that all class members (with SAG-led litigation, there are no class members, just aggrieved citizen consumers) have suffered a concrete harm. For example, in a recent case, Florida sued the defendant for alleged violations of the TCPA.[59] In its motion to dismiss, the defendant asserted that the State "has yet to allege a single instance of harm or produce one victim."[60] Indeed, the State offered no evidence that any Floridian had received a robocall in violation of the TCPA.[61] The State did, however, establish that the Defendant had previously been notified that 250 calls using its service were likely illegal under the TCPA.[62] The court denied the defendant's motion to dismiss, finding that the State had standing to bring the action.[63]

Because SAGs do not need to establish standing for all citizens on behalf of whom the SAG is suing, *TransUnion* does not seem to prevent SAGs from bringing *parens patriae* actions on behalf of state citizens who suffered only statutory harms.[64]

59. Off. of the Att'y Gen. of Fla. v. Smartbiz Telecom LLC, No. 1:22-cv-23945-JEM, 2023 WL 5491835 at *1 (S.D. Fla. Aug. 23, 2023).

60. Defendant's Motion to Dismiss for Lack of Jurisdiction at 7, Off. of the Att'y Gen. of Fla. v. Smartbiz Telecom LLC, No. 1:22-cv-23945 (S.D. Fla. Jan. 20, 2023).

61. *See* Complaint, Off. of the Att'y Gen. of Fla. v. Smartbiz Telecom LLC, No. 1:22-cv-23945 (S.D. Fla. Dec. 5, 2022).

62. *Id.*

63. Off. of the Att'y Gen. of Fla. v. Smartbiz Telecom LLC, No. 1:22-cv-23945-JEM, 2023 WL 5491835 at *1 (S.D. Fla. Aug. 23, 2023).

64. *See, e.g.*, *id.* at *3 (S.D. Fla. Aug. 23, 2023) (finding at motion to dismiss that *parens patriae* standing for SAG to bring TCPA enforcement action when the SAG had only then established that 250

Surprisingly little has been written about the state enforcement of federal consumer law.[65] This is surprising because dozens of federal laws—including statutes that are fairly well-known to the public, such as the Fair Credit Reporting Act—give concurrent enforcement authority to the states, authorizing a cause of action and statutorily conferring standing for SAGs.

Perhaps the reason for the lack of scholarship is that, to this point, few SAGs have actually utilized this concurrent authority. The most authoritative analysis of SAG enforcement of federal consumer law—written back in 2011—notes that, of the sixteen studied federal consumer law statutes that grant SAGs concurrent authority with the federal government, SAGs have asserted claims under only nine.[66] 120 claims were made in total.[67] Ninety-one of the 120 claims were made under one of two telemarketing statutes, the Telemarketing Sales Rule (TSR) and Telephone Consumer Protection Act (TCPA).[68] So, that leaves twenty-nine claims across the remaining seven statutes.[69] Looking at enforcement actions brought under federal consumer laws, it does not appear that state enforcement has rapidly increased in the past decade.

This then raises the question: why *don't* more SAGs enforce federal law? Scholarly literature does not provide a conclusive answer. Widman and Cox argue that the non-enforcement by states could not be fully explained by fee and cost-shifting provisions, damage awards, the availability of alternative state law, or preemption.[70] Their "best explanation" is that SAGs simply are not familiar with the subject matter of these federal consumer laws, whereas they are relatively familiar with telemarketing statutes—which, unlike most federal consumer laws, do frequently have state law analogues.[71] Austin Krist argues that SAGs have not enforced FCRA because credit reporting errors have "not consistently been an issue of paramount concern in the public consciousness until recent years," and, as "SAGs are predominately elected officials responding to the will of their respective electorates," SAGs are more likely to enforce other statutes.[72] Instead of addressing why there is this enforcement gap, scholars instead engage

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calls were illegal out of hundreds of thousands). SAGs should still assert that there was a concrete harm suffered by *at least* one citizen. Utah Div. of Consumer Prot. v. Stevens, 398 F. Supp. 3d 1139, 1145–46 (D. Utah 2019) (finding no *parens patriae* standing because Utah failed to assert that any Utah citizen suffered a concrete harm).

65. *E.g.*, Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 702 (2011) ("[State e]nforcement has been neglected in the federalism literature to date, which equates state power with state law."); Austin H. Krist, *Large-Scale Enforcement of the Fair Credit Reporting Act and the Role of State Attorneys General*, 115 COLUM. L. REV. 2311, 2337 (2015) ("To date, the exercise of concurrent enforcement powers by SAGs has not been widely studied.").

66. Widman & Cox, *supra* note 1, at 71–72.

67. *Id.* at 72.

68. *Id.*

69. *Id.*

70. *Id.* at 83.

71. *Id.*

72. Krist, *supra* note 65, at 2338.

in debate over whether state enforcement of federal law is a net-positive[73] or negative.[74]

It may actually be *unsurprising* that a clear, single explanation has not emerged for this lack of enforcement.[75] There are over fifty current SAGs and many more former ones from jurisdictions with different state common law, constitutional, and statutory powers given to SAGs. Each SAG has their own priorities, especially since, as Krist notes, most SAGs are democratically elected. There are dozens of federal statutes granting concurrent authority across multiple areas of substantive law.[76] Though often the largest law firm in a given state, a SAG office is still resource-constrained. But as the plaintiffs' bar is hobbled by the Court's retrenchment philosophy, state enforcement might begin to take a larger role in the consumer law enforcement regime,[77] and so future scholars will hopefully answer remaining questions on why SAGs did not take advantage of this enforcement authority when they could claim "statutory standing" to establish Article III standing.[78]

III. *PARENS PATRIAE* LITIGATION—THE PATHWAY TO ROBUST CONCURRENT ENFORCEMENT

SAGs should be able to defend their use of concurrent enforcement authority against likely jurisdictional arguments. Defendants have successfully argued that SAGs lack standing to enforce federal consumer law in federal court. This note aims to provide enterprising SAGs with a roadmap of how to bring actions to enforce federal consumer law in federal court.

Like any litigant in federal court, SAGs must have a cause of action and standing to sue. SAGs have a cause of action to enforce many federal consumer laws. In most enforcement actions in federal court, the "closer" question will be whether SAGs have standing.

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73. Lemos, *supra* note 65, at 744–49 (noting that the anti-tyranny and federalism benefits of state enforcement outweigh the risk of over-enforcement); Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 930–31 (2017) (concluding that the benefits of state enforcement—including a lack of regulatory capture, democratic accountability, and legal innovation—outweigh the negatives); *see also* Amanda Rose, *State Enforcement of National Policy: A Contextual Approach (With Evidence from the Securities Realm)*, 97 MINN. L. REV. 1343, 1368 n.84 (2013) (citing sources relevant to the "mature debate . . . over the wisdom of concurrent state enforcement in the antitrust context.").

74. Victor Schwartz & Christopher Appel, *The Plaintiffs' Bar's Covert Effort to Expand State Attorney General Federal Enforcement Power*, 17 NO. 11 ANDREWS ANTITRUST LITIG. REP. 12, at *1 (2010) (arguing that SAGs will abuse concurrent authority to hire third-party private counsel); *see also* Rose, *supra* note 73.

75. Having been unable to find anything close to a conclusive answer in the scholarly literature, the author notes a glaring hole in scholarship on the topic: sources written by SAGs themselves (or, at least, sources that interviewed SAGs).

76. Widman & Cox, *supra* note 1, at 71–72.

77. Or, it is fully possible that SAGs fail to pick up the baton.

78. In state courts, the standing inquiry is normally simpler. SAGs, through common law, constitutional, and statutory powers, have standing to sue on behalf of state citizens.

