No. 22-

IN THE

Supreme Court of the United States

RENETRICE R. PIERRE,
Petitioner,
v.
MIDLAND CREDIT MANAGEMENT, INC.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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November 7, 2022

QUESTION PRESENTED

This case, as Judge Hamilton noted in his en banc dissent, "presents an important question on the extent of Congress's . . . power to authorize private civil remedies for statutory violations that cause intangible but concrete injuries, including emotional distress, fear, and confusion." *Pierre* v. *Midland Credit Mgmt., Inc.*, 36 F.4th 728, 729 (2022) (Hamilton, J., dissenting).

In this case, the district court certified a class and granted Petitioner summary judgment on her Fair Debt Collection Practices Act ("FDCPA") claim, and a jury awarded the class statutory damages. On appeal, the Seventh Circuit vacated the judgment on the basis that Petitioner suffered only confusion and emotional harm, which are not sufficiently concrete for Article III standing to pursue an FDCPA claim, despite Congress granting a right of action. *Pierre* v. *Midland Credit Mgmt., Inc.*, 29 F.4th 934, 939 (7th Cir. 2022).

In so holding, the decision below "deepen[ed] an important and growing circuit split" regarding Congress's ability to elevate intangible injuries to a legally cognizable status. *Id.* at 940 (Hamilton, J., dissenting). Moreover, the decision is "out of step" with *Spokeo, Inc.* v. *Robins*, 578 U.S. 330 (2016), and *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190 (2021). *Pierre*, 36 F.4th at 736 (Hamilton, J., dissenting).

The question presented is:

Whether a plaintiff who suffers emotional or psychological distress and confusion from a debt collector's unlawful attempt to collect a debt has Article III

standing to sue, when Congress granted the plaintiff a statutory right to do so under the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.*, and the Act was enacted to preclude emotional and psychological distress caused by debt collectors.

PARTIES TO THE PROCEEDING

Petitioner Renetrice R. Pierre was the appellee and cross-appellant below.

Respondent Midland Credit Management, Inc. was the appellant and cross-appellee below.

RELATED CASES

Pierre v. *Midland Credit Management, Inc.*, No. 16 C 2895, U.S. District Court for the Northern District of Illinois. Judgment entered Feb. 5, 2018.

Pierre v. Midland Credit Management, Inc., Nos. 19-2993 & 19-3109, U.S. Court of Appeals for the Seventh Circuit. Judgment entered April 1, 2022.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 29 F.4th 922 and reproduced at Appendix ("App.") 1a–47a. The judgment of the District Court is unpublished but available at 2018 WL 723278 and is reproduced at App. 48a–63a.

JURISDICTION

The Seventh Circuit filed its published decision on April 1, 2022. That court denied Petitioner's request for rehearing *en banc* on June 8, 2022. App. 64a–85a. On Petitioner's application, and by order of August 24, 2022, this Court extended the time within which to file a petition for writ of certiorari to November 5, 2022. As November 5, 2022 falls on a Saturday, this petition is due November 7, 2022. U.S. Sup. Ct. R. 30.1. This petition is thus timely, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III provides, *inter alia*, that "[t]he judicial Power shall extend to" "Cases" and "Controversies." U.S. Const. Art. III, § 2.

15 U.S.C. § 1692e provides, in relevant part:

> **False or misleading representations.**
>
> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> * * * *
>
> (2) The false representation of –
>
> (A) the character, amount, or legal status of any debt; or
>
> (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
>
> * * * *
>
> (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

15 U.S.C. § 1692f provides, in relevant part:

> **Unfair practices.**
>
> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.

The Appendix, at App. 86a–91a, reproduces the relevant portions of the statute.

STATEMENT OF THE CASE

I. Statutory Background

Enacted in 1978, the FDCPA was designed to "eliminate abusive debt collection practices." App. 73a. These practices had been "perfected" to "exploit[] the[] distraught condition" of debtors who were not unwilling but rather unable to pay their debts. PL 95-109 at S9351, Remarks by Mr. Riegle, President of the Consumer Affairs Subcommittee of the Committee on Banking, Housing and Urban Affairs (1977) (entering an editorial from the *New York Times* into the record). Those practices, Congress found, contributed "to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a).

While the FDCPA provides for enforcement by federal agencies pursuant to § 1692*l*, § 1692k contemplates private, civil actions as the primary method of enforcement. In the Senate Committee on Banking, Housing, and Urban Affairs' report on the bill, the committee noted that the Act would be "primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance." S. Rep. No. 95-382 at 5, *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1699. In accordance with this understanding, the committee anticipated that the legislation would result in no additional costs to the government. *Id.* at 1700. In order to spur private enforcement, the Act provides for actual damages without limitation, as well as additional damages of up to $1,000 in individual cases and up to $500,000 in class actions. § 1692k.

II. Factual Background

In 2006, Petitioner opened a credit card account with Target National Bank, which she used to purchase household goods for her and her son. App. 3a. Petitioner amassed consumer debt on the credit card and defaulted on her debt on March 30, 2008. App. 49a. In 2010, Midland Funding, LLC ("Midland Funding") purchased Petitioner's debt and sued her to collect it. App. 3a. That same year, Midland Funding voluntarily dismissed the lawsuit.

Years later, on September 9, 2015, which was well after the statute of limitations had run on Petitioner's debt, Petitioner received a letter from Midland Credit Management, Inc. ("Midland Credit" or "Respondent") attempting to collect the debt (and not disclosing it was actually collecting on behalf of Midland Funding). The letter, which had been crafted by a team of marketers to pressure debtors into paying, advised Petitioner she owed more than $7,000—more than twice the amount Petitioner had been sued for five years earlier—and had been "pre-approved" for certain "discounts" if she paid the debt within 30 days. The letter also repeatedly noted Petitioner had a "Payment Due Date" 30 days following the letter. The letter concluded with the following text:

> The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it, we will not report it to any credit reporting agency, and payment or non-payment of this debt will not affect your credit score.

In fact, these weren't "discounts" at all. And the letter tellingly omitted that Petitioner *could not* be sued on her debt at all. The letter also critically failed to make any mention of the fact that—under the relevant state law—any partial payment on Petitioner's debt or an agreement to pay the debt could restart the statute of limitations period on the debt, allowing Petitioner to be sued anew on the debt.

Petitioner was extremely distressed and confused. She thought the debt had disappeared years earlier when Midland Funding dismissed its suit against her, but now here was a different entity with a very similar name demanding payment on her debt by a specified due date. Not only that, but the debt reflected in the letter was even larger than that listed in the complaint filed against her years earlier, threatening her with financial ruin. She was worried that the calls from the debt collector would resume as before, that she would receive more mail pressing her to pay, that her credit rating would be hurt if she did not pay, and that one of the Midland entities would sue her again on the debt. She also feared that Respondent would sell her debt to another entity, who would in turn demand even more money from her, and sue her for it.

Afraid of being sued again if she did not pay the amount demanded, Petitioner called Respondent to contest its collection efforts and consulted a lawyer.

III. District Court Proceedings

On March 7, 2016, Petitioner brought a class action lawsuit in the U.S. District Court for the Northern District of Illinois against Respondent for violations of the FDCPA, 15 U.S.C. § 1692, *et seq.*, on behalf of recipients of Respondent's letter. The suit alleged, *inter alia*, that the letter violated FDCPA §§ 1692e(2), 1692e(10) and 1692f because it did not warn recipients that the Respondent *could not* sue them; it mischaracterized payments as discounts; it identified payment as the only option; and it imposed a "Payment Due Date" despite no payment being actually due. On April 21, 2017, the district court certified the class.

