Is Modern Standing Doctrine Just Calvinball?

BY JOHN K. CRISHAM

"No sport is less organized than Calvinball."
Bill Watterson, *The Calvin and Hobbes Lazy Sunday Book*

Just a few months ago, a three-judge panel of the Seventh Circuit decided *Dinerstein v. Google*,[1] holding among other things that a breach of contract alone—without a showing of money damages—cannot ground Article III standing absent some separate and stand-alone factual harm.

The import of the panel's holding is breathtaking. After all, individuals and businesses operate on contracts every day in this country. If *Dinerstein*'s reasoning is correct, then a business that believes another has breached a contract will nevertheless have no standing to sue in federal court unless and until the former can assert a separate, money-based harm. Indeed, should this reasoning become the law, then it is no stretch to say that the viability and predictability of dozens, if not hundreds, of current contracts are up for grabs.

Case Background

Dinerstein filed a class-action lawsuit against the University of Chicago Medical Center (University) and others, on the theory that the University breached an agreement with Dinerstein by collecting and then distributing his anonymized medical records to Google, all for purposes of developing a predictive and AI-powered means of anticipating patients' future medical needs. According to Dinerstein, because the University exploited his personal medical information notwithstanding its promise in a written privacy policy and other pre-admission documents to preserve his privacy and patient confidentiality, the University should be liable as a matter of substantive Illinois contract law.

The Seventh Circuit rejected Dinerstein's contract-based claim at the threshold, holding that his allegation that the University breached their contract by disclosing such information was not the sort of "injury in fact" sufficient to ground Article III standing. In so holding, the panel repeatedly found refuge in its reading of a troika of recent US Supreme Court standing cases: *TransUnion LLC v. Ramirez*,[2] *Thole v. U.S. Bank N.A.*,[3] and *Spokeo v. Robins*.[4]

But the panel's reliance on those three cases—coupled with its seeming disregard of some at least arguably contrary Supreme Court decisions and a growing tide of disagreement among the federal circuits on the proper contours of the standing analysis—raises pointed and important questions. Indeed, and as some legal scholars were quite right to point out even before *Spokeo*'s ink could dry, have federal courts marked out a doctrine of standing with a still identifiable stopping point?[5] Or, to borrow the words of one of the panel's federal appellate colleagues, has Article III standing jurisprudence simply "jumped the tracks"?[6]

The Development of Modern Standing Doctrine

The standing doctrine in cases brought in or removed to federal court stems from the "cases" or "controversies" provision in Article III of the US Constitution, which expressly limits the "judicial Power . . . to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority," and "to Controversies to which the United States shall be a Party," "Controversies between two or more States," controversies "between a State and Citizens of another State," or between "Citizens of different States."[7]

For the first two centuries or so of American jurisprudence, it was generally well accepted that an individual had standing under Article

III to bring a federal suit if that individual could establish that he or she suffered, at the hands of the defendant, the invasion of a legal right. Within the last few decades, though, the Court's focus in articulating the relevant inquiry for standing purposes has seemed to shift, with the Court appearing to turn its sights on whether the plaintiff had alleged the violation of an "injury in fact," such as an actual monetary loss or a real physical harm.

One of the more recent cases to mark this seemingly seismic shift in standing doctrine is Justice Antonin Scalia's well-known opinion for the Court in *Lujan v. Defenders of Wildlife*.[8] There, the Court articulated in one formulation the "irreducible constitutional minimum of standing," comprising three parts:

- First, the plaintiff "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or hypothetical . . . .'"
- Second, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'"
- Third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[9]

While several recent Supreme Court decisions have continued to tweak the contours of the standing inquiry at various margins, the Court's decisions in *Spokeo* and *TransUnion* have played an outsized role in this regard. In *Spokeo*, for instance, the Court held that a plaintiff could only ground standing by actually asserting a concrete injury-in-fact, which the Court described and delimited as an injury that is "real" and "actually exist[s]."[10] And in *TransUnion*, the Court took the opportunity to refine *Lujan*'s concreteness element even more directly, holding that plaintiffs only have standing to sue in federal court if they can establish *both* a cause of action giving them a right to sue the defendant for a legal infraction, *and* a real and concrete injury that they suffered as a result of that infraction.[11]

The *Dinerstein* Panel's Rejection of Pure Breach-of-Contract Standing

It is against this (admittedly truncated) backdrop that we now assess the reasoning of and takeaways from the Seventh Circuit panel's rejection of Dinerstein's contract-based theory of standing.