To have standing, litigants must be the real party in interest—that is, courts disfavor third-party litigation brought by mere nominal parties on behalf of someone else. SAGs, however, are no ordinary party. They can bring representative litigation, so long as they "articulate an interest apart from the interests of particular private parties."[79] When SAGs bring these representative suits, they are acting as *parens patriae*—"parent of the state."

If a party is a real party in interest, the court must determine that the litigant has either Article III[80] or prudential standing. This note asserts that SAGs will frequently have Article III standing to enforce federal consumer law in federal court through the *parens patriae* doctrine and to bring actions for damages. But, in some cases, SAGs might not be able to obtain damages awards for aggrieved individuals, and instead might only be able to assert claims for injunctive relief, declarative relief, and damages awards for injuries to the State.

A. Basics of the Parens Patriae *Doctrine*

Article III of the Constitution requires that there be a live "case" or "controversy" between parties in federal court. There must be (1) an "injury-in-fact" that is "concrete," "particularized," and "actual or imminent, not conjectural or hypothetical" (2) in a way that is "fairly traceable" to the defendant's conduct, and (3) such that a favorable decision is likely to bring redress to the injury.[81]

Sometimes, individuals are unlikely or unable to vindicate their own rights. Courts generally disfavor third-party suits—that is, lawsuits brought by one person on behalf of another.[82] Exceptions are few, and the *parens patriae* doctrine is one of them.

The *parens patriae* power allows state officials to bring representative suits. Historically, there have been two avenues to *parens patriae* standing. This note aims to clarify how SAGs can assert *parens patriae* standing through these two avenues, noting open legal questions.

First, Congress has granted a right of action to state enforcement officials to litigate alleged violations of these consumer legal rights.[83] Courts and litigants seemed to have assumed that, provided with the cause of action, SAGs had federal court standing.[84] However, *Spokeo* and *TransUnion* call into question

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79. Alfred Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982).

80. SAGs must suffer (1) an "injury-in-fact" that is "concrete," "particularized," and "actual or imminent, not conjectural or hypothetical" (2) in a way that is "fairly traceable" to the defendant's conduct, and (3) such that a favorable decision is likely to bring redress to the injury. Spokeo, Inc. v. Robins, 578 U.S. 330, 338–39 (2016) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)).

81. *Id.*

82. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) ("When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well.").

83. *See generally* Widman & Cox, *supra* note 1 (discussing grants of concurrent enforcement authority).

84. *Id.* n. 61 (discussing how some courts have "fail[ed] to distinguish between the question of *parens patriae* standing and the question of statutory standing").

whether Congress can authorize statutory standing. Those two cases held that the violation of a legal right, created by statute, is insufficient to establish an injury-in-fact as required by Article III.[85] This note suggests that *Spokeo* and *TransUnion*'s holding does not apply to SAGs because the Supreme Court's rationale for heightening and tightening standing requirements for individual litigants—that the concrete harm requirement can keep out frivolous suits—does not apply to SAGs. If *Spokeo* and *TransUnion*'s concrete harm requirement does not apply to SAGs, then SAGs could establish statutory standing and sidestep the much more fact-intensive common law *parens patriae* inquiry. However, this note suggests that SAGs should still cover their bases and make the necessary factual findings to establish common law *parens patriae* standing.

Second, the Supreme Court recognized common law *parens patriae* standing which enables SAGs to bring suit in federal court, even in the absence of statutory standing.[86] Common law *parens patriae* standing requires the state to assert a "quasi-sovereign" interest.[87] When a quasi-sovereign interest is properly asserted, this interest satisfies Article III's "injury-in-fact" requirement.[88] This note suggests that a combination of quasi-sovereign interests should enable SAGs to recover consumer remedies that are statutorily defined in federal consumer legislation—including injunctive relief, actual damages, and statutory damages—even if statutory standing for SAGs does not survive *Spokeo* and *TransUnion*.

B. Statutory Parens Patriae *Standing Survives* Spokeo *and* TransUnion*, and so* Parens Patriae *Standing is Coterminous with the Federal Cause of Action*

Statutory *parens patriae* standing for SAGs survives *Spokeo* and *TransUnion* because the rationale of these decisions—protecting the judiciary from a deluge of cases—does not apply to state enforcement actions. Thus, this note argues that SAGs have *parens patriae* standing to enforce federal consumer law in federal court, even if SAGs cannot establish common law *parens patriae* standing.

Spokeo and *TransUnion* held that statutorily-conferred standing is alone insufficient to satisfy Article III's "injury-in-fact" requirement. The Supreme Court made itself clear: "Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court."[89] But this note suggests that *Spokeo* and *TransUnion* should not bar state enforcement officials from asserting they have statutorily been granted *parens patriae* standing. *TransUnion* focuses almost entirely on private, individual plaintiffs. The Supreme Court foresaw a federal court system with no guardrails in place: "if the law of Article III did not require plaintiffs to demonstrate a 'concrete harm,' Congress could authorize virtually any citizen to bring a

85. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2197 (2021).
86. Alfred Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 609–10 (1982).
87. *Id.* at 601.
88. *See id.*
89. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021).

statutory damages suit against virtually any defendant who violated virtually any federal law."[90] In the Court's worst nightmare, there are too many private plaintiffs bringing these statutory claims. The judiciary must hear an onslaught of additional cases where, at best, the plaintiff is not the best party to bring suit, and at worst, the plaintiff brings a frivolous suit to force an early settlement. If a potential plaintiff thinks that the statutory damage award is worth the time and money spent to bring suit, then an economically rational plaintiff will bring the suit. A cottage industry of attorneys will take these cases on contingency (so there are little to no upfront costs for a plaintiff), take a recently-filed complaint and update it with this new case's facts, and demand that the defendant settle. Judges will face a backlogged docket and cannot spend adequate time on their other cases. So, this concrete harm requirement can clear dockets by 1) dissuading a potential plaintiff from bringing suit in the first place, or 2) granting the judiciary a mechanism to boot cases from the docket.

SAGs have minimal opportunity or motive to deluge the judiciary with consumer law enforcement actions. To begin with, there are only fifty-six SAGs.[91] Yes, there are likely thousands of attorneys working in SAG offices.[92] But many attorneys practice in fields distinct from "consumer protection" law,[93] and so there probably are not enough consumer protection attorneys in state government to deluge the judiciary.

Also, there is not a profit-making incentive for SAGs to bring these claims. In a private civil case, plaintiffs (and their attorneys) pocket the statutory damages.[94] With SAG-brought enforcement actions, the recovered funds usually are kept in a recovery fund for aggrieved consumers or are moved to the state's general treasury.[95] SAGs do not pocket the recovered funds for themselves.[96] Furthermore, as most SAGs are elected officials,[97] SAGs must justify their actions to voters and thus will theoretically act in the best interests of their state's citizens—meaning

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90. *Id*. at 2206.

91. The fifty states, D.C., Guam, Puerto Rico, the Northern Mariana Islands, American Samoa, and the Virgin Islands. *Attorneys General*, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, https://www.naag.org/attorneys-general/ [https://perma.cc/4YM4-XLZB].

92. *E.g.*, *About the Office of the Attorney General*, STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, https://oag.ca.gov/office (noting how the AG "[o]verse[s] more than 5,600 lawyers, investigators, sworn peace officers, and other employees) [https://perma.cc/8VR8-8SWG].

93. *E.g.*, *id*. (listing "consumer protection" as one of nine practice areas in the "What We Do" section of the OAG's website).

