No. 20-1673

In the Supreme Court of the United States

ASHLEY NETTLES, PETITIONER,
v.
MIDLAND FUNDING LLC & MIDLAND CREDIT MANAGEMENT, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

CURTIS C. WARNER
5 E. Market St., Ste. 250
Corning, NY 14830
(888) 551-8685
cwarner@warner.legal

JAMES C. PHILLIPS
Donald P. Kennedy Hall
One University Dr.
Orange, CA 92866
714-628-2543
jcphillips@chapman.edu

GENE C. SCHAERR
Counsel of Record
HANNAH C. SMITH
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Petitioner

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INTRODUCTION

Imagine a lawyer freshly graduated from law school with massive debt, say $150,000. Struggling to make the monthly payment, the lawyer receives a collection letter overstating the amount by nearly 20%—or $30,000—and threatening to collect if the inflated amount is not fully paid. Further, the debt collector initiates wage garnishments. Wouldn't that cause panic, confusion, fear, and stress? And wouldn't the lawyer likely have to take time away from work and personal life to deal with this error?

That's what happened to Petitioner Ashley Nettles. Yet Respondents flippantly recharacterize her emotional and mental anguish and lost work and time as mere annoyance and inconvenience. A long line at the grocery store is annoying and inconvenient. A commercial Goliath coming after you for more than you owe is something much more.

Recognizing this, Respondents' brief is a master class in mischaracterization, obfuscation, and contradiction. For instance, Respondents claim (at 2) that Ashley "never argued" that receiving the letter overstating her debt "is closely related to a historically cognizable injury," yet later in the brief concede (at 10) that Ashley analogized to the common law torts of abuse of process and malicious prosecution.

Respondents also admit (at 2,13) that the lower court failed to do the historical analysis that *Spokeo* and *TransUnion* require. And Respondents confess (at 13-16) that on both questions presented there are still circuit splits, even in the wake of *TransUnion*.

Respondents are therefore left with the classic refrain of Respondents everywhere: more lower-court percolation is necessary. But Respondents fail to rebut Petitioner's showing that the issues presented affect millions of Americans and are national in scope and importance—increasingly so in the wake of a pandemic-induced recession. In short, both questions remain viable and in need of this Court's resolution.

ARGUMENT

I. Respondents Mischaracterize the Record and the Permissible Inferences Therefrom.

In an attempt to undermine the petition as a vehicle for resolving these questions, Respondents fan a lot of factual smoke but point to no flames.

As Respondents would have it, Ashley merely experienced a little annoyance and inconvenience from receiving an inaccurate letter. BIO.2-3,14-15.[1] As the petition and appendix make clear, however, that is false—especially given that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

The letter Respondents sent Ashley, besides ignoring payments she had made and overstating the amount she owed by nearly 20%, "was an attempt to collect on" that inflated amount. Pet.12 (quoting Pet.App.11a). Further, as Respondents admitted in oral argument, its efforts to collect were not confined

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[1] Respondents lean heavily upon the Seventh Circuit's equally erroneous mischaracterization of Ashley's injuries. BIO.7. But doubling down on an error does not make it correct.

to sending a letter but also included "garnishments in the Michigan state court." Pet.App.12a.

Not surprisingly, these actions by Respondents induced panic in Ashley, causing her to be "upset," "completely confused," and "fearful." Pet.13 (citing record). After all, in response to previously being sued by Respondents and engaging in negotiations that resulted in a state court entering a consent judgment, upon which she had begun making monthly payments, Ashley thought this dispute was settled and she could move on. Pet.11. But to deal with the new letter, Ashley had to take time out from work, school, and home, including consulting her attorney. Pet.13. And that was a big deal given her precarious family and financial situation. Pet.9-10. This was no mere annoyance.

Further, Respondents' claim (at 6) that Ashley admitted that Midland's actions "did not technically affect her in any way" is misleading. That comment by Ashley's counsel was in the context of Seventh Circuit precedent which did not recognize the emotional, temporal, or legal injuries she was raising. Pet.App.20. It was thus a statement about Seventh Circuit law, not about the actual, personal impact of Respondents' conduct on Ashley.

II. *TransUnion* Expressly Did Not Resolve the Issue in this Petition's Second Question Presented and Respondents Concede There Is a Circuit Split.

In two respects, Respondents are also wrong about *TransUnion* and its impact on this case.