On July 18, 2017, Petitioner moved for summary judgment on the ground that Respondent had violated the FDCPA as a matter of law. On February 5, 2018, the district court found that Petitioner proved all of the elements of § 1692e(10) and granted summary judgment as to that claim. Among other findings, the district court determined that Respondent's dunning letter was "impermissibly misleading" because had Petitioner "made a partial payment or promise to repay that debt, she could have revived the statute of limitations and subjected herself to the debt obligation anew." App. 56a. The class was subsequently awarded $350,000 in damages by a jury.

IV. The Seventh Circuit's Opinion

Both parties cross-appealed the findings of the district court, raising issues related to standing, class certification, and the merits of the dispute.

The Seventh Circuit ruled solely on the issue of Article III standing. Over Judge Hamilton's dissent, the Seventh Circuit held that Petitioner lacked Article III standing to sue under the FDCPA. As relevant here, the Circuit held that "[p]sychological states induced by a debt collector's letter," such as emotional distress and confusion, "fall short" of the concreteness requirement for Article III standing. App. 67a. The court stated that the fact that Petitioner "didn't make a payment, promise to do so, or otherwise act to her detriment in response to anything in or omitted from the letter" was fatal to her standing. App. 9a. Nowhere did the court recognize that intangible injuries may support Article III standing.

Judge Hamilton filed a lengthy and thorough dissent. He noted that the Seventh Circuit's decision "deepen[ed] an important and growing circuit split" as to "whether Congress has the power under the Constitution to create private causes of action under the Fair Debt Collection Practices Act and other consumer protection statutes for injuries that are intangible but quite real," including "emotional distress, stress, and harm to reputation." App. 11a. In affirming that Congress indeed has that power, Judge Hamilton looked to the judgment of Congress as well as historical analogues to find that Petitioner's claim "easily satisfies the Supreme Court's standing requirements." App. 24a. Judge Hamilton noted that "Congress wanted to provide a remedy for consumers subjected to abusive practices" and that Petitioner's "emotional distress, confusion, and anxiety. . . fit well within the harms that would be expected from many of [those] abusive

practices." App. 25a. He further found that the "common law has long authorized damages for emotional distress in a wide range of cases lacking intangible injury" and that "plaintiffs can establish standing in a wide variety of constitutional cases by alleging and showing they have suffered various forms of emotional distress." App. 31a.

Thus, Judge Hamilton concluded in his dissent, Petitioner's suit "satisfied the constitutional requirements of *Spokeo* and *TransUnion* by offering evidence of harms that [] lie close to the heart of the protection Congress reasonably tried to offer consumer debtors in the FDCPA, and [that] bear close relationships to harms long recognized under the common law and constitutional law." App. 71a. In sum, Judge Hamilton explained, following "the teachings of *Spokeo* and *TransUnion*" to "give 'due respect' for Congress's judgment and [to] recognize that [Petitioner's] statutory claim and intangible injuries fit closely in legal history and tradition" required the court to affirm the judgment below. App. 81a.

By contrast, as Judge Hamilton explained, the majority's opinion amounts "to [a] hold[ing] that the statute granting the civil remedy under the FDCPA, 15 U.S.C. § 1692k, is unconstitutional in many, and perhaps most, applications within the scope of the statutory language." App. 45a. Moreover, the Circuit's "errors have broad implications for many statutes beyond the FDCPA," as "Congress has exercised its legislative power to protect consumers in a host of statutes" seeking to "*prevent* the worst harms by imposing a range

of procedural, informational, and substantive requirements to reduce the risk of harm." App. 46a.

Petitioner timely filed a petition for rehearing and rehearing *en banc*. The Seventh Circuit denied that petition on June 8, 2022; Judge Hamilton, joined by Judges Rovner, Wood, and Jackson-Akiwumi, dissented. App. 66a. Judge Hamilton reiterated that the Seventh Circuit had "failed to give the judgments of Congress the 'due respect' the Supreme Court called for in *Spokeo* and *TransUnion*" and that the Circuit had "overlooked close historical parallels . . . for remedies for intangible harms caused by many violations of the FDCPA and other consumer-protection statutes." App. 67a. Judge Hamilton again concluded that Petitioner "suffered just the sorts of intangible but real injuries. . . that Congress foresaw and for which it enacted statutory remedies." App. 84a.

Petitioner now seeks review by this Court.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided On Congress's Constitutional Authority to Create Causes of Action for Intangible Injuries such as Emotional Distress and Psychological Harm.

In holding that "[p]sychological states" such as "emotional distress" and "confusion" are insufficiently concrete to confer Article III standing to sue under the FDCPA, the Seventh Circuit's decision "deepens an important and growing circuit split on the separation of powers between legislative and judicial branches"

following this Court's decisions in *Spokeo, Inc.* v. *Robins*, 578 U.S. 330 (2016), and *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190 (2021). App. 11a (Hamilton, J., dissenting). "The issue is whether Congress has the power under the Constitution to create private causes of action under the [FDCPA] and other consumer protection statutes for injuries that are intangible but quite real. Such injuries may include emotional distress, stress, and harm to reputation." *Id.*

The courts of appeals are deeply divided. Four circuits recognize that intangible harms suffice for Article III standing to bring suit under the FDCPA, adhering to the principle that Congress may validly "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 578 (1992). Four more, including the Seventh Circuit, have largely shut the door to plaintiffs alleging these types of harms. Another two still, while appearing to recognize standing to sue for intangible psychological harms, have recently adopted a restrictive approach to standing. This Court's intervention is needed to resolve the clear division among the circuits.

1. The Third, Fourth, and Tenth Circuits hold that plaintiffs suing for intangible injuries induced by violations of the FDCPA have Article III standing. App. 41a (Hamilton, J., dissenting) (noting that the Third and Tenth Circuits "have been less restrictive in allowing standing for intangible injuries under the FDCPA"). The D.C. Circuit, too, appears to recognize

that intangible injuries such as emotional harm and confusion suffice for standing under the FDCPA.

In *DiNaples* v. *MRS BPO, LLC*, the Third Circuit affirmed summary judgment for a plaintiff suing the defendant for displaying a QR code on the outside of a letter to her that, when scanned, revealed the internal reference number associated with the plaintiff's collection account. 934 F.3d 275 (3d Cir. 2019). The court held that the "[d]isclosure of the debtor's account number through a QR code. . . implicate[d] core privacy concerns" which "closely related to harm that has traditionally been regarded as providing a basis for a lawsuit in English and American courts." *Id.* at 280 (internal quotations omitted).

Similarly, in *Lupia* v. *Medicredit, Inc.*, the Tenth Circuit found plaintiff had standing to sue under the FDCPA for a single unwanted phone call, likening plaintiff's claim to the common law tort of "intrusion upon seclusion." 8 F.4th 1184, 1191 (10th Cir. 2021). Notably, the Tenth Circuit found that "[t]hough a single phone call may not intrude to the degree required at common law, that phone call poses the same *kind* of harm recognized at common law—an unwanted intrusion into a plaintiff's peace and quiet." *Id.* at 1192 (citing *TransUnion*, 141 S. Ct. at 2204).