94. *E.g.*, Lemos, *supra* note 65, at 730 (2011) ("Private enforcement is often profit-driven; public enforcement is not. Private parties and their attorneys stand to benefit directly from successful enforcement efforts; public enforcers do not.").

95. *See, e.g.*, *id*. at 701 n.9, 733 n.159 (citing article by Hubbard and Yoon in which "consumers have received direct payments as a result of state enforcement" and describing how $75 million in fines and penalties from a settlement went into the New York state treasury).

96. *Id*. at 733.

97. *Attorneys General*, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, https://www.naag.org/attorneys-general/ [https://perma.cc/4YM4-XLZB] (noting that SAGs are elected in 43 states, Washington D.C, Guam, and the Northern Mariana Islands).

that a well-informed citizenry could provide a check on an overzealous SAG at the ballot box.[98]

When SAGs bring consumer protection actions in federal court, the SAGs assist the federal Executive Branch in executing the law. The Constitution states that the Executive has a duty to take care and enforce the law.[99] Federal consumer laws delegated this enforcement power to state enforcement officials. As described above, the federal government alone likely does not possess resources to bring enforcement actions for every violation of federal consumer law. Whereas a random, private plaintiff without a concrete harm has no right[100] to instigate litigation in federal court, the SAG has a *duty* to enforce the law.[101] The Supreme Court wrote in *TransUnion* that "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch."[102] It is within the discretion of the Executive Branch to delegate an enforcement role to SAGs.

Prior to *Spokeo* and *TransUnion*, SAGs could omit discussions of *parens patriae* standing when bringing enforcement actions pursuant to explicit grants of concurrent enforcement authority.[103] The courts and parties assumed that, if Congress gave SAGs a cause of action to enforce a federal statute, then the SAG would have standing in federal court.[104] If the holding of *TransUnion*—that Congress cannot statutorily confer standing to a litigant in the absence of a concrete harm—does not apply to SAG enforcement of federal law, then SAGs might have grounds to argue that the *parens patriae* power is still coterminous with the federal cause of action.

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98. *E.g.*, Lemos, *supra* note 65, at 746 ("By authorizing enforcement by state attorneys general as well as a federal agency, Congress enhances citizens' ability to influence public enforcement of federal law.")

99. U.S. CONST. art. II § 3.

100. According to the Supreme Court. See TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021).

101. A political-executive duty to ensure that the consumer statutes currently on the books are actually being enforced and actually protecting a given SAG's constituents. Though this line of inquiry goes well beyond the scope of this note, it is possible that SAGs are "taking care" to enforce federal law, in the stead of the federal Executive Branch. If this is the case—and if SAGs are protecting "public rights" rather than "private rights"—then Congress may violate Article II, Section III of the Constitution. This clause vests the President with the power to faithfully execute the law. Arguably, Congress lacks the power to delegate this enforcement authority. Brief of Constitutional Accountability Center Amicus Curiae in Support of Respondent, Acheson Hotels, LLC v. Laufer, No. 22-429 (U.S. argued Oct. 4, 2023) https://www.supremecourt.gov/DocketPDF/22/22-429/274920/20230809094422304_Laufer%20amicus%20FINAL.pdf [https://perma.cc/8SQN-NL2E].

102. The Supreme Court most certainly was referring to the federal Executive Branch, but the rationale still applies to state executives. And, many of these federal consumer laws require the SAG to coordinate with, or at least receive the blessing of, the federal enforcement agencies when bringing an enforcement action. *TransUnion LLC*, 141 S. Ct. at 2207.

103. *See, e.g.*, Maryland v. Universal Elections, Inc., 862 F. Supp. 2d 457, 466 (D. Md. 2012) (awarding the State of Maryland one million dollars in TCPA action even though State did not expressly invoke its *parens patriae* power).

104. *E.g.*, *id.*

C. Even if Parens Patriae *Standing is Not Coterminous with the Federal Cause of Action, SAGs Can Still Possess* Parens Patriae *Standing Under Common Law*

State constitutions and statutes grant broad powers to SAGs to enforce both state and federal laws on behalf of the state's citizens.[105] But a *state* constitution granting the power to sue on behalf of the state's citizenry does not provide a ticket to *federal* court—SAGs must establish Article III standing. While the Supreme Court generally disfavors third-party standing in which the litigant bringing suit is not the party who directly suffered the alleged harm, the Court recognized that SAGs can bring *parens patriae* suits in federal court under common law when the state has a "quasi-sovereign" interest in the litigation.[106] The "quasi-sovereign" interests are a "set of interests that the State has in the well-being of its populace."[107] The Supreme Court stated that the recognition of "quasi-sovereign" interests is a "case-by-case" matter,[108] though it identified some absolute requirements as well as guiding principles. The Court requires a "quasi-sovereign interest" to ensure that a state is articulating "an interest apart from the interests of particular private parties . . . [such that] the State [is] more than a nominal party. . . . Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well. . . ."[109] To qualify as a "quasi-sovereign interest," the asserted interest "must be sufficiently concrete to create an actual controversy between the State and the defendant."[110]

1. *Snapp* and the Two "Quasi-Sovereign" Interests that Justify Common Law *Parens Patriae* Standing

The Supreme Court, in the seminal *Snapp v. Puerto Rico* case, identified at least two "quasi-sovereign interests" that can justify common law *parens patriae* standing. First, states "ha[ve] a quasi-sovereign interest in the health and well-being—both physical and economic—of [their] residents in general."[111] The Supreme Court has not attempted to define how many state residents must be impacted. The Court has given *some* guideposts. The state must allege more than just an injury to a specific group of people.[112] The state can include indirect effects when asserting it has *parens patriae* standing.[113] A "helpful indication"—but not a necessary or sufficient one—in determining if the state has a quasi-

105. *See What Attorneys General Do*, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, https://www.naag.org/attorneys-general/what-attorneys-general-do/ [https://perma.cc/UKC9-D5J8].
106. Alfred Snapp & Son, Inc. v. Puerto Rico *ex rel*. Barez, 458 U.S. 592, 608–10 (1982).
107. *Id*. at 602.
108. *Id*. at 607.
109. *Id*. at 593.
110. *Id*. at 602.
111. *Id*. at 607.
112. *Id*. at 593.
113. *Id*.

sovereign interest in its citizens' health and well-being is "whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers."[114]

Second, a state has a quasi-sovereign interest in "securing observance of the terms under which it participates in the federal system" such that the states "are not excluded from the benefits that are to flow from participation in the federal system."[115] This "federal benefit" theory attaches when "federal statutes creating benefits or alleviating hardships create interests that a State will obviously wish to have accrue to its residents."[116] The state should have an interest independent from an interest in obtaining benefits for specific people.[117]

In *Snapp*, the Commonwealth of Puerto Rico asserted that it had *parens patriae* standing to sue on behalf of Puerto Rican migrant apple pickers who had allegedly been discriminated against by Virginia apple farmers.[118] The Supreme Court held that the Commonwealth had *parens patriae* standing because it possessed both of the aforementioned quasi-sovereign interests.[119] First, the Supreme Court held that the Commonwealth had a quasi-sovereign economic interest in protecting its citizens from discrimination, even though the Commonwealth was bringing suit on behalf of only 787 migrant workers.[120] The Court rejected the argument that the Commonwealth lacked standing because 787 jobs were too few to establish a quasi-sovereign interest. Rather, the Commonwealth had an interest in protecting *all* of its migrant workers from discrimination[121] when they sought employment in the mainland United States. These migrant workers—not just the apple pickers, but all temporary migrant workers—composed a significant enough portion of the Commonwealth's economy to establish a quasi-sovereign interest.[122]

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114. *Id*. at 607. And, States *do* address consumer protection issues through their sovereign lawmaking powers.