1. First, as the Petition showed, the lower courts are split on whether the types of emotional and mental injuries, as well as lost time, that Ashley suffered can satisfy Article III standing requirements. Pet.26-29. And this Court expressly left that question unresolved in *TransUnion LLC* v. *Ramirez*, 141 S.Ct. 2190, 2211 n.7 (2021). There the Court noted that knowing exposure "to a risk of future physical, monetary, or reputational harm could cause its own current emotional or psychological harm." *Ibid*. But because the plaintiffs in *TransUnion* did not raise such an argument, the Court took "no position on whether or how such an emotional or psychological harm could suffice for Article III purposes." *Ibid*.

Yet the Court repeatedly hinted that such harm *could* suffice for Article III standing. *Id*. at 2211 (implying that "an actual harm that has occurred but is not readily quantifiable" satisfies *Spokeo*'s observation that "the law has long permitted recovery by certain tort victims even in their harms may be difficult to prove or measure") (quoting 578 U.S. at 341). For instance, in finding that some of the *TransUnion* plaintiffs did not "present evidence" that they "were independently harmed," the Court identified "emotional injury" as an injury that may justify standing. *Ibid*. The Court also noted, in finding a lack of concreteness, that the plaintiffs failed to

present evidence that "they were confused[or] distressed." *Id.* at 2213 (quoting *Ramirez* v. *Transunion LLC*, 951 F.3d 1008, 1039 (2020) (opinion of McKeown, J.)); see also *id.* at 2214 (same).[2]

As to the presentation of evidence, a trial was held in *TransUnion*. 141 S.Ct. at 2202. But here the proceedings never got beyond a motion to compel arbitration filed just a couple of months after the complaint was filed. That is important because "[a] plaintiff must demonstrate standing with the manner and degree of evidence required at successive stages of the litigation." *Id.* at 2208 (cleaned up). And "[a]t the pleading stage, *general factual allegations of injury* resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at

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[2] That *TransUnion* would imply that emotional injury, such as confusion or distress, could be a sufficient injury for Article III standing make sense both practically and legally. Practically, as we have all experienced, such injuries have real physiological and health impacts. See Tom C. Russ et. al., *Association Between Psychological Distress and Liver Disease Mortality: A Meta-analysis of Individual Study Participants*, 148 Gastroenterology 958, 965 (2015), https://doi.org/10.1053/j.gastro.2015.02.004 (noting "growing evidence of a detrimental impact of psychological distress on physical conditions"); Sarah Stewart-Brown, *Emotional Wellbeing and its Relation to Health: Physical Disease May Well Result From Emotional Distress*. 317 BMJ 1608-1609 (1998), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1114432/pdf/1608.pdf (discussing studies correlating emotional distress with physical illness). And legally, every state recognizes torts arising from emotional distress. *In re Big Apple Volkswagen, LLC*, 571 B.R. 43, 50 (S.D.N.Y. 2017) (finding every state permits recovery on the basis of emotional distress).

561 (cleaned up, emphasis added). Thus, despite Respondents' desire to hold Ashley to a higher evidentiary standard, Ashley's allegations that Midland caused her to be "upset," "completely confused," "fearful," and to lose time, suffice given the stage of the proceedings below. Pet.13.

Moreover, other things that *TransUnion* noted were lacking from the alleged injuries of the plaintiffs there—and whose absence precluded a finding of an Article III injury—are *present* here. For example, *TransUnion* faulted some plaintiffs for failing to "establish a sufficient risk of future harm to support Article III standing." *TransUnion*, 141 S.Ct. at 2212. Yet here, besides the emotional harm and lost time, Respondents admitted to initiating garnishment proceedings against Ashley. Pet.App.12a. Likewise, while "there [was] no evidence" that the *TransUnion* plaintiffs that lacked standing "so much as opened" the mailings that violated the statute, 141 S.Ct. at 2213, 2214, here Ashley clearly had read the letter.

Similarly, *TransUnion* found "[i]t *** difficult to see how a risk of future harm could supply the basis for a plaintiff's standing when the plaintiff did not even know that there was a risk of future harm." *Id.* at 2212. By contrast, besides suffering immediate emotional and temporal harm, Ashley clearly knew of the risk of future financial harm. Pet.App.18a. Indeed, the risk of harm later manifested after the filing of this complaint, when Defendant attempted to garnish a larger amount than Ashley owed. *Id.* at 12a. The letter that Ashley received, like the later garnishment, are both completely unlike a letter that sits in a desk drawer. They would naturally have a

real-word impact on the reader's decision-making and emotional state.