The Fourth Circuit has squarely held that plaintiffs have standing to sue under the FDCPA for intangible harms. In those cases, the plaintiffs were subjected to attempts by the defendant to collect a debt based on an improper and unauthorized interest rate, which caused plaintiffs to suffer "emotional distress,

anger, and frustration." *Ben-Davies* v. *Blibaum & Assocs.*, P.A., 695 F. App'x 674, 676 (4th Cir. 2017) (quotations omitted); *Moore* v. *Blibaum & Assocs., P.A.*, 693 F. App'x 205, 206 (4th Cir. 2017). In both instances, the Fourth Circuit found that the plaintiffs had "established the existence of an injury in fact." *Ben-Davies*, 695 F. App'x at 676-77; *Moore*, 693 F. App'x at 206.

Finally, the D.C. Circuit appears to recognize that "stress and inconvenience" rises to the level of a cognizable injury for purposes of an FDCPA lawsuit. *Frank* v. *Autovest, LLC*, 961 F.3d 1185, 1187-88 (D.C Cir. 2020) (emotional stress and confusion suffice for standing under FDCPA but plaintiff in that case did not "connect[]" her "stress" to violative conduct); *see also Magruder* v. *Cap. One, Nat'l Ass'n*, 540 F. Supp. 3d 1, 8, 14 (D.D.C. 2021) (citing *Frank*; the "history and the judgment of Congress tip in favor of cognizing [the plaintiff's] allegations of emotional harm as an injury-in-fact insofar as the FDCPA is concerned") (quotation marks omitted).

2. Other circuits—in addition to the Seventh Circuit in the decision below—have applied a much more restrictive approach to standing under the FDCPA.

The Fifth Circuit held that a FDCPA plaintiff's "confusion" following receipt of a letter demanding payment for debt barred by the statute of limitations was not "a concrete injury" because it "isn't similar 'in kind'" to plaintiff's proffered common-law analog of fraudulent misrepresentation. *Perez* v. *McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816, 825 (5th

Cir. 2022). Thus, the Fifth Circuit explained, it "join[ed] several of [its] sister circuits in holding that the state of confusion, absent more, is not a concrete injury under Article III." *Id.* The Circuit also rejected the theory that the plaintiff's "receipt of an unwanted letter caused her to suffer a concrete injury analogous to the tort of intrusion upon seclusion." *Id.* at 825-26.

The Ninth Circuit, in a case involving a debt collection letter that failed to clearly identify the current creditor, also held that a plaintiff's confusion was insufficient for Article III standing under the FDCPA. The court held that, "[w]ithout more, confusion does not constitute actual harm to [plaintiff's] concrete interests." *Adams* v. *Skagit Bonded Collectors, LLC*, 836 F. App'x 544, 547 (9th Cir. 2020).

Finally, in a case involving a nearly identical dunning letter to the one at issue here (sent by the same debt collector, Respondent Midland Credit), the Eleventh Circuit found plaintiffs lacked standing. In that case, the plaintiffs alleged the letter they received was misleading. *Trichell* v. *Midland Credit Mgmt., Inc.*, 964 F.3d 990, 995 (11th Cir. 2020). The Eleventh Circuit held that plaintiffs' claims had "no relationship" to the "closest historical comparison" for "fraudulent or negligent misrepresentation" because plaintiffs did not seek to prove "that they relied on the representations" in the letters, "much less that the reliance caused them any damages." *Id.* at 998. Nor, the Court ruled, were the alleged harms supported by the judgment of Congress, as they were not similar in kind to the harms the statute was designed to address. *Id.* at

998-1000. Earlier this year, the Eleventh Circuit observed that it had "not yet decided in a published opinion whether emotional distress alone is a sufficiently concrete injury for standing purposes." *Toste* v. *Beach Club at Fontainebleau Park Condo. Ass'n, Inc.*, No. 21-14348, 2022 WL 4091738, at *4 (11th Cir. Sept. 7, 2022). The following day, the en banc court held that a plaintiff's intangible injury stemming from disclosure of his debt to a third-party mail vendor "lack[ed] a close relationship with a traditional common-law tort." *Hunstein* v. *Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1245 (11th Cir. 2022).

3. In two other circuits—the Sixth and Eighth Circuits—the trend in recent cases has been to restrict standing for intangible injuries.

The Sixth Circuit has ruled that confusion and anxiety were insufficient to confer standing to sue under the FDCPA in a pair of decisions. *Garland* v. *Orlans, PC*, 999 F.3d 432, 437-38 (6th Cir. 2021); *Ward* v. *Nat'l Patient Acct. Servs. Sols., Inc.*, 9 F.4th 357, 362-63 (6th Cir. 2021).

Last, the Eighth Circuit has similarly restricted standing for intangible, psychological harms in its most recent precedent addressing the issue. *Ojogwu* v. *Rodenburg L. Firm*, 26 F.4th 457, 463 (8th Cir. 2022) ("Ojogwu's allegations of intangible injury – fear of answering the telephone, nervousness, restlessness, irritability, amongst other negative emotions – fall short of cognizable injury as a matter of general tort law.") (quotation marks omitted).

4. These diverging approaches—articulated in reasoned decisions—mean that a plaintiff's ability to bring suit for intangible harms under the FDCPA turns on her zip code. The circuit split is "entrenched, at least pending further guidance from the Supreme Court." App. 45a (Hamilton, J., dissenting). This Court's intervention is urgently needed to resolve the question presented.

II. The Decision Below Is Wrong and Conflicts with Precedent from This Court.

A. The Seventh Circuit's Decision Contravenes This Court's Guidance.

Article III of the Constitution requires that a "plaintiff's injury in fact be 'concrete'—that is, 'real and not abstract.'" *TransUnion*, 141 S.Ct. at 2204 (quoting *Spokeo*, 578 U.S. at 340). But as this Court has made clear, "[c]oncrete is not . . . necessarily synonymous with 'tangible.'" *Spokeo*, 578 U.S. at 340. Indeed, "[a]lthough tangible injuries are perhaps easier to recognize," this Court has nevertheless "confirmed in many of [its] previous cases that intangible injuries can nevertheless be concrete." *Spokeo*, 578 U.S. at 340.

This Court has explained that, in determining which intangible injuries are sufficiently concrete to confer Article III standing, "both history and the judgment of Congress play important roles." *Spokeo*, 578 U.S. at 340. In other words, courts must consider "whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or

American courts," though an exact duplication of those traditional harms is not required. *Id.* at 341; *TransUnion*, 141 S. Ct. at 2200, 2204. "In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." *Spokeo*, 578 U.S. at 341. Accordingly, "[c]ourts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation." *TransUnion*, 141 S. Ct. at 2204 (citing *Spokeo*, 578 U.S. at 340-41).

The Seventh Circuit ignored this Court's direction and supplied none of the required analysis. Absent from the Seventh Circuit's opinion is any analysis whatsoever comparing the harm Petitioner suffered to those that have historically or at common law provided a basis for suit. Indeed, the Circuit failed even to acknowledge that an intangible injury may be a proper basis for Article III standing. Moreover, the opinion is entirely bereft of any discussions at all regarding the judgment of Congress, let alone affording such judgment the required "due respect." *TransUnion*, 141 S. Ct. at 2204. Instead, the court issued a conclusory determination that psychological states *per se* fall short of the concreteness requirement of Article III. The Seventh Circuit thus invalidated Congress's judgment in providing a cause of action under the FDCPA for injuries such as Petitioner's, disregarding close historical analogues that permit suit for the

sorts of injuries Petitioner experienced. *See TransUnion*, 141 S. Ct. at 2211 n.7 (acknowledging, without deciding, the possibility that "emotional or psychological harm could suffice for Article III purposes").