115. *Id*. at 607–608.

116. *Id*. at 608.

117. *Id*.

118. *Id*. at 609.

119. *Id*.

120. *Id*.

121. After *Snapp*, the federal courts have broadly interpreted the "health and well-being category of quasi-sovereign interests," especially when the State alleges unlawful discrimination. Massachusetts v. Bull HN Info. Sys., Inc., 16 F. Supp. 2d 90, 97 (D. Mass. 1998). So, SAGs likely have an easier road to showing a quasi-sovereign interest if defendant violators of consumer law have targeted a "protected or disadvantaged group[]," *id*., even one that does not have constitutionally protected status. *See* New York by Abrams v. 11 Cornwell Co., 695 F.2d 34, 39 (2d Cir. 1982) (holding that the SAG had a "quasi-sovereign interest" in preventing discrimination against the mentally handicapped); Support Ministries for Persons with AIDS, Inc. v. Waterford, 799 F. Supp. 272, 277 (N.D.N.Y. 1992) (finding a "quasi-sovereign interest" in preventing discrimination against persons with HIV/AIDS).

122. *Snapp*, 458 U.S. at 607. The Court notes that Puerto Ricans have long suffered discrimination along ethnic lines. A discrimination-based argument for *parens patriae* standing would be less powerful with respect to two states with no history of inter-state ethnic discrimination. If a state could show discrimination based on state of origin such that the discrimination violated federal law, then the state could seek *parens patriae* standing. *Id*. at 609.

Second, the Supreme Court held that Puerto Rico had a quasi-sovereign interest in ensuring that its citizens could fully benefit from federal employment law.[123] Unemployment is a significant hardship on a state's residents, and the state must expend resources to support the unemployed. Federal law created benefits that alleviated these hardships. The Commonwealth thus had an interest in obtaining these benefits for its citizens.[124]

2. Open Questions and Circuit Splits on Common Law *Parens Patriae* Standing

The last Supreme Court case discussing the bounds of *parens patriae* in the context of SAGs *enforcing* federal law was *Snapp*, decided forty years ago. Since then, federal courts have dealt with thorny questions, most of which, this note argues, were actually answered by the *Snapp* decision. The note identifies three main categories of disputed questions: when to apply the "health and well-being" quasi-sovereign interest, when to apply the "federal benefit" interest, and whether SAGs can recover damage awards on behalf of aggrieved state consumers.

a. When to apply the first quasi-sovereign interest – health and well-being

When SAGs bring *parens patriae* claims under the "health and well-being" quasi-sovereign interest, SAGs should address two open questions in the doctrine. First, federal circuits are split as to whether a SAG can only bring an enforcement action when there is no opportunity for individual litigation. Second, federal courts have not explicitly defined how many consumers must be harmed, though this open question should not pose a barrier to establishing standing.

A minority of federal courts require the State to show that individual methods of recourse have been exhausted. The Second Circuit in *Abrams v. 11 Cornwell Company* held that the *parens patriae* standing doctrine "requires a finding that individuals could not obtain complete relief through a private suit,"[125] and the Ninth Circuit has cited this requirement favorably.[126] But soon after *11 Cornwell*, federal district courts sitting in the Second Circuit narrowed this requirement. In *Support Ministries*, the Northern District of New York found the State could sue in a *parens patriae* capacity because "it [was] conceivable that a private action by Support Ministries may not produce complete relief for all of the persons injured"[127]—conceivable, but not certain, that relief was impossible through private suit. In *People v. Peter & John's Pump House, Inc.*, the court found that *parens patriae* power could be utilized in another discrimination case because discrimination lawsuits "often carr[y] greater implication and a broader scope

123. *Id.* at 609–10.

124. *Id.*

125. New York by Abrams v. 11 Cornwell Co., 695 F.2d 34, 40 (2d Cir. 1982), *vacated in part and remanded*, People of State of New York by Abrams v. Cornwell Co. 718 F.2d 22 (2d. Cir. 1983) (finding that mentally challenged residents of a facility would not be able to allege specific facts demonstrating that they had faced unlawful discrimination).

126. *See* Missouri *ex rel.* Koster v. Harris, 847 F.3d 646, 652 (9th Cir. 2017).

127. *Support Ministries for Persons with AIDS, Inc.*, 799 F. Supp. at 278.

than the denial of benefits, services, or accommodation to known individuals," and the State and named plaintiffs' interests were not coextensive because the private plaintiffs were more likely to "compromise" for money damages whereas the State might push for injunctive relief.[128] This logic should also extend to consumer protection cases: because the true universe of harmed consumers is usually impossible to identify, the State can represent more individuals than just the named plaintiffs who might bring a private enforcement action; and consumers are more likely to want statutory damage awards than the State which has a greater interest in injunctive relief.

When SAGs assert the "health and well-being" quasi-sovereign interest, federal courts have routinely rejected arguments that SAGs should not have *parens patriae* standing because the SAGs enforcement action would affect too small a portion of the state's citizens. While defendants may raise this argument, precedent suggests that the argument is unlikely to persuade a court to deny *parens patriae* standing.

The Supreme Court expressly chose not "to draw any definitive limits on the proportion of the population . . . that must be adversely affected," though it does ask that a State "allege[] injury to a sufficiently substantial segment of its population."[129] In *Snapp*, the Supreme Court held that Puerto Rico had a "quasi-sovereign interest" in bringing an anti-discrimination suit on behalf of Puerto Rican apple pickers who had not been selected for positions in Virginia.[130] The Court expressly rejected the argument that, because there were only 787 job opportunities in Virginia, any alleged discrimination could not have had a substantial impact on the general population of Puerto Rico.[131] The Court pointed to the Commonwealth's interest in protecting its citizens from "the harmful effects of discrimination" and noted that the "invidious" discrimination against Puerto Ricans extended beyond the apple-picking job market.[132]

Federal courts have found a "quasi-sovereign interest" to protect a similarly-low number of state citizens, some citing the Court's explicit rejection of a hard cut-off.[133] In *Bramkamp*, which predates *Snapp* by one year, the Second Circuit held that the Commonwealth of Puerto Rico had *parens patriae* to sue on behalf of fewer than two-thousand apple pickers.[134] The *Bramkamp* court stated that "*all* future migrant workers who might be refused employment due to the alleged

128. *Peter & John's Pump House, Inc.*, 914 F. Supp. at 813 (internal quotations omitted).

129. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982).

130. *Id.* at 609.

131. *Id.* at 599, 609 ("We granted certiorari to determine whether Puerto Rico could maintain a *parens patriae* action here, despite the small number of individuals directly involved.").

132. *Id.* at 609.

133. "The Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population." *Id.* at 607.