Finally, in finding a lack of standing, *TransUnion* noted that "[t]he plaintiffs put forth no evidence" that they "would have tried to correct" the error. *Id*. at 2213. Here, by contrast, Ashley lost time from work, school, and home life *trying* to correct the erroneous debt amount. Pet.9; Pet.App.18a.

In sum, this petition presents "a real controversy with real impact on [a] real person[]"—the very thing that "a federal court may resolve." *TransUnion*, 141 S.Ct. at 2203 (quoting *American Legion* v. *American Humanist Assn.*, 139 S.Ct. 2067, 2103 (2019) (Gorsuch, J., concurring). The Court should grant review to make clear that such injuries confer Article III jurisdiction.

2. Like a failed magician, Respondents' efforts to make the circuit split disappear also fall short. For example, Respondents try to show that the Eleventh Circuit did not squarely split with the decision below because *Fern Kottler* "considers only whether time spent communicating with a *debt collector* qualifies as a concrete harm," BIO.16, whereas here Ashley spent time communicating with her attorney. But this argument is a classic distinction without a difference. What matters is that in both cases the debt collectors' illegal conduct caused an injured party to take time to address the harm. For an unrepresented person, that could involve contacting the debt collector directly. But for a person already represented by counsel, it makes little sense to contact the debt collector directly, especially in Ashley's situation, where her attorney

and the debt collector had already negotiated a solution.

Further, the debt collector's attorneys could not ethically talk to a represented person directly without the person's lawyer's consent and such communication around Ashley's counsel would also be another per se violation of the Act.[3] An injury for purposes of standing cannot depend on whether someone has an attorney—otherwise represented individuals will be forced to communicate with those that injure them without their attorney's assistance. That result is neither mandated by the Constitution nor worthy of incentivization.

Advancing another irrelevant distinction, Respondents argue that "[t]he other cases cited by petitioner consider annoyance alone as a concrete harm." BIO.16. So what? Ashley advanced two separate types of harm: emotional and temporal. It therefore does not matter if some cases only address one of those harms. What matters is that they came out differently than the decision below and so result in a split.

And, for reasons previously explained, Respondents' (mis)characterization of these cases as considering "annoyance" understates the harms recognized in those cases: being "confused [or] misled," *Frank* v. *Autovest LLC*, 961 F.3d 1185, 1188 (D.C. Cir. 2020); feeling "emotional distress, anger, and frustration," *Ben-Davies* v. *Blibaum & Assocs., P.A.*, 695 F. App'x 674, 676-677 (4th Cir. 2017); being

[3] See ABA Model Rules of Professional Conduct, Rule 4.2; 15 U.S.C. § 1692c(a)(2).

"clustered and jumbled," "scared," and "feared," *Fern Kottler* v. *Gulf Coast Collection Bureau, Inc.*, 847 F. App'x 542, 543 (11th Cir. 2021). If that's not enough, Respondents fail to acknowledge that *Fern Kottler* held that *both* time and emotional injuries provide standing. *Ibid*.

There is thus a clear conflict on the second question presented, involving multiple circuits on both sides. Pet.26-29.

Despite this, Respondents contend that "further percolation is warranted" because these courts did not conduct a historical analysis as required under *TransUnion*. BIO.3,6,15. But at least as to emotional injury, this badly misreads *TransUnion*, which "took *no position* on *** *how* *** emotional or psychological harm could suffice for Article III purposes." 141 S.Ct. at 2211 n.7 (emphasis added).

Thus, a GVR on this point would be futile: *TransUnion* took "no position" on the issue, 141 S.Ct. at 2211 n.7, and Seventh Circuit precedent forecloses Ashley's emotional and psychological injuries, Pet.App.7a-8a; BIO.15. Like millions of other Americans who have similarly suffered, the only remedy for the harm Respondents inflicted on Ashley depends on this Court's resolving the circuit split on the second question presented—the question *TransUnion* left unresolved.

III. Respondents Admit the Lower Court Did Not Conduct the Required Historical Analysis and There Is Still a Circuit Split on the First Question Presented.

As to the first question presented: Respondents claim that "*TransUnion* resolves [that] question in respondents' favor." BIO.8. For two reasons, this is wrong.