In addition to certain other theories, Dinerstein alleged that he had standing to sue because when he was admitted to the University Medical Center for treatment, he was provided "a Notice of Privacy Practices detailing the University's confidentiality obligations and the circumstances in which it might use or disclose [his] medical information," and which "stated that the University would obtain 'written permission' for the sale of such information."[12] Although those privacy practices explained that "[p]atient permission was not required . . . for the University to use or share [his] information in limited research-related circumstances," Dinerstein argued that the documents made clear that "all efforts would be made to protect [Dinerstein's] privacy and that any use of his medical information would comply with both the notice and federal and state laws."[13] And because he claimed he would not have agreed to receive treatment at the University but for those promises, Dinerstein argued that the University injured him through its failure to abide by its contractual obligation to safeguard his medical information.

According to Dinerstein, his contract-based theory could proceed on the merits because any breach of contract "is itself a legally cognizable injury in fact."[14] This is so, Dinerstein claimed, because "common-law courts traditionally entertained claims for breach of contract regardless of whether the plaintiff alleged any harm beyond the breach itself," which meant that the mere allegation of a breach of contract is enough to ground Article III standing.[15]

The panel, however, disagreed. It first declined to entertain or engage with Dinerstein's position that historical practice had long accorded a breach of contract itself as a source of legal harm, finding instead that the Supreme Court's decisions in *TransUnion* and *Spokeo* rejected this notion. This was so, the panel declared, because *TransUnion* had already answered the question by "confirm[ing] that 'an injury in law is not an injury in fact.'"[16] In order to qualify as a legally cognizable injury in fact, the panel asserted, a plaintiff like Dinerstein must show *both* that he has (1) a cause of action giving him a right to sue over the defendant's legal infraction, *and* (2) an injury that was suffered as a result of that infraction. Without both, the panel concluded, there is no standing. In the Seventh Circuit's words: "[A] suitable cause of action cannot save a plaintiff's case if he has suffered no harm," because only *concrete* injury can give rise to a cognizable injury in fact.[17]

Although this holding certainly is difficult to square with certain longstanding practices (such as permitting plaintiffs to pursue contract claims for nominal damages only), the panel's stated rationale appears, at least at face value, even more confounding. Indeed, the panel relied on not only *TransUnion* and *Spokeo*, but also various writings from academics—some of whom, as noted above, have highlighted significant problems with *Spokeo*'s reasoning.[18]

The panel's reliance on these sources is puzzling, to say the least. After all, the premise underlying those scholarly articles does not seem to be that *Spokeo* was correctly decided as a doctrinal matter, but instead that it raises particularly troubling consequences for cases involving allegations of a breach of contract, insofar as such allegations may not suffice to ground standing without some independent theory of additional factual harm. The downstream effect of applying *Spokeo*'s logic in contract cases could well prove problematic:

> Requiring an injury in fact to support standing for breach of contract . . . would limit freedom of contract by restricting the enforceability of rights that parties create through contracts. Contract provisions designating federal courts as the appropriate forum for breach actions would be unenforceable if the consequence of the breach does not result in a cognizable factual injury. Requiring injury in fact could also generate disparity in the enforceability of contract rights in federal and state courts—thereby undermining one of the principal reasons for extending diversity jurisdiction to the federal courts. State courts that do not have an injury in fact

requirement could hear breach claims that federal courts could not hear.[19]

Nor is that the mere extent of the problem. On the contrary, the inherent difficulty in transposing *Spokeo*'s articulation of what qualifies as an injury-in-fact from the statutory context into the breach-of-contract context raises serious questions about whether *Spokeo* was rightly decided. After all, the Supreme Court often limits the reach of its decisions when it views such a limitation doctrinally necessary or appropriate,[20] and yet one will search *Spokeo* in vain for any such carve-out for traditional breach-of-contract claims. The absence of any such limitation is not insignificant:

> The inability to square *Spokeo* with contracts provides a compelling argument that *Spokeo* was wrongly decided. Faithfully following its language and logic would prevent federal courts from fulfilling their function of enforcing legally valid contracts. Large swaths of contracts that contain provisions aimed at protecting privacy or provisions conferring rights idiosyncratically valued by the parties would not be vindicated in federal court. This cannot be right. When a person sues to vindicate a contract right, standing should not depend on whether the breach of contract caused an injury in fact. The violation of the contractual right alone should suffice to support standing. Generalizing this principle from contracts to other areas of the law provides strong support for the argument that the violation of a legal right should suffice to support standing.[21]

Not only that, but *Dinerstein*'s reasoning raises other difficult questions too. It seems hard to reconcile with longstanding common law breach-of-contract remedies, with other recent Supreme Court decisions in similar contexts, and with long latent and now more festering disagreement among the federal circuits as to the validity of current standing doctrine more generally.

Standing Questions Worth Considering Post-*Dinerstein*

These evolving approaches to Article III standing—marked most recently by *Dinerstein*—are sure to raise many questions in the minds of judges, lawyers, and litigating parties alike. Although a complete analysis of those questions and their potential answers is beyond the scope of this article, some of those that seem particularly timely and important to businesses are set forth below.

Do Nominal Damages Remain a Viable Remedy in Breach-of-Contract Cases?

One of the more immediate questions raised in the wake of the Seventh Circuit's decision is whether federal courts remain a suitable forum for a litigant seeking to recover nominal damages as a remedy for a breach of contract.

Some may scoff at such a question. After all, well-worn treatises make clear that nominal damages have been a well-accepted form of remedy dating back to and before the American founding—because, as Blackstone put it, the British legal principle underlying a cause of action is that "where there is a legal right there is also a legal remedy, by suit or action of law, whenever that right is invaded."[22]

The story is the same here in the United States: Nominal damages have been held to be a valid remedy in cases alleging violations of the Constitution[23] and some federal statutes,[24] and have been accepted in common law tort[25] and contract[26] contexts too. Indeed, in one recent example here in Colorado, the high-profile musician Taylor Swift prevailed before a federal jury and was awarded nominal damages of $1 on her counterclaims of assault and battery.[27]

The *Dinerstein* panel's reasoning seems incompatible with this long line of established Anglo-American law. And that is particularly true given the panel's failure to grapple meaningfully with the disconnect between its reasoning (emanating, we are told, from the rationale in *Spokeo* and *TransUnion*) and that of the Supreme Court in *Uzuegbunam v. Preczewski*.[28]

In *Uzuegbunam*, the parties agreed that the plaintiff had adequately alleged an injury in fact, and disputed instead whether nominal damages would suffice to "redress" his injury—that is, whether nominal damages were permissible both in their prospective and retrospective forms. The defendants argued that nominal damages could not be awarded as retrospective relief, insofar as nominal damages typically marked an avenue for plaintiffs to protect current actions from future legal threats, not as a means of remedying past legal harms.[29]

The *Uzuegbunam* Court disagreed. Relying in no small part on the "later courts" at British "common law," the Court explained that "*every* legal injury necessarily causes damages," such that "nominal damages" often were "awarded" even "absent evidence of other damages (such as compensatory, statutory, or punitive damages)" and even "did so where there was no apparent continuing or threatened injury for nominal damages to address."[30]

And in rejecting Chief Justice Roberts's attempted casting of such cases as British, rather than American, the Court pointed to decisions from Justice Story explaining that "a prevailing plaintiff 'is entitled to a verdict for nominal damages' whenever 'no other [kind of damages can] be provided,'"[31] precisely because nominal damages are available "whenever there is a wrong," and that, "'[a] fortiori, this doctrine applies where there is not only a violation of a right of the plaintiff, but the act of the defendant, [which] if continued, may become the foundation, by lapse of time, of an adverse right.'"[32]

The *Dinerstein* panel, meanwhile, took a different tack. Relying on Chief Justice Roberts's *Uzuegbunam* dissent, the panel held that deciding the merits of a breach of contract claim without a separate, attendant harm would be accepting the invitation to function "'not as an Article III court, but as a moot court.'"[33] But the correctness of that view is far from certain: After all, and as *Uzuegbunam* itself explained, the idea that litigants may recover nominal damages alone was "unsurprising in the light of the noneconomic rights that individuals had at that time," including the right to "due process or voting rights," ones "that were not readily reducible to monetary valuation."[34]