134. Puerto Rico *ex rel.* Quiros v. Bramkamp, 654 F.2d 212, 214 (2d Cir. 1981).

unlawful discrimination, *and the families of these workers*, stand to be directly injured."[135] And even if the number of directly injured citizens was "not substantial enough . . . for their interests to be deemed public," the effort of Puerto Rico to "secure the rights of migrant workers will . . . significantly benefit the general population."[136]

Two cases brought in the Northern District for New York suggest that, so long as the SAG can establish that *at least one* citizen suffered a concrete harm, the SAG does not need to identify a large base of aggrieved consumers. In one case, the court found that the New York AG could use its *parens patriae* power on behalf of six named consumers because its enforcement of a consumer fraud claim was "part of a much broader scheme of consumer protection."[137] In another case, the New York AG had *parens patriae* standing to sue on behalf of eight African-American residents in an anti-discrimination suit against a membership club.[138] The court rejected the claim that the State must "do more than . . . claim general societal harm from discriminatory practices."[139] But there appears to be a requirement that *at least one* state citizen have suffered a concrete injury themselves.[140]

b. When to apply the second quasi-sovereign interest – federal benefits

The "federal benefit" justification provides the clearest justification for SAGs to enforce federal consumer law, as the "federal benefit" theory of *parens patriae* standing recognizes that SAGs should have standing to sue in federal court to ensure that the benefits of federal law flow to American citizens. In *Snapp*, the Supreme Court held that the Commonwealth of Puerto Rico had a "quasi-sovereign interest" in ensuring that its workers could fully benefit from federal anti-discrimination law.[141] The *Snapp Court* wrote that this "federal benefit" theory attaches whenever the federal government creates benefits for U.S. citizens that a State would have an interest in ensuring that the state residents can accrue.[142]

Soon after *Snapp*, the District of Minnesota found that Minnesota's SAG had *parens patriae* standing to sue Standard Oil for alleged violations of the Economic Stabilization Act (ESA).[143] Minnesota asserted *parens patriae* standing to bring

135. *Id.* at 216 (emphasis added).

136. *Id.*

137. *In re* Hemingway, 39 B.R. 619, 622 (N.D.N.Y. 1983).

138. New York v. Peter & John's Pump House, Inc., 914 F. Supp. 809, 810–13 (N.D.N.Y. 1996).

139. *Id.* at 812.

140. Utah Div. of Consumer Prot. v. Stevens, 398 F. Supp. 3d 1139, 1146 (D. Utah 2019) (analyzing other cases to find that there is a "requirement that a State seeking to sue as *parens patriae* must allege concrete injury to its citizens"); *see also* Table Bluff Reservation v. Philip Morris, Inc., 256 F.3d 879, 885 (9th Cir. 2001) (rejecting claim that Tribe had *parens patriae* standing because the Tribe failed to meet its burden to "allege injury in fact to the citizens they purport to represent as *parens patriae*").

141. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607–10 (1982).

142. *Id.* at 608. The State must have an interest "independent of the benefits that might accrue to any particular individual" such that it is not a mere nominal party. *Id.*

143. Minnesota *ex rel.* Humphrey v. Standard Oil Co. of Ind., 568 F. Supp. 556, 559 (D. Minn. 1983).

claims for actual damages to itself and its citizens, damages for harms to the State's general economy, and treble damages for willful overcharges as authorized by the ESA.[144] The ESA contained a private cause of action but did not contain a concurrent enforcement provision.[145] The court found that the State had a "quasi-sovereign interest" in ensuring that its residents could fully benefit from the ESA,[146] noting that the State had an increased interest in enforcement because "individuals with small overcharge claims will not avail themselves" of the ESA because of the high cost of litigation.[147]

In *Massachusetts v. Bull HN Informational Systems*, the district court found that the Commonwealth had standing to enforce the Older Workers Benefit Protection Act (OWBPA) and of the Age Discrimination in Employment Act (ADEA), writing that Massachusetts' "quasi-sovereign interest" in ensuring that its residents could benefit from federal legislation was "even more obvious" than its interest under the health and well-being quasi-sovereign interest.[148] While under investigation for age discrimination in violation of the ADEA, the defendant technology company revised its severance agreement, requiring employees to waive their right to sue the defendant for conduct arising from the employee's time at the company before the employee could receive severance pay.[149] The court wrote that when "individuals are curtailed from making use of the courts to address violations of federal law on their own behalf, the state's interest in stepping in to protect them is greater."[150]

The Fifth Circuit imposed a new requirement that is inconsistent with *Snapp* and therefore should not be adopted by other federal circuits. In *Harrison v. Jefferson Parish School Board*, the Fifth Circuit stated that the "federal benefit" theory only applies when a SAG is attempting to protect its citizens from

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144. *Id.*

145. Economic Stabilization Act of 1970, Pub. L. No. 92-210 § 210 (1971) (formerly codified at 12 U.S.C. § 1904).

146. *Id.* at 564.

147. *Id.*

148. Massachusetts v. Bull HN Info. Sys., Inc., 16 F. Supp. 2d 90, 98 (D. Mass. 1998).

149. *Id.* at 94–95.

150. *Id.* at 98. To bolster its case, the State in a potential future *parens patriae* action should allege that there is some external constraint that justifies the SAG bringing suit, rather than the federal government or private parties. This "soft" requirement was dicta in *Snapp*, *Standard Oil*, and *Bull*, but all three courts discussed how these constraints gave SAGs additional justification to utilize *parens patriae* standing, so future SAGs should make it part of their complaints. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 610 (1982) (noting that the Commonwealth's continued participation in federal employment programs "makes even more compelling its *parens patriae* interest"); Minnesota *ex rel.* Humphrey v. Standard Oil Co. of Ind., 568 F. Supp. 556, 564 (D. Minn. 1983) (noting that the State is better poised to bring claims under the Economic Stabilization Act because "individuals with small overcharge claims will not avail themselves" of the law); Massachusetts v. Bull HN Info. Sys., Inc., 16 F. Supp. 2d 90, 98 (D. Mass. 1998) (noting that state has stronger interest in bringing suit when "individuals are curtailed from making use of the courts to address violations of federal law on their own behalf," and the state residents had waived right to sue as a precondition to receiving severance packages).

discrimination *by other states*.[151] This seems facially plausible–as the Fifth Circuit's opinion notes, federal court is the proper venue to adjudicate cases and controversies between States.[152] But this requirement ignores the basic facts of *Snapp*: the defendant in *Snapp* was a private apple company and *not* a state government.[153] If the Fifth Circuit's reasoning was applied to the *Snapp* facts, the Puerto Rican SAG would have had no *parens patriae* standing under the federal benefit theory. Since the Fifth Circuit's *Harrison* decision is flatly inconsistent with *Snapp*, other federal circuits should not adopt *Harrison*'s requirement that the federal benefit theory should only apply when dealing with state-based discrimination.

c. Can SAGs obtain damage awards in parens patriae *suits?*

Federal circuits are split as to whether, when, and how SAGs can obtain damage awards in *parens patriae* suits brought in federal court. The split does not neatly fall on any distinction previously discussed—that is, statutory versus common law standing, or health-and-wellness versus federal benefit theories of common law standing—suggesting an inconsistent treatment of *parens patriae* across the federal judiciary. This note discusses how federal courts have treated the issue of damages within SAG-brought cases in federal court and suggests that the availability of damage awards should depend on the underlying assertion of *parens patriae* standing:

- When suing pursuant to a concurrent enforcement provision, SAGs should be able to obtain all statutorily-defined remedies available *to SAGs*. Remedies usually include injunctive relief and statutory damages for each legal violation;
- When suing pursuant to the health-and-wellness theory of common law standing, SAGs should be able to obtain injunctive relief and actual, direct damages to the State and aggrieved consumers;
- When suing pursuant to the federal benefit theory of common law standing, SAGs should be able to obtain all statutorily-defined remedies available *to individual consumers*. Remedies usually include injunctive relief and statutory damages for each legal violation.[154]

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151. Harrison v. Jefferson Par. Sch. Bd., 74 F.4th 712, 720 (5th Cir. 2023).

152. *Id.*

153. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 597 (1982).