1. First, Respondents concede that the lower court here did *not* conduct the historical analysis that both *Spokeo* and *TransUnion* require. BIO.2. Instead, Respondents brazenly claim (at 2) that "petitioner has never argued that the receipt of an inaccurate collection letter is closely related to a historically cognizable injury." But Respondents later admit (at 10) that in the litigation below Ashley analogized Respondents' conduct to "a common law abuse of process claim" and "the common-law tort of malicious prosecution." And they admit that the lower court did not perform any historical analysis, instead relying solely on circuit precedent. Pet.App.1a-8a; see BIO.13 (noting the Seventh Circuit did not conduct "the historical inquiry called for by *TransUnion*"). And that precedent, involving a different type of injury (failing to provide statutorily required information in a letter), also conducted no historical inquiry. See *Casillas* v. *Madison Ave. Assoc's*, 926 F.3d 329 (7th Cir. 2019).

In short, *TransUnion* did not resolve the first question presented in favor of the Respondents because the lower court never performed the analysis *TransUnion* requires. At the very least, a GVR on that question is necessary so that the Seventh Circuit can

address Ashley's historical analogs in the first instance.

2. Second, in any event, plenary review is warranted because Respondents confess there is a circuit split even after *TransUnion*. BIO.13-14. On facts nearly identical to those here, the Eighth Circuit determined that a debt collection letter that "falsely represent[ed] the amount of debt, falsely threaten[ed] to take action, us[ed] unfair means to attempt to collect debt, and attempt[ed] to collect debts not owed" "is similar to the harm suffered by victims of the common-law torts of malicious prosecution, wrongful use of civil proceedings, and abuse of process." *Demarais* v. *Gurstel Chargo, P.A.*, 869 F.3d 685, 691 (8th Cir. 2017). Thus, despite "not alleg[ing] any tangible harms from the *** letter," the court found the plaintiff had standing under the historical analog analysis for alleged violations of sections 1692e and 1692f of the Fair Debt Collection Practices Act—the same sections under which Ashley brought suit. *Id.* at 692. See also *St. Pierre* v. *Retrieval-Masters Creditors Bureau, Inc.*, 898 F.3d 351, 355 (3d Cir. 2018) (finding standing because the defendant's conduct "implicates *** the invasion of privacy—and thus is closely related to harm that has traditionally been regarded as provide a basis for a lawsuit in English and American courts").

Yet when faced with nearly the same facts and some of the same historical analogs, the Seventh Circuit below found no standing. Hence, at the very least, Petitioner "has identified a potentially viable conflict between two courts of appeals on the question of Article III standing to seek damages under the

FDCPA based solely on the receipt of an inaccurate collection letter." BIO.14. Given the afore-mentioned split on the second question presented, the Court could also grant review on the first question and thereby resolve both splits.

IV. The Issues In This Case Remain Vitally Important for Tens of Millions of Americans.

Respondents, moreover, do not dispute the practical importance of this case. They do not deny that the average American is massively in debt and relies on the protection of the Act. Pet.29-30. Nor do Respondents deny that things have only gotten worse for most people with the pandemic-induced recession. Pet.30-31. And the nation is trending in the wrong direction on COVID-19, which will further exacerbate personal financial challenges.[4]

In the face of this national crisis, Respondents conveniently asks this Court to wait for another day. BIO.2, 8, 11, 14. But while the average American suffers financially, sinking further and further into debt, delay allows Respondents to continue to engage in underhanded tactics like those committed against Ashley.

Given these unprecedented times and given the circuit splits that even Respondents admit exist after *TransUnion*, to wait any longer would allow further injury to be inflicted unnecessarily on society's most

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[4] See Maria Caspani & Roshan Abraham, *U.S. COVID-19 Cases Reach Six-Month High, Florida Grapples With Surge*, Reuters (Aug. 5, 2021), https://www.reuters.com/world/us/us-covid-19-cases-hit-six-month-high-over-100000-reuters-tally-2021-08-05/.

financially vulnerable. The petition should therefore be granted.

CONCLUSION

Personal debt is this nation's economic pandemic, with tens of millions more people owing money than are unvaccinated against COVID-19. And unfair debt collection practices have not gone away since the Fair Debt Collection Practices Act was passed over 40 years ago. The emotional, psychological, and temporal harms Americans suffer when exposed to these underhanded practices are real. This Court's guidance on whether and how such harms satisfy Article III standing is needed now. Further lower-court percolation will only allow more Americans to sustain these injuries, even while Respondents and others continue to profit off of them.

Respectfully submitted.

GENE C. SCHAERR
Counsel of Record
HANNAH C. SMITH
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

CURTIS C. WARNER
5 E. Market St., Suite 250
Corning, NY 14830
(888) 551-8685
cwarner@warner.legal

JAMES C. PHILLIPS
Donald P. Kennedy Hall
One University Dr.
Orange, CA 92866
714-628-2543
jcphillips@chapman.edu

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