The decision below places the Seventh Circuit "out of step with the Supreme Court" and "at the far, most restrictive, end of a range of approaches by different circuits." App. 45a (Hamilton, J., dissenting from denial of rehearing en banc, joined by Rovner, Wood, and Jackson-Akiwumi, JJ.). Lamentably, the Seventh Circuit's decision gutted standing under a statute that Congress intended to be "primarily self-enforcing," meaning that "consumers who have been subjected to collection abuses [would] be enforcing compliance." App. 15a. Because, as Congress found, the abusive practices the FDCPA aims to prohibit are often directed at those without the ability to pay, it follows that violations of the FDCPA regularly result in intangible harms such as stress and mental anguish rather than pecuniary loss. App. 76a. Under the decision of the Seventh Circuit and other like-minded courts of appeals, these harms—against which Congress legislated to protect the vulnerable in society—are, against Congress's wishes, effectively left unredressed.

B. Analyzed Properly, Petitioner's Claim Easily Satisfies the Concreteness Requirement of Article III.

A. Petitioner's injuries—deemed sufficient by Congress to justify a private, statutory right of action in order to enforce a statutory obligation created by Con-

gress—bear a "'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 141 S.Ct. at 2204 (quoting *Spokeo*, 578 U.S. at 341).

Petitioner's emotional distress echoes the harm resulting from the long-standing tort of intentional or reckless infliction of emotional distress ("IIED"). The Restatement (Second) of Torts provides that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." Restatement (Second) of Torts § 46(1). Here, there is no question that Respondent's action in sending Petitioner a misleading dunning letter was intentional. Moreover, and unsurprisingly given that Congress had outlawed Respondent's conduct, sending misleading dunning letters to provoke emotional distress is "extreme and outrageous." There is no real dispute that Respondent's conduct was designed to provoke an emotional response in order to coerce Petitioner into paying a debt she did not have to pay. After all, absent fear and worry caused by these letters, there would be no point in Respondent even tendering them. And there is no dispute that Petitioner in fact suffered worry and confusion, which is unquestionably similar in kind to the type of harm the common-law tort of IIED is designed to guard against. 136 Am. Jur. Proof of Facts 3d 175 (originally published in 2013) ("A cause of action for IIED/outrage is based on injury to one's own mental or emotional well-being."); Restatement (Second) of Torts § 46 (1965) (emotional

distress "includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea").

This analogy finds further support from *TransUnion*. Though this Court took no position in that case on whether emotional distress is cognizable under Article III—meaning this Court's attention is required—the Court did recognize that "a plaintiff's knowledge that he or she is exposed to a risk of future physical, monetary, or reputational harm could cause its own current emotional or psychological harm," which could be "analog[ized] to the tort of intentional infliction of emotional distress." 141 S.Ct. at 2211 n.7.

Intrusion upon seclusion presents another historical analog to the harm suffered by Petitioner. In that context, "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Restatement (Second) of Torts § 652B (1977). Courts often require plaintiffs to show "that the intrusion caused the plaintiff anguish and suffering, or mental suffering, shame, or humiliation." 62A Am. Jur. 2d Privacy § 34. Again, this is the same harm Petitioner suffered here. Petitioner's harm is thus well within the ambit of harms traditionally recognized under the common law.

B. Due respect to the judgment of Congress compels the same result. The FDCPA was enacted to create a cause of action for consumers who were subjected to "abusive, deceptive, and unfair debt collection practices," which Congress had judged to be a "widespread and serious national problem." App. 13a (S. Rep. No. 95-382 at 2) (emphasis added). This abuse, Congress judged, could take many forms, including "obscene or profane language, threats of violence, telephone calls at unreasonable hours, *misrepresentations of a consumer's legal rights*, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process." App. 14a (S. Rep. No. 95-382 at 2) (emphasis added). Congress found that these abusive practices contributed to "personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692. In other words, Congress expressly recognized that such abuses cause emotional and psychological distress.

"The emotional distress, confusion, and anxiety suffered by Pierre in response to the zombie debt collection effort fit well within the harms that would be expected from many of the abusive practices." App. 72a (Hamilton, J., dissenting). Indeed, it is the very harm that Respondent sought to inflict upon Petitioner in the hopes that it would cause her to make a payment she did not need to make. "Standing for Pierre thus fits well within Congress's judgments about actionable harms." *Ibid.*

III. The Question Presented Is Exceptionally Important.

A. At bottom, this case is about the separation of powers—i.e., Congress's authority to "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law," in order to enforce a constitutionally enacted federal statutory obligation. *Lujan*, 504 U.S. at 578.

The restrictive approach to that question adopted by some circuits improperly ignores that Congress has the authority not only to define primary obligations, but also to determine how those obligations can be enforced, by whom, and in what context. In denying Congress the power to create private causes of action—and elevate intangible injuries to a legally cognizable status—courts have "unduly restrict[ed] the legislative policy choices Congress should be able to make in regulating interstate commerce"; and, in this context, those courts hamstring "congressional efforts to protect consumers." App. 12a (Hamilton, J., dissenting). As Judge Ripple has explained, "[t]o say there is no injury in this economy when a person receives a dunning letter demanding money that is not owed not only ignores the realities of everyday life, it also ignores the findings of Congress and constitutes a direct affront to congressional prerogative at the core of the legislative function." *Markakos* v. *Medicredit, Inc.*, 997 F.3d 778, 785 (7th Cir. 2021) (Ripple, J., concurring).

B. Further, Congress's authority to elevate intangible injuries to cognizable status is implicated not just in the context of the FDCPA, but in a variety of

federal statutes. Violations of a wide swath of federal statutes have the potential to cause intangible but very real harms, including psychological injuries, for which Congress legislated private causes of action.

Take for instance the Fair Credit Reporting Act ("FCRA"), the statute at issue in *Spokeo* and *TransUnion*. The FCRA seeks to ensure "fair and accurate credit reporting" by imposing a "host of requirements concerning the creation and use of consumer reports." 15 U.S.C. § 1681(a)(1) *et seq.*; *Spokeo*, 578 U.S. at 335-36. But not all violations of the FCRA's provisions result in tangible harms, such as monetary losses. Instead, violations of the FCRA often result in intangible harms, like emotional distress and anxiety or reduced credit scores.

This concept is illustrated by *Magruder* v. *Cap. One, Nat'l Ass'n*, 540 F. Supp. 3d 1 (D.D.C. 2021). There, plaintiff brought a number of claims under various statutes, including the FCRA, alleging that the defendants "misrepresented information about him on his credit reports," disseminated inaccurate information about him and that a "debt collector wrongly pursued him to recover debts stemming from" these errors. *Id.* at 4. In asserting that he was harmed by defendants' alleged violation of the FCRA, plaintiff alleged that he sustained "emotional harm," which the district court found satisfied Article III's injury-in-fact requirement. *Id.* at 8-10.

Consider, also, *Susinno* v. *Work Out World Inc.* 862 F.3d 346 (3d Cir. 2017). In that case, the plaintiff received an unsolicited call on her cell phone from the

defendant, which left a prerecorded message on her voicemail. *Id.* at 348. The court found that the plaintiff's injury, nuisance, and invasion of privacy were concrete, concluding: "Where a plaintiff's intangible injury has been made legally cognizable through the democratic process, and the injury closely relates to a cause of action traditionally recognized in English and American courts, standing to sue exists." *Id.* at 352.