154. Oftentimes, SAGs and individual litigants have the same available remedies. But that is not always the case. For example, one statute authorizes SAGs to sue for a larger universe of legal violations than can private litigants. But this note suggests that the key difference between suing under statutory standing and under common law standing is more of a procedural and conceptual question—under which statutory provision is the SAG actually suing? The common law strain of *parens patriae* standing developed when SAGs litigated federal laws that did not include a concurrent enforcement provision. And so, SAGs would bring suit under the private right of action provisions.

Thus, this note makes a suggestion: assert *parens patriae* standing on statutory grounds (citing the concurrent enforcement provision) *and* common law grounds (citing the private cause of action

This delineation of available remedies would bring much-needed consistency to federal doctrine and bring *parens patriae* doctrine back into alignment with Supreme Court precedent and textualist readings of federal consumer laws. If SAGs can establish *parens patriae* standing under multiple theories, then the SAG should be able to combine the remedies, so long as the remedies are not duplicative.

The only guidance from the Supreme Court on whether and when SAGs can recover damage awards in *parens patriae* actions is from *Hawaii v. Standard Oil*. Hawaii alleged that Standard Oil violated the Clayton Act and sought injunctive relief and treble damages for injuries to Hawaii's economy caused by the allegedly inflated oil prices.[155] The Clayton Act provides a private right of action to recover treble damages for "any person who shall be injured in his business or property" by a violation of the Act but does not contain a concurrent enforcement provision for SAGs.[156] Notably, Hawaii did not assert any direct harms, such as the State of Hawaii having to pay extra money for oil it used to fund state services.[157] The Supreme Court held that Hawaii was a "person" under the Act, had *parens patriae* standing to seek injunctive relief and treble damages for injuries caused to the State's "commercial interests or enterprises," and lacked *parens patriae* standing to seek treble damages for injuries caused to the State's "general economy" because those injuries were "no more than a reflection of injuries to the business or property of consumers."[158]

i. If statutory parens patriae *standing survived* TransUnion*, SAGs can recover all available statutory remedies available to SAGs*

This note suggests in an earlier section that the status quo before *TransUnion*—when the SAG has a statutory cause of action to police violations of federal law, and a violation occurs, the SAG has standing to sue even in the absence of a "concrete" harm as defined by the *TransUnion* majority—remains in place. If this is the case, and statutorily-conferred *parens patriae* standing is coterminous with the statutory cause of action, then the State should be able to recover all statutorily remedies available to SAGs in the concurrent enforcement provisions.

A Telephone Consumer Protection Act ("TCPA") case brought before *Spokeo*[159] illustrates how this suit would proceed. In *Maryland v. Universal Elections, Inc.*, the State of Maryland sued the defendant under the TCPA's

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provisions). The existence of a concurrent enforcement provision weighs strongly in favor of finding common law *parens patriae* standing but, as discussed elsewhere in this note, is alone insufficient to establish common law *parens patriae* standing.

155. Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 260 (1972).

156. Clayton Act, 15 U.S.C. § 15.

157. 405 U.S. at 255–56.

158. *Id.* at 264.

159. The author could not find post-*Spokeo* SAG-led enforcement actions in federal court for TILA, FCRA, RESPA, TSR. The author found a TCPA case, discussed above.

concurrent enforcement provision.[160] The TCPA authorizes SAGs to recover actual monetary loss on behalf of state residents, $500 per violation, or up to $1500 (treble damages) per willful or knowing violations.[161] The State alleged that the defendant placed 112,000 calls that violated the TCPA. In the complaint, the State does not actually assert that any Marylanders received one of these calls.[162] The defendant, in its motion to dismiss, asserted that the State must plead that there were concrete harms and that "[n]ot one citizen is named as the recipient of a telephone call [that violated the TCPA] from the Defendants."[163] The State, in its response, asserted that "the plain language of the statute does not require that consumers receive the offending message."[164] The court, finding that the State had standing, found that the defendants had knowingly violated the TCPA, making the defendants liable for treble damages, and ordered that the defendants pay the State $1,000,000 in statutory damages.[165] If statutory *parens patriae* standing survives *TransUnion*, then SAGs can likely recover statutory damages for each violation of the law, even without showing that each legal violation led to a concrete harm.

Even though, as this note argues, the rationale of *Spokeo* and *TransUnion* does not apply to SAG-led enforcement actions, SAGs should not rely solely on statutory grants of standing and should assert the existence of *parens patriae* standing under common law to improve the State's chances of surviving a motion to dismiss for lack of standing.

ii. SAGs can also recover damages through common law parens patriae *claims*

Defendants will likely assert in their motion to dismiss that SAGs cannot, when bringing common law *parens patriae* claims, seek monetary damages on behalf of individual consumers. The federal circuits are split as to whether SAGs can recover monetary damages in a *parens patriae* suit. However, the decisions which hold that SAGs cannot act in a *parens patriae* capacity when recovering damages for state citizens is inconsistent with *Snapp*, and these decisions ignored the "federal benefit" quasi-sovereign interest. Thus, a faithful interpretation of *Snapp*—and the precedent immediately following *Snapp*—establishes that SAGs can recover monetary damages for aggrieved state citizens in *parens patriae* litigation.

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160. *See, e.g.*, Maryland v. Universal Elections, Inc., 862 F. Supp. 2d 457, 466 (D. Md. 2012) (awarding the State of Maryland one million dollars after the defendant committed willful violations of the TCPA, even after the State did not plead any actual damages).

161. Telephone Consumer Protection Act, 47 U.S.C. § 227(g)(1).

162. Complaint, Maryland v. Universal Elections, Inc., No. 10-CV-03183 (D. Md. Nov. 10, 2010).

163. Memorandum in Support of Motion to Dismiss Complaint at 4, Maryland v. Universal Elections, Inc., No. 10-CV-03183 (D. Md. Dec. 15, 2010).

164. Opposition to Motion to Dismiss at 8, Maryland v. Universal Elections, Inc., No. 10-CV-03183 (D. Md. Dec. 22, 2010).

165. Maryland v. Universal Elections, Inc., 862 F. Supp. 2d 457, 466 (D. Md. 2012).

As previously discussed in this note, Minnesota SAG sued Standard Oil in federal court under the Economic Stabilization Act ("ESA") which sought to prevent intentional overcharges for goods in excess of what the Executive Branch had deemed permissible.[166] The ESA had no concurrent enforcement provision but did authorize the recovery of treble damages or statutory damages—"not less than $100 or more than $1000"—by "[a]ny person suffering legal wrongs because of any act or practice" that violated the ESA.[167] Minnesota sought injunctive relief and treble damages for overcharges directly incurred by the State, indirectly incurred by the State when the State purchased Standard Oil products through resellers, and directly incurred by individual citizens.[168] The court dismissed the indirect purchaser claim but denied Standard Oil's motion to dismiss the injunctive relief and two other claims for damages, finding that the ESA authorized to recover damages, not only to the State itself, but also on behalf of Minnesotans.[169]

The State alleged that the Standard Oil Company of Indiana violated the Economic Stabilization Act and that the State could sue on behalf of state residents in a *parens patriae* capacity. The court found that the SAG had common law *parens patriae* standing through both *Snapp* rationales – Minnesota had a "quasi-sovereign interest" in protecting the economic health of its citizens *and* in ensuring that its residents benefitted from federal antitrust legislation. The court allowed the State to recover "overcharges and other damages as the representative of the individual claims of its residents."[170] Not wanting to award duplicative damages, the court dismissed the State's claims for damages caused by harm to the State's general economy.