And as the *Uzuegbunam* Court rightly explained, although nominal damages assuredly are minimal in nature, they are not merely symbolic:

> [A] person who is awarded nominal damages receives "relief on the merits of his claim" and "may demand payment for nominal damages

no less than he may demand payment for millions of dollars in compensatory damages." Because nominal damages are in fact damages paid to the plaintiff, they "affec[t] the behavior of the defendant towards the plaintiff" and thus independently provide redress. True, a single dollar often cannot provide full redress, but the ability "to effectuate a partial remedy" satisfies the redressability requirement.[35]

To be sure, the *Dinerstein* panel and some of its defenders may minimize the importance of *Uzuegbunam* on the grounds that it decided a question of redressability, not whether there was a well-pleaded injury in fact. But even were that distinction sufficient, it does nothing to locate the panel's decision within the broader Anglo and American system of law on nominal damages more generally. And that, perhaps not surprisingly, raises a related and long-percolating question haunting the standing analysis, and one that certain recent federal appellate court opinions have brought once more to the foreground.

Is Modern Standing Doctrine a Gotcha?

Over 35 years ago, in an eyebrow-raising article entitled "The Structure of Standing," current Ninth Circuit Senior Judge William Fletcher postulated that the problem with accepted standing doctrine lied in its "structure."[36] By developing a test for standing that focused on whether the plaintiff had suffered an "injury in fact," and through "attempt[ing] to capture the question of who should be able to enforce legal rights in a single formula," he explained, the courts had gone astray. The proper course correction, in Judge Fletcher's view, would be one in which courts treat "standing . . . [as] a question on the merits of plaintiffs' claim."[37]

Strains of similar criticisms now find themselves among the pages of the Federal Reporter. Eleventh Circuit Judge Kevin Newsom, for example, authored an important concurring opinion in *Sierra v. City of Hallandale Beach*,[38] a case that involved a claim by a deaf individual suing a city in Florida under Title II of the Americans with Disability Act on the theory that the city failed to provide closed captioning on certain videos it posted to its website, which injured him because he was left with no way to understand the meaning of those videos. The Eleventh Circuit reversed the district court's dismissal on standing grounds, holding that Sierra had alleged a viable injury for standing purposes, because he "was personally and directly subjected to discriminatory treatment when Hallandale Beach published videos on its website that he accessed but could not understand."[39]

Although he agreed with the ultimate result reached by the panel, Judge Newsom noted his doubts that "current standing doctrine—and especially its injury-in-fact requirement—is properly grounded in the Constitution's text and history, coherent in theory, or workable in practice."[40] In Judge Newsom's view, the current approach to the standard handed down from *Lujan* to *Spokeo* was misguided:

> There is a far more natural and straightforward reading of the word "Case" than one that turns on the existence of an "injury in fact": An Article III "Case" exists so long as—and whenever—a plaintiff has a cause of action, whether arising from the common law, emanating from the Constitution, or conferred by statute.[41]

Under this approach, Judge Newsom explained, a plaintiff has standing "whenever he has a legally cognizable cause of action, regardless of whether he can show a separate, stand-alone factual injury."[42] In so concluding, Judge Newsom pointed to the fact that the kinds of cases courts "routinely heard in the years surrounding the Founding" were those in which a "case" was treated as "synonymous with cause of action," and notably identified suits seeking nominal damages as a prime example.[43]

What Comes Next—Calvinball?

Dinerstein's rationale and holding are difficult to square with the historical tradition of courts hearing suits for nominal damages. Maybe that is the correct result, maybe there is a way to reconcile the two, and maybe the Supreme Court will explain how and do so expressly.