Likewise, in *Benson* v. *Wells Fargo Bank, N.A.*, the district court addressed the issue of standing for intangible harms in the FCRA context. No. CIV. 16-5061-JLV, 2019 WL 1347925 (D.S.D. Mar. 25, 2019). Finding that the plaintiff could not "allege a concrete intangible injury to his privacy that is sufficient to confer Article III standing," the court dismissed plaintiff's claim. *Id.* at *7 (internal quotation marks omitted).

Similarly, violations of the Telephone Consumer Protection Act ("TCPA") can and often do involve intangible harms as opposed to tangible, monetary damages. The TCPA prohibits the use of certain telephone equipment, including automatic telephone dialing systems ("ATDS")—more commonly known as robocalls—with limited exceptions. But obviously this prohibited conduct is not the type to usually lead to loss of funds; the use of such equipment to harass and nag consumers instead leads to the imposition of largely intangible harms, such as stress, anxiety, and aggravation.

Cabiness v. *Educational Financial Solutions, LLC* illustrates the point. The plaintiff there alleged defendant violated the TCPA by making repeated robocalls to her cell phone, which "caused her a large amount of stress and anxiety." *Cabiness* v. *Educ. Fin. Sols.*, LLC, No. 16-CV-01109-JST, 2016 WL 5791411, at *1 (N.D. Cal. Sept. 1, 2016) (internal quotation marks omitted). Analyzing the judgment of Congress and historical practice, the district court found plaintiff's intangible injuries sufficient to establish a concrete injury in fact. *Id.* at *6; *see also Caudill* v. *Wells Fargo Home Mortg., Inc.*, No. CV 5: 16-066-DCR, 2016 WL 3820195 (E.D. Ky. July 11, 2016) (finding standing given plaintiff's intangible injuries, including "stress; extreme anxiety; aggravation; nervousness; humiliation; worry; and deep fear of losing his home"); *Toldi* v. *Hyundai Capital America*, No. 2:16-CV-01877-APG-GWF, 2017 WL 736882 (D. Nev. Feb. 23, 2017) (finding standing given plaintiff's intangible injuries, including invasion of privacy and stress).

In short, violations of consumer protection statutes often result only in intangible, but nonetheless very real, injuries. But these intangible harms are precisely the types of injuries Congress provided a cause of action to remedy. If the Seventh Circuit's judgment is allowed to stand, it will effectively neuter these and other consumer protection statutes. This Court's intervention is needed to provide much-needed guidance to lower courts to ensure that Congress's authority, as embodied in a wide swath of consumer protection statutes, is not thwarted simply because courts disagree with Congress's remedial judgment and balance.

IV. There Are No Vehicle Problems

The question presented is squarely implicated in the Seventh Circuit's published decision, with no vehicle problems. As the Seventh Circuit expressly affirmed, the decision below only addressed Article III standing: "The parties have cross-appealed, raising issues related to standing, class certification and the merits. We begin and end with standing." App. 2a. Further, the Seventh Circuit held that psychological harms are insufficient to confer Article III standing as a matter of law. What is more, the appeal followed a judgment of liability and a jury verdict as to damages. Thus, the question presented is outcome-dispositive, and this Court's intervention will conclusively resolve not just the question presented, but the entire case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 7, 2022

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED APRIL 1, 2022

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 19-2993 & 19-3109

RENETRICE R. PIERRE, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiff-Appellee/Cross-Appellant,

v.

MIDLAND CREDIT MANAGEMENT, INC.,

Defendant-Appellant/Cross-Appellee.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 16 C 2895 — Harry D. Leinenweber, *Judge.*

November 9, 2020, Argued; April 1, 2022, Decided

Before SYKES, *Chief Judge*, and HAMILTON and BRENNAN, *Circuit Judges*. HAMILTON, *Circuit Judge*, dissenting.

SYKES, *Chief Judge*. Midland Credit Management, Inc., sent Renetrice Pierre a letter offering to resolve a

long-unpaid debt at a discount. The statute of limitations on the debt had run. The letter advised Pierre that because of the age of the debt, Midland Credit would neither sue her for it nor report it to a credit agency and that her credit score would be unaffected by either payment or nonpayment.

Pierre did not take Midland Credit up on the offer. Instead, she sued the company alleging that it violated the Fair Debt Collection Practices Act. Asking for payment of a time-barred debt isn't unlawful, but Pierre contended that the collection letter was a deceptive, unfair, and unconscionable method of debt collection, in violation of the Act. She sought to represent a class of Illinois residents who had received similar letters from Midland Credit. The district court certified the class and entered summary judgment in its favor on the merits. A jury awarded statutory damages totaling $350,000.

The parties have cross-appealed, raising issues related to standing, class certification, and the merits. We begin and end with standing. The letter might have created a risk that Pierre would suffer a harm, such as paying the time-barred debt. But a risk, at most, is all it was. That's not enough to establish an Article III injury in a suit for money damages, as the Supreme Court held last year in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210-11, 210 L. Ed. 2d 568 (2021). Accordingly, we vacate and remand with instructions to dismiss the case for lack of subject-matter jurisdiction.

Appendix A

I. Background

In 2006 Pierre opened a credit-card account with Target National Bank. She accumulated consumer debt on the account and defaulted on it. Midland Funding, LLC, bought the debt and sued Pierre for it in Illinois state court in 2010. Midland Funding later voluntarily dismissed the lawsuit.

Fast forward to 2015. Midland Credit, which collects debts for Midland Funding, sent Pierre a letter seeking payment of the debt. The letter told Pierre that she had been "pre-approved for a discount program designed to save [her] money." It listed multiple payment plans—one promising savings of 40%—and said that the offer would expire in 30 days.

Because the debt was so old, the statute of limitations had run. *See* 735 ILL. COMP. STAT. 5/13-205. Midland Credit could ask for payment, but it couldn't sue for it. The letter ended with this: "The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it, we will not report it to any credit reporting agency, and payment or non-payment of this debt will not affect your credit score."

The letter surprised and confused Pierre. Midland Funding had sued her for the debt and then dropped the case. Now a company with a slightly different name sought payment. The new company with the similar name said it wouldn't sue her, but perhaps it (or another entity) could sue her if it really wanted to. Concerned about another

lawsuit, she called Midland Credit to contest the collection effort. Then she contacted a lawyer and sued Midland Credit.

Pierre claimed that the collection letter violated various provisions of the Fair Debt Collection Practices Act ("FDCPA"). She alleged that the letter falsely represented the character and legal status of the debt, 15 U.S.C. § 1692e(2); was a deceptive means to attempt to collect the debt, *id.* § 1692e(10); and was an unfair or unconscionable means to attempt to collect the debt, *id.* § 1692f. She sought to represent a class of Illinois residents who had received similar letters from Midland Credit.

The district judge certified the class and entered summary judgment in its favor on the merits based on our holding in *Pantoja v. Portfolio Recovery Associates, LLC*, 852 F.3d 679 (7th Cir. 2017). Damages were left to a jury, and it awarded just over $350,000. (Pierre also brought individual claims, but those were settled before final judgment so we mention them no further.)

Midland Credit twice asked the judge to dismiss the suit for lack of Article III standing. Both times he declined to do so, reasoning that the misleading nature of the letter risked real harm to the interests that Congress sought to protect with the FDCPA.