In the same year, the Fourth and Fifth Circuits held that SAGs had *parens patriae* standing to recover statutory damages on behalf of aggrieved consumers under the Hart-Scott-Rodino Antitrust Improvements Act ("AIA"). Unlike the Clayton Act and ESA, the AIA expressly authorized SAGs to bring suit in a *parens patriae* capacity. Furthermore, the AIA authorized SAGs to recover treble damages for "injur[ies] sustained by . . . natural persons to their property by reason of any violation" of the AIA. In *Mid-Atlantic Toyota Distributors*, the Fourth Circuit ruled that Congress can grant a cause of action to SAGs to enforce federal law in a *parens patriae* capacity, even when the SAGs would be unable to justify common law *parens patriae* standing through the assertion of a quasi-sovereign

166. Minnesota *ex rel.* Humphrey v. Standard Oil Co. of Ind., 568 F. Supp. 556, 559 (D. Minn. 1983).

167. Economic Stabilization Act of 1970, Pub. L. No. 92-210 § 210 (1971) (formerly codified at 12 U.S.C. § 1904).

168. 568 F. Supp. at 559.

169. *Id.* at 570–71.

170. Minnesota *ex rel.* Humphrey v. Standard Oil Co. of Ind., 568 F. Supp. 556, 565 (D. Minn. 1983). The court did note that, because the value of an individual's antitrust claim for damages was small in the instant case, individual private enforcement was unlikely and so the State "may have added incentive to bring this action as *parens patriae*, to assure its residents the full benefit of the [Economic Stabilization Act]."

interest.[171] In *Scott & Fetzer*, the Fifth Circuit rejected claims that SAGs cannot bring *parens patriae* suits when functioning as a direct representative of state citizens, reasoning that *parens patriae* suit is by definition not brought in the stead of individuals.[172]

In a discrimination case brought under the Civil Rights Act and New York state law against a membership-only social club, the Northern District of New York found that the SAG had *parens patriae* standing to assert claims for, among other things, compensatory and punitive damages.[173]

In each case where federal courts have held that SAGs do not have common law *parens patriae* standing to recover statutory damages for aggrieved consumers, the federal courts have elided any discussion of the "federal benefit" theory. The Second Circuit held in *New York v. Seneci* that, "[w]here the complaint only seeks to recover money damages for injuries suffered by individuals, the award of money damages will not compensate the state for any harm done to its quasi-sovereign interests" and that the "state as *parens patriae* lacks standing."[174] The court held that the New York SAG could not recover statutory damages for consumers under the "health and well-being" claim, suggesting that statutory damages for consumers do not flow from the harm to a state's quasi-sovereign interest in the health and well-being of a state's economy.[175] But the ruling failed to acknowledge that a state can have a quasi-sovereign interest in ensuring that its citizens benefit from federal laws.[176]

In *Navajo Nation v. Wells Fargo*, the District of New Mexico found that the Navajo Nation could not bring an enforcement action for various federal consumer laws under the *parens patriae* doctrine because the Nation's complaint failed to satisfy the requirement that "both the injury and the proposed relief must involve more than individual interests."[177] The Nation alleged violations of the Equal Credit Opportunity Act, the Equal Funds Transfer Act, the Truth in Lending Act, and the Fair Credit Reporting Act[178,179] and that the Nation had a "quasi-sovereign interest in the economic health and well-being of its people, including protection from fraud and relief from discriminatory financial practices."[180] The Nation sought damages, injunctive relief, and declaratory relief.[181]

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171. The Fourth Circuit favorably cited a law review article for the proposition that States do not have a quasi-sovereign interest "in seeing that consumers or any other group of persons receive a given sum of money." Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. L. REV. 193, 214 (1970).

172. Texas v. Scott & Fetzer Co., 709 F.2d 1024, 1027 (5th Cir. 1983).

173. New York v. Peter & John's Pump House, Inc., 914 F. Supp. 809, 811 (N.D.N.Y. 1996).

174. New York *ex rel.* Abrams v. Seneci, 817 F.2d 1015, 1017 (2d Cir. 1987).

175. *Id.*

176. *See generally id.*

177. Navajo Nation v. Wells Fargo & Co., 344 F. Supp. 3d 1292, 1311 (D.N.M. 2018).

178. *Id.* at 1308.

179. *Id.* at 1309. Notably, the Nation's complaint cited the provisions of these statutes detailing private rights of action.

180. *Id.* at 1311.

181. *Id.* at 1312.

The *Navajo* court agreed that economic health is a "quasi-sovereign interest when the alleged harm impacts the economy as a whole."[182] But the court concluded that the Nation was just acting as individual consumers' personal attorney in suing for damages, and thus could not bring a *parens patriae* action, favorably citing *Seneci* for the proposition that the "quasi-sovereign interest" in protecting a state's economy is separate from "the private interest in compensatory damages owed to individual consumers."[183] Like the Second Circuit, the district court in *Navajo* failed to acknowledge the "federal benefit" theory.[184]

Neither the *Seneci* nor *Navajo Nation* decisions discuss the "federal benefit" theory of *parens patriae* standing. The omission is glaring. *Snapp* recognized that "federal statutes creating benefits or alleviating hardships create interests that a State will obviously wish to have accrue to its residents."[185] The *Snapp* Court explicitly stated that "a State does have an interest, independent of the benefits that might accrue to any particular individual, in assuring that the benefits of the federal system are not denied to its general population."[186]

But sometimes, individuals cannot, or are unlikely to, vindicate their rights through private litigation. A Puerto Rican apple picker in Virginia likely will not retain counsel for alleged discrimination.[187] And so, Puerto Ricans were left largely unprotected by federal statutes. Recognizing that the practical realities of civil litigation may leave gaps in the enforcement of federal laws, the Supreme Court recognized that SAGs have a quasi-sovereign interest in filling the gap, in ensuring that their states' citizens can accrue those benefits of federal law.

Right now, private litigation and federal enforcement provide insufficient protection to American consumers. State attorneys general should use their *parens patriae* power—leaning heavily on the "federal benefit" theory—to fill in the enforcement gap.

IV. PUTTING IT TOGETHER: WHERE AND WHEN CAN SAGS USE *PARENS PATRIAE* STANDING TO ENFORCE FEDERAL CONSUMER LAWS?

SAGs can likely bring some federal consumer law enforcement actions in state courts and certain others in federal courts. Generally, state courts follow federal court requirements that litigants have standing and a cause of action.

SAGs have no inherent authority to enforce federal law, and so there must be a "clear expression of congressional purpose" for SAGs to have a cause of action

182. *Id.* at 1311.
183. *Id.*
184. *See generally id.*
185. Alfred Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 608 (1982).
186. *Id.*
187. *See* Puerto Rico *ex rel.* Quiros v. Alfred Snapp & Sons, Inc., 632 F.2d 365, 370 (2d Cir. 1980) (finding that the Commonwealth's standing to bring *parens patriae* claims was bolstered by the fact that "[i]t cannot be said with any assurance that [the migrant workers] are in positions to litigate these issues effectively"), *aff'd* Alfred Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592 (1982).

under federal law.[188,189] A comprehensive scholarly analysis of state concurrent authority in federal consumer protection statutes identified twenty-four statutes that incorporated concurrent state enforcement provisions and thus give SAGs a cause of action to enforce those consumer protection laws.[190] Among these twenty-four statutes are some of the most "familiar" consumer protection laws, such as the Fair Credit Reporting Act (FCRA), Health Insurance Portability and Accountability Act (HIPAA), and the Telephone Consumer Protection Act (TCPA).[191] SAGs have a cause of action to enforce these statutes.

As discussed in this note, there are significant questions as to whether and when SAGs can enforce federal consumer law in *federal* court in a *parens patriae* capacity.