But unless and until that happens, the Seventh Circuit's decision should give any person or business operating on a contract basis pause—if it really is the case that the doors to federal court are closed to those who have suffered nominal damages from a breach of contract, that would work a sea change in the common law tradition that existed for centuries before this country came to be. And unless and until the Supreme Court addresses the limitations and seeming incoherence of its injury-in-fact requirement, litigants, lawyers, and lower courts alike are going to find themselves stuck playing a standing law version of Calvinball—where "the only permanent rule . . . is that you can't play it the same way twice!"[44] This may be the endgame that the Constitution's founders envisioned for determining who may and may not proceed in federal court, but if so, it would seem helpful to have the Supreme Court explain why. CL

John K. Crisham is a founding partner of the law firm of Crisham & Holman LLC. Previously, he was a partner at Greenberg Traurig LLP in Denver, an associate and then partner at Kirkland & Ellis LLP in Washington, DC, and a law clerk for Judge Paul J. Kelly Jr. of the US Court of Appeals for the Tenth Circuit. Throughout his nearly 20 years of practicing law, Crisham has briefed, argued, and won complex civil litigation cases in state and federal trial and appellate courts throughout the country involving questions of federal preemption, federal and state constitutional law, and statutory interpretation, as well as class actions, energy and environmental matters, commercial and business disputes, products liability and health care, and employment law.

Coordinating Editor: John Ridge, john.ridge@outlook.com

NOTES

1. *Dinerstein v. Google, LLC*, 73 F.4th 502 (7th Cir. 2023).

2. *TransUnion LLC v. Ramirez*, __U.S.__, 141 S.Ct. 2190 (2021).

3. *Thole v. U.S. Bank N.A.*, __ U.S. __, 140 S.Ct. 1615 (2020).

4. *Spokeo v. Robins*, 578 U.S. 330 (2016).

5. *See, e.g., Hessick*, "Standing and Contracts," 89 *Geo. Wash. L. Rev.* 298 (2021) ("Hessick, Standing and Contracts").

6. *See Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1117 (11th Cir. 2021) (Newsom, J., concurring).

7. U.S. Const. art. III, § 2, cl. 1.

8. *Lujan v. Def. of Wildlife*, 504 U.S. 555 (1992).

9. *Id.* at 560–61 (citations omitted).

10. *Spokeo*, 578 U.S. at 340.

11. *TransUnion*, 141 S.Ct. at 2205.

12. *Dinerstein*, 73 F.4th at 508.

13. *Id.* (alterations and internal quotation marks omitted).

14. *Id.* at 518.

15. *Id.*

16. *Id.* at 518–19 (quoting *TransUnion*, 141 S.Ct. at 2205).

17. *Id.* at 519.

18. *Id.* (quoting Hessick, *supra* note 5 (noting that "[t]he logic of Spokeo," which holds that "standing cannot rest on violations of legal rights that do not result in factual harms," seems to apply equally "to suits alleging breach of contract," which themselves "simply establish legal rights") (internal quotation marks omitted)).

19. Hessick, *supra* note 5 at 301–02 (footnotes omitted).

20. *See, e.g., Mut. Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472, 487 n.4 (2013) ("We do not address state design-defect claims that parallel the federal misbranding statute.").

21. Hessick, *supra* note 5 at 302 (footnotes omitted).

22. 3 Blackstone, *Commentaries on the Laws of England* at *23.

23. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (noting that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," and that although "[t]he government of the United States has been emphatically termed a government of laws, and not of men," that "high appellation" "will certainly cease to" apply should "the laws furnish no remedy for the violation of a vested legal right") (citations omitted); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151–52 (1970) (noting that one question that matters for Article III standing purposes, at least under the federal Administrative Procedures Act, "is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise") (emphasis added).

24. *See, e.g., Alexander v. Riga,* 208 F.3d 419, 428–29 (3d Cir. 2000) (holding that "even absent proof of actual injury, nominal damages are to be awarded to recognize [a] violation of a constitutional right") (citing *Carey v. Piphus*, 435 U.S. 247, 266–67 (1978)).

25. *See, e.g., Yukos Ca. SA v. Feldman*, 977 F.3d 216, 243–44 (2d Cir. 2020) (explaining that although "nominal damages cannot satisfy the 'damage' element of a tort that requires actual harm" under New York law, "nominal damages can be available as a remedy, in limited damages, to plaintiffs who have *already established* a claim for breach of fiduciary duty but who cannot recover compensable damages") (emphasis in original) (citing *inter alia, Restatement (Second) of Torts* § 907 cmt. a (1979) (recognizing that a court may award nominal damages when "a cause of action for a tort exists but no harm has been caused by the tort or the amount of harm is not significant or is not so established that compensatory damages can be given"), and quoting 22 *Am. Jur. 2d*, Damages § 8 (explaining that "nominal damages" means one of "two types of awards: (1) those damages recoverable where a legal right is to be vindicated against an invasion that has produced no actual, present loss of any kind; and (2) the very different allowance made when actual loss or injury is shown, but the plaintiff fails to prove the amount of damages")).