II. Discussion

Article III of the Constitution limits the jurisdiction of the federal courts to "Cases" and "Controversies."

U.S. CONST. art. III, § 2. The case-or-controversy requirement ensures that the judiciary "confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71, 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013). Requiring a plaintiff to establish standing to sue is an essential component of the case-or-controversy limitation, "serv[ing] to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013).

Standing has three elements. A plaintiff must have (1) a concrete and particularized injury in fact (2) that is traceable to the defendant's conduct and (3) that can be redressed by judicial relief. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Without "an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve." *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 333 (7th Cir. 2019).

The concreteness requirement is our concern here. A concrete injury is "real, and not abstract." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) (quotation marks omitted). Qualifying injuries are those with "a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 141 S. Ct. at 2204 (quoting *Spokeo*, 578 U.S. at 341). This standard includes "traditional tangible harms, such as physical harms

and monetary harms," as well as "[v]arious intangible harms," such as "reputational harms, disclosure of private information, and intrusion upon seclusion." *Id.; see also Spokeo*, 578 U.S. at 340-42.

Congress's decision to create a statutory cause of action may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan*, 504 U.S. at 578. This does not mean, however, that Congress may "enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *TransUnion*, 141 S. Ct. at 2205 (quotation marks omitted). History and tradition remain our ever-present guides, and legislatively identified harms must bear a close relationship in kind to those underlying suits at common law. *See Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462-63 (7th Cir. 2020).

Until recently there was a hint that the mere "risk of real harm" could concretely injure plaintiffs seeking money damages. *Spokeo*, 578 U.S. at 341. However, as the Supreme Court clarified in *TransUnion*, a risk of harm qualifies as a concrete injury only for claims for "forward-looking, injunctive relief to prevent the harm from occurring." 141 S. Ct. at 2210; *see Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."). A plaintiff seeking money damages has standing to sue in federal court only for harms that have in fact materialized. *TransUnion*, 141 S. Ct. at 2210-11.

Many of our recent decisions mark the line between FDCPA violations inflicting concrete injuries and those causing no real harm. Discussion of just a few of these leaves the line clear enough to resolve this case. We found standing in *Ewing v. Med-1 Solutions, LLC*, 24 F.4th 1146, 1149-50 (7th Cir. 2022), where a debt collector failed to notify a credit-reporting agency that the plaintiffs had disputed the debts in question. There was evidence that the statutory violations caused the plaintiffs' credit scores to decline. *Id.* We reasoned that the incomplete reporting worked a harm analogous to that associated with common-law defamation. *Id.* at 1153-54. That "intangible, reputational injury [was] sufficiently concrete for purposes of Article III standing." *Id.* at 1154.

Casillas sits on the other side of the line. A debt collector sent Paula Casillas a notice demanding payment of a debt and informed her that she could dispute or request verification of it. *Casillas*, 926 F.3d at 332. But the notice failed to specify that any dispute or verification request must be made in writing to trigger certain statutory protections. *Id.* The failure, though a statutory violation, caused Casillas no harm. *Id.* at 334. She hadn't even considered disputing or seeking verification of the debt, and the omission deprived her of no benefit. *Id.* As such, there was nothing for the court to remedy. *See id.* at 339.

We also found no standing in *Larkin v. Finance System of Green Bay, Inc.*, 982 F.3d 1060 (7th Cir. 2020). There the defendant debt collector's dunning letters admonished the plaintiffs: "You want to be worthy of the

faith put in you by your creditor. ... We are interested in you preserving a good credit rating with the above creditor." *Id.* at 1063 (alteration in original). The plaintiffs alleged that this collection tactic was deceptive and unconscionable in violation of the FDCPA. *Id.* Statutory violation or not, there was no concrete harm. Neither plaintiff paid a debt she did not owe or otherwise acted to her detriment in response to the letter. *Id.* at 1066. There was, again, nothing for the court to remedy. *See id.* at 1066-67.

With these principles and precedents in place, we turn to this case. Pierre, as the party invoking the federal court's jurisdiction, bears the burden of establishing her standing to sue. *Collier v. SP Plus Corp.*, 889 F.3d 894, 896 (7th Cir. 2018) (per curiam). Standing must be established "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Here, then, Pierre needed to establish standing with evidence offered at summary judgment, and her standing must remain adequately supported in the face of any adverse evidence introduced at trial. *See id.* Whether a plaintiff has established Article III standing is reviewed de novo. *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 966 (7th Cir. 2016).

Pierre argues that Midland Credit's deceptive letter created a risk that she might make a payment on a time-barred debt, and a payment—or even a promise to pay—risked restarting the limitations period. *See Schmidt v. Desser*, 81 Ill. App. 3d 940, 401 N.E.2d 1299, 1301, 37 Ill. Dec. 206 (Ill. App. Ct. 1980); *see also Pantoja*, 852 F.3d at

684-85 (discussing Illinois law). But critically, Pierre didn't make a payment, promise to do so, or otherwise act to her detriment in response to anything in or omitted from the letter. That aligns Pierre with the plaintiffs in *Casillas* and *Larkin*, who received allegedly defective letters but who did not experience any harm—or even a risk of real harm, which we now know isn't enough—caused by the defects.

Pierre's response to the letter was to call Midland Credit to dispute the debt and to contact a lawyer for legal advice. These are not legally cognizable harms. Making a call to a debt collector is not closely related to an injury that our legal tradition recognizes as providing a basis for a lawsuit. Nor is seeking legal advice. *Brunett v. Convergent Outsourcing, Inc.*, 982 F.3d 1067, 1069 (7th Cir. 2020); *see also Diamond v. Charles*, 476 U.S. 54, 70-71, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986). Indeed, the concreteness requirement would be an empty one if all it took was contacting a lawyer and filing suit.

Psychological states induced by a debt collector's letter likewise fall short. Pierre testified that Midland Credit's letter confused her as to whether she could be sued for the debt. Confusion, we have held, is not a concrete injury in the FDCPA context. *E.g., Markakos v. Medicredit, Inc.*, 997 F.3d 778, 781 (7th Cir. 2021); *Brunett*, 982 F.3d at 1068. She further testified that she experienced emotional distress arising from her concern about being sued for the debt. But worry, like confusion, is insufficient to confer standing in this context. *Wadsworth v. Kross, Lieberman & Stone, Inc.*, 12 F.4th 665, 668 (7th Cir. 2021); *Pennell v. Glob. Tr. Mgmt., LLC*, 990 F.3d 1041, 1045 (7th Cir. 2021).

Finally, Pierre points out that our decision in *Pantoja* involved similar facts and was decided on the merits rather than dismissed for lack of subject-matter jurisdiction. *See* 852 F.3d at 682. But we did not consider standing in *Pantoja*, which—importantly—was decided before *TransUnion*. A case that is not about standing cannot control the issue here. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144, 131 S. Ct. 1436, 179 L. Ed. 2d 523 (2011).

Pierre did not experience a concrete injury giving her standing to pursue claims for money damages in federal court. Accordingly, we vacate the judgment and remand with instructions to dismiss this case for lack of subject-matter jurisdiction.

VACATED AND REMANDED WITH INSTRUCTIONS

HAMILTON, *Circuit Judge*, dissenting. The majority's dismissal of this "zombie debt" case for lack of standing is mistaken. It deepens an important and growing circuit split on the separation of powers between legislative and judicial branches. The issue is whether Congress has the power under the Constitution to create private causes of action under the Fair Debt Collection Practices Act and other consumer protection statutes for injuries that are intangible but quite real. Such injuries may include emotional distress, stress, and harm to reputation. These harms are all real and foreseeable results of unfair and deceptive debt-collection practices aimed directly at the plaintiffs. Congress has authorized private actions like this case to seek damages for them.

The majority follows several cases from the last two years in which this court has denied standing under the FDCPA on grounds that leave little or no room for intangible injuries, and apparently none for "psychological states" caused by statutory violations. These decisions have erred by failing to give the judgments of Congress the "due respect" the Supreme Court's precedents call for. They have also erred by overlooking close historical parallels—from both common law and constitutional law—for remedies for intangible harms caused by many violations of the FDCPA and similar statutes. These errors have led us to restrict standing under consumer protection laws much more tightly than the Supreme Court itself has. The cumulative effect may be close to a tipping point, leaving at least the FDCPA largely neutered in the three states of the Seventh Circuit.

At a broader level, this court's recent restrictions on standing threaten to undermine congressional efforts to protect consumers. They also threaten more broadly the appropriate separation of powers under the Constitution, unduly restricting the legislative policy choices Congress should be able to make in regulating interstate commerce. I respectfully dissent.

Part I explains this case in terms of how the FDCPA applies to collecting "zombie" debts and how defendant's violation of the FDCPA affected plaintiff Pierre, with a particular eye on emotional distress, anxiety, confusion, and fear. Part II summarizes the key lessons from the Supreme Court's recent cases on standing in consumer protection cases asserting intangible injuries, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), and *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021). Part III applies those lessons to Pierre's case, emphasizing first Congress's policy judgment to authorize damages actions for the effects she suffered and then the common-law and constitutional relatives of those actions and intangible harms. Part IV reviews this court's recent FDCPA standing cases and explains where some have gone astray. Parts V and VI summarize the deepening circuit split on intangible injuries under consumer protection statutes and the importance of the issue in terms of practical consequences and the separation of judicial and legislative powers.

Appendix A

I. Zombie Debt, the FDCPA, and Pierre's Case

Plaintiff Pierre proved that defendant Midland Credit violated the FDCPA. Midland sent plaintiff Pierre a letter carefully designed to try to induce her to surrender her statute of limitations defense to an old debt, one so old it would be known in the debt collection business as "zombie" debt.[1] The letter left Pierre confused and fearful. She consulted a lawyer. She then sued on behalf of a class of debtors who received such deceptive letters from Midland. The district court granted summary judgment to plaintiffs on the merits, and a jury awarded the class $350,000 in statutory damages. Both sides appealed.

A. The FDCPA

Congress enacted the Fair Debt Collection Practices Act in 1977 in response to widespread "abusive, deceptive, and unfair debt collection practices." 15 U.S.C.

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1. See, e.g., Renae Merle, Zombie Debt: How Collectors Trick Consumers into Reviving Dead Debts, Washington Post, Aug. 7, 2019, available at www.washingtonpost.com/business/2019/08/07/zombie-debt-how-collectors-trick-consumers-into-reviving-dead-debts/ (last visited March 30, 2022). The industry prefers a less colorful term, "out-of-statute debt." See, e.g., Receivables Mgmt. Ass'n, Int'l, *Out-of-Statute Debt: What is a Smart, Balanced, and Responsible Approach?* (2015) (trade group policy paper on regulatory proposals), available at https://rmaintl.org/news-press/white-papers/(last visited March 30, 2022). Much of this debt trades at prices of a penny or less per dollar of face value. Consumer Financial Protection Bureau, *Market Snapshot: Online Debt Sales* 9-10 (2017), available at www.consumerfinance.gov/data-research/research-reports/market-snapshot-online-debt-sales/ (last visited March 30, 2022).

§ 1692(a). The targeted practices included "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process." S. Rep. No. 95-382, *as reprinted in* 1997 U.S.C.C.A.N. 1695, 1696.

Congress made statutory findings that these abusive practices contributed to personal bankruptcies, marital instability, lost jobs, and invasions of privacy. 15 U.S.C. § 1692(a). The reference to marital instability is especially significant here, where a key question is whether emotional distress, fear, and anxiety prompted by a violation of the Act will support standing to recover statutory damages. More on that in Part III. The Act imposes substantive and procedural requirements on debt collectors, requiring certain specific practices and outlawing others, while including general prohibitions on "false, deceptive, or misleading representations or means," § 1692e, and "unfair or unconscionable means" to collect debts, § 1692f.

Relevant to the issue of standing for intangible injuries, including emotional distress, fear, and anxiety, the Act prohibits many actions likely to cause those reactions. These include threats, obscene or profane language, and harassing calls, § 1692d, and false or misleading representations or implications on many subjects, § 1692e. The Act also imposes many specific requirements intended to make sure the debtor receives

accurate and clear (i.e., not confusing) information about the amount and nature of the debt and the identity of the creditor. § 1692g.

The Act provides for enforcement by federal agencies, § 1692*l*, but the more important enforcement tool is a private civil action under § 1692k. The Act authorizes actual damages, without limits. Congress also recognized that many abusive practices might not produce measurable harms. To encourage enforcement in such cases, the Act authorizes additional damages of up to $1,000 in an individual's case and up to $500,000 in a class action.[2]

B. Collecting Debts Barred by Statutes of Limitations

One area of concern under the Act is deceptive and abusive efforts by debt collectors to collect debts so old that they cannot be enforced in court. Such debts, whether called "zombie" or "out-of-statute," can offer surprising potential for profit. As noted, the "rights" to such debts may be purchased for less than a penny on the dollar of the face amount. Collecting just a few percent of the face value of a portfolio of such debts can turn a large profit.

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2. In its report on the final bill, the Senate Committee on Banking, Housing, and Urban Affairs described the new law as "primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance." S. Rep. No. 95-382 at 5, *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1699. The committee anticipated that the legislation would not result in any additional costs to the government. *Id.* at 1700. The plain implication was that no personnel or money would be provided to the FTC or other agencies to enforce the new Act, leaving the private civil action as the primary enforcement mechanism.

We explained the potential for abuse in *Pantoja v. Portfolio Recovery Associates, LLC*, 852 F.3d 679 (7th Cir. 2017), *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010 (7th Cir. 2014), and *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076 (7th Cir. 2013). Those opinions cite similar decisions of other courts. It is well established that a debt collector violates the Act by either suing or threatening to sue to collect a debt after the statute of limitations has run. E.g., *Pantoja*, 852 F.3d at 683. In *Pantoja* we also affirmed summary judgment against a debt collector who had sent a collection letter offering to "settle" such a zombie debt despite the carefully phrased note that, "Because of the age of your debt, we will not sue you for it and we will not report it to any a credit reporting agency." *Id.* at 682. *Pantoja* and other cases have stopped short of declaring efforts to collect such out-of-statute per se illegal (as long as there is no litigation or threat of litigation). Still, the potential for profit—from buying such debts at less than a penny on the dollar and somehow "persuading" a few debtors to pay something—creates an obvious temptation. A buyer of these debts has a strong incentive to prey on unsophisticated consumers, pushing the envelope with abusive and deceptive tricks to give at least a few debtors the false impression that they need to pay. Given the high potential for abuse and the miniscule market value of such zombie debts, it's hard to see any good reason not to outlaw these efforts altogether.

Letters like Midland's can set a legal trap for debtors in many states. A partial payment or even a promise to make a partial payment may nullify the valid statute of limitations defense and start the statute's clock running

all over again. See *Pantoja*, 852 F.3d 684-86; *Buchanan v. Northland Group, Inc.*, 776 F.3d 393, 398-400 (6th Cir. 2015); *McMahon*, 744 F.3d at 1021; Debt Collection, 78 Fed. Reg. 67,848, 67,876 (Nov. 12, 2013) (notice of proposed rulemaking by Consumer Financial Protection Bureau). As these cases and the CFPB recognize, many consumers will not understand the legal effects of the statute of limitations or the risk that they might unwittingly lose the statute's protections. In other words, the focus is on the risk that consumers will be misled and confused. The confusion spawned among many vulnerable recipients can predictably cause stress and anxiety, and it may lead those who have access to a lawyer to seek guidance about their rights, risks, and options.

C. Plaintiff Pierre

That's exactly what happened with plaintiff Pierre. Midland sent her a letter claiming she owed it more than $7,000 on a zombie debt. Midland offered to "settle" this unenforceable debt for 60% of the face amount, as if that would have saved her money. The letter offered different settlement options and included a "due date" for accepting one.

Central to standing, Pierre testified in detail about the letter and her reaction. The prospect of a revived $7,000 debt threatened her with financial catastrophe. She was confused and afraid that she might be sued again on this debt. (An earlier suit on the same debt had been dismissed years earlier.) Pierre described her "emotional duress," and she was anxious about the prospect of the cost and

hassle of more litigation. She was afraid of repercussions if she did not answer the letter and if she did not accept one of the settlement options. She was also afraid that her credit rating would be hurt. Pierre sought out a lawyer. She had read the statement that Midland would not sue her on the debt, but she worried that Midland could refer the debt to another party who would sue her or hurt her credit rating. Her testimony on these topics appears in her deposition at pages 67, 79, 82, 84, 104, 108-09, 114-17, and 141. At trial, she described her surprise, confusion, and distress when she received the letter claiming she owed more than twice as much on a debt that she thought she had successfully disputed years earlier. Dkt. 262 at 52-73.[3]

In other words, much of Pierre's reaction, apart from her consulting a lawyer and not actually paying, was just the kind of reaction that Midland hoped for by its violation of the Act. Her stress and fear were some of the intangible but real harms that Congress enacted the FDCPA to protect her from. Pierre avoided the worst, most tangible potential consequences, like reviving the debt. But she still suffered concrete and particularized harm from the statutory violation in the form of stress, anxiety, confusion, and emotional distress.[4]

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3. I cite both her deposition and trial testimony because standing was never contested in the district court in 2019.

4. In some debt-collection cases, the debtor may experience emotional distress and anxiety because of serious underlying financial problems, not a minor, hypertechnical violation of the FDCPA. In the case of an out-of-statute zombie debt, however, the effort to collect is an attempt to re-open a closed chapter. That may easily cause significant additional distress and anxiety, as Pierre's testimony described.

II. Standing and Intangible Injuries: Spokeo and TransUnion

The majority opinion finds that none of the harm Pierre experienced was enough to show "injury in fact," relying primarily on recent decisions by this court. The critical point in the majority opinion is its assertion that "Psychological states induced by a debt collector's letter," including emotional distress, confusion, and anxiety, all fall short of showing concrete injury sufficient to support the civil remedy that Congress authorized. Ante at 8, citing *Wadsworth v. Kross, Lieberman & Stone, Inc.*, 12 F.4th 665, 668 (7th Cir. 2021); *Markakos v. Medicredit, Inc.*, 997 F.3d 778, 781 (7th Cir. 2021); *Pennell v. Global Trust Mgmt., LLC*, 990 F.3d 1041, 1045 (7th Cir. 2021); and *Brunett v. Convergent Outsourcing, Inc.*, 982 F.3d 1067, 1068 (7th Cir. 2020).

Those cases rejecting emotional distress, confusion, and anxiety as sufficient injuries built their analyses on two recent Supreme Court decisions, *Spokeo* and *TransUnion*, about standing under another consumer protection law, the Fair Credit Reporting Act, but our cases have gone too far in restricting standing, losing sight of the limits of these Supreme Court decisions and the analysis they require. As Judge Ripple put it, we have been "traveling far out in front of our *Spokeo*-provided headlights," and I would now add, the *TransUnion*-provided headlights. See *Markakos*, 997 F.3d at 784 (Ripple, J., concurring in the judgment).

Spokeo and *TransUnion* established that a bare statutory violation is not necessarily enough to support standing. Both cases, however, left Congress much more room than our recent cases have to provide statutory remedies for violations of consumer protection laws that inflict intangible harm without inflicting measurable financial harm on the victim.

Starting with *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), the defendant was a consumer reporting agency that generated profiles of individual consumers. Plaintiff Robins discovered that his Spokeo profile contained inaccurate information. He sued for an allegedly willful violation of the Fair Credit Reporting Act's requirement to use reasonable procedures to assure maximum possible accuracy of such information. The Supreme Court held that the alleged statutory violation regarding his information was not enough, by itself, to establish the concrete and particularized injury in fact needed for constitutional standing. The Court remanded the case to the Ninth Circuit for further consideration of standing.

Along the way, the Court said that a plaintiff must allege and prove a "concrete" injury, but the Court also made clear that an intangible injury could be concrete for purposes of standing. 578 U.S. at 340-41. The key question in *Spokeo* and in cases like Pierre's is when an intangible injury is sufficiently concrete. To answer that, *Spokeo* teaches, "both history and the judgment of Congress play important roles." *Id.* at 340. The Court told us to consider "whether an alleged intangible harm has

a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," and to treat the judgment of Congress as "instructive and important." *Id.* at 341.

Spokeo also cited *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992), for the proposition that Congress may elevate to the status of legally cognizable injuries harms that were previously not adequate to support a case. The *Spokeo* Court concluded that a violation of the FCRA's procedural requirements could result in cognizable harm, but memorably warned that a "bare procedural violation," such as a report of an incorrect zip code, would not be enough by itself to establish concrete harm. 578 U.S. at 342.[5]

In another FCRA case, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021), a major credit reporting agency offered to tell creditors whether particular consumers might be on a government list of suspected terrorists, drug-traffickers, and others with

5. On remand in *Spokeo*, the Ninth Circuit found that the plaintiff had alleged a sufficiently concrete harm to sue. Giving deference to the judgment of Congress, the Ninth Circuit found that dissemination of false information in consumer reports posed a risk of serious harm and that consumers' interests in accurate information resembled reputational and privacy interests long protected under tort law. 867 F.3d 1108, 1113-15 (9th Cir. 2017). The court also concluded that the alleged inaccuracies regarding plaintiff Robins were neither harmless nor trivial, like the Supreme Court's hypothetical wrong zip code. *Id.* at 1116-17. The Supreme Court denied further review in the case. 138 S. Ct. 931, 200 L. Ed. 2d 204 (2018).

whom business dealings are generally unlawful. Lots of law-abiding Americans share first and last names with people on the government's list, and TransUnion identified such people as "potential matches" for the terrorist list. When plaintiff Ramirez tried to buy a car, his name turned up as a potential match. The dealer refused to sell him the car. Ramirez sued TransUnion under the FCRA on behalf of a class for failing to use reasonable