In *state* court, SAGs almost certainly have *parens patriae* standing, as most states give Attorneys General a broad array of authority to institute litigation within their sovereign territory.[192] When the federal law gives SAGs concurrent enforcement authority to bring suit in state court, SAGs can enforce the statutes in their home state's court, as state courts are "presumptively competent[] to adjudicate claims arising under the laws of the United States" and have "concurrent jurisdiction where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case."[193]

Sometimes, enforcing federal law in state courts will maximize benefits to consumers. SAGs have familiarity with local and regional businesses and institutions, and they have more experience providing their citizens with compensation after enforcement actions.[194] And, as evidenced by the length of the preceding discussion of *parens patriae* standing in federal court, SAGs will have an easier time justifying their enforcement of federal consumer law in state court.

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188. Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 263–64 (1972).

189. *See also* Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (emphasizing that Congress must be clear as to whether individuals have a private right of action).

190. Amy Widman & Prentiss Cox, *supra* note 1, at 66. Widman and Cox identified the following state enforcement provisions: RESPA, 12 U.S.C. § 2607(d)(4) (2006); TILA, 15 U.S.C. § 1640(e) (2006); CROA, 15 U.S.C. § 1679h (2006); FCRA, 15 U.S.C. § 1681s(c)(1) (2006); CPSIA, 15 U.S.C. § 2073(b) (2006); TSR, 15 U.S.C. § 6103 (2006) (federal court only); Boxing Safety, 15 U.S.C. § 6309 (2006) (federal court only); COPPA, 15 U.S.C. § 6504 (2006) (federal court only); CAN-SPAM, 15 U.S.C. § 7706(f) (2006) (federal court only); FACE, 18 U.S.C. § 248 (2006) (federal court only); Nutrition Labeling Act, 21 U.S.C. § 337(b) (2006); HIPAA, 42 U.S.C. § 1320d-5 (2006) (federal court only); TCPA, 47 U.S.C. § 227(f) (2006) (federal court only); Household Goods Mover Oversight Enforcement and Reform Act of 2005, 49 U.S.C. §§ 14710-14711 (2006) (federal court only); Odometer Act, 49 U.S.C. § 32709(d) (2006); Dodd-Frank, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (amending the Truth in Lending Act, 15 U.S.C. § 1640(e)).

191. *Id.*

192. *See, e.g.,* State *ex rel.* Cordray v. Marshall, 915 N.E.2d 633, 638 (Ohio 2009) ("[T]he attorney general has common-law – as well as statutory – authority to institute suits on behalf of the public."); *see also* LYNNE ROSS, STATE ATTORNEYS GENERAL, POWERS AND RESPONSIBILITIES (Bureau of National Affairs 1990) for a comparative analysis of SAG authorities.

193. Tafflin v. Levitt, 493 U.S. 455, 458–60 (1990).

194. *See* Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 673 (2003), for a discussion of state enforcement of consumer protection law in state court.

However, most defendants prefer federal court as the forum for litigation and would remove the *parens patriae* proceeding to federal court under 28 U.S.C. 1331's grant of federal question jurisdiction.[195] And, occasionally, there will be benefits to filing in federal court.[196]

Though most federal consumer protection laws limit state enforcement to federal courts, two well-known federal consumer laws allow state court claims: TILA and FCRA. This means that SAGs should be able to bring enforcement actions under TILA and FCRA in state court, since both statutes authorize SAGs to bring suit in courts of "competent jurisdiction."[197] SAGs almost certainly have standing in their home state court. The defendants can remove the case to federal court but cannot have the case dismissed for lack of Article III standing. Multiple defendants have attempted this maneuver, and, in each case, the federal court simply remanded to state court under 28 U.S.C. 1447 without prejudice.[198] In at least one case, the court even slapped the defendant with attorneys' fees for wasting the court's time.[199] So, "based on well-settled law," a defendant cannot remove a case from state court and claim, post-*Spokeo*, that the plaintiff lacks Article III standing. A defendant can still remove to federal court, but many of the reasons a defendant wants to remove to federal court (when dealing with non-state parties) are absent when dealing with an enforcement action brought by a SAG.[200]

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195. Section B(iii)(c)'s discussion of whether SAGs have standing in federal court for pure statutory violations is thus relevant on the removal question: if SAGs do not have standing in federal court, then a federal court cannot exercise jurisdiction over the State and thus must send the case back to a state court.

196. When the defendant has deep pockets, an enforcement action would be particularly complex and expensive, and the harm occurred in multiple states. In this situation, SAGs should partner together in multi-state litigation (MSL) to share strategy and resources, enabling them to tackle these complex, important cases that might not have been brought in the absence of cooperation. MSL brought in federal court enables SAGs to file once and minimize the duplicative use of resources (for both the States and defendants, who would otherwise have to defend against multiple, nearly identical suits).

197. TILA, 15 U.S.C. § 1640(e); FCRA, 15 U.S.C. § 1681s(c)(1).

198. *See, e.g.,* Mocek v. Allsaints USA Ltd., 220 F. Supp. 3d 910, 910–12 (N.D. Ill. 2016) ("Defendant removed the case under 28 U.S.C. § 1441, asserting federal subject matter and diversity jurisdiction. One month later, without alleging any change in circumstances bearing on jurisdiction, defendant moved to dismiss the case for lack of federal jurisdiction . . . In response, plaintiff moved for an order remanding the case to state court pursuant to 28 U.S.C. § 1447(c)."); *see also* Tyus v. U.S. Postal Serv., 2016 WL 6108942, at *1 (E.D. Wis. Oct. 19, 2016) (remanding Fair Credit Reporting Act claim after finding plaintiff lacked standing); Hopkins v. Staffing Network Holdings, LLC, 2016 WL 6462095, at *4 (N.D. Ill. Oct. 18, 2016) (remanding FCRA claim based on lack of standing); Schartel v. One Source Tech., LLC, 2016 WL 6024558, at *3 (N.D. Ohio Oct. 14, 2016) (same); Disalvo v. Intellicorp Recs., Inc., 2016 WL 5405258, at *5 (N.D. Ohio Sept. 27, 2016) (same); Davis Neurology v. DoctorDirectory.com LLC, 2016 U.S. Dist. Lexis 84391, at *1 (E.D. Ark. June 29, 2016) (*sua sponte* remand of TCPA claim based on defendant's motion seeking dismissal for lack of standing).

199. *Mocek*, 220 F. Supp. 3d at 914 ("[D]efendant tried to have it both ways by asserting, then immediately disavowing, federal jurisdiction.").

200. As discussed above, SAGs are more likely to survive a motion to dismiss for failure to state a claim under *Twombly* and *Iqbal* because they can engage in pre-litigation fact-finding. SAGs can also bring suits on behalf of their state's residents without needing to satisfy the strictures of Rule 23.

CONCLUSION

In the wake of numerous Supreme Court decisions that have made it more difficult for consumers to achieve civil recourse for violations of their consumer rights, innovative litigation strategies must be utilized to fight back against the well-capitalized defense bar.

This note identifies the concurrent enforcement authority of State Attorneys General as one mechanism to enforce federal consumer law. Congress granted broad powers to State Attorneys General to enforce federal law, and the Supreme Court recognized that States can have common law *parens patriae* standing to bring enforcement actions. This note suggests that States might also have statutory *parens patriae* standing, such that States have federal court standing whenever the federal statute includes an explicit cause of action for States to bring suit in federal court. Even if statutory *parens patriae* standing does not exist post-*Spokeo* and *TransUnion*, this note articulates how States can likely recover a broad spectrum of relief for aggrieved consumers, justifying Article III standing under the common law *parens patriae* doctrine.