26. *See, e.g., Cath. Charities of Sw. Kan., Inc. v. PHL Variable Ins. Co.*, 74 F.4th 1321, 1323 (10th Cir. 2023) (observing that a party may "assert a breach of contract claim seeking nominal damages, specific performance, or" other applicable remedies even absent actual money damages); *Nieves v. Plaza Rehab. & Nursing Ctr.*, No. 20-cv-1191, 2023 WL 4763945, at *10 (S.D.N.Y. July 26, 2023) (explaining that "in contract actions, if a plaintiff cannot show actual damages flowing from the breach of contract, she is entitled to nominal damages," and that this is "true even if nominal damages were not explicitly pleaded in the complaint") (quoting *Heimei v. Peconic Bay Med. Ctr.*, No. 17-cv-782, 2022 WL 4551696, at *11 (E.D.N.Y. Sept. 29, 2022), and citing, *inter alia, Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 651 (2d Cir. 1998)).

27. *See* Final Judgment at 1, *Mueller v. Swift*, No. 15-cv-1974 (D.Colo. Aug. 15, 2017) (No. 241).

28. *Uzuegbunam v. Preczewski*, 141 S.Ct. 792 (2021).

29. *Id.* at 798.

30. *Id.* (citing *Barker v. Green*, 2 Bing. 317, 130 Eng.Rep. 327 (C.P. 1824) (nominal damages awarded for one-day delay in arrest because "if there was a breach of duty the law would presume some damage"); *Hatch v. Lewis*, 2 F.&F. 467, 479, 485–86, 175 Eng.Rep. 1145, 1150, 1153 (N.P. 1861) (ineffective assistance by criminal defense attorney that does not prejudice the client); *Dods v. Evans*, 15 C.B.N.S. 621, 624, 627, 143 Eng.Rep. 929, 930–31 (C.P. 1864) (breach of contract); *Marzetti v. Williams*, 1 B. & Ad. 415, 417–18, 423–28, 109 Eng.Rep. 842, 843, 845–47 (K.B. 1830) (bank's one-day delay in paying on a check); *id.* at 424, 109 Eng.Rep. at 845 (recognizing that breach of contract could create a continuing injury but determining that the fact of breach of contract by itself justified nominal damages)).

31. *Uzuegbunam*, 141 S.Ct. at 799 (quoting *Webb v. Portland Mfg. Co.*, 39 F.Cas. 506, 508–09 (No. 17,322) (CC Me. 1838)).

32. *Id.* (quoting Webb, 39 F.Cas. at 507).

33. *Dinerstein*, 73 F.4th at 520 (quoting *Uzuegbunam*, 141 S.Ct. at 804 (Roberts, C.J., dissenting)).

34. *Uzuegbunam*, 141 S.Ct. at 800 (citing, inter alia, Carey, 435 U.S. at 266–67 (awarding plaintiff nominal damages for a violation of procedural due process)).

35. *Id.* at 801 (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992), and *Hewitt v. Helms*, 482 U.S. 755, 761 (1987), and citing *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S.Ct. 1652, 1660 (2019) ("If there is any chance of money changing hands, [the] suit remains live."), and *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)).

36. *Fletcher*, "The Structure of Standing," 98 Yale L.J. 221 (1988).

37. *Id.* at 223.

38. *Sierra*, 996 F.3d at 1113.

39. *Id.* at 1114.

40. *Id.* at 1115 (Newsom, J., concurring).

41. *Id.* at 1122.

42. *Id.* at 1115.

43. *Id.* at 1123 ("At common law, courts regularly awarded nominal damages when a plaintiff suffered a legal injury but either didn't seek or couldn't prove compensatory damages.") (citations omitted).

44. *See* Watterson, *Scientific Progress Goes Boink?* 153 (Andrews McMeel Publishing 1991); Watterson, *The Calvin & Hobbes Tenth Anniversary Book* 129 (Andrews McMeel Publishing 1995) ("People have asked how to play Calvinball. It's pretty simple: you make up the rules as you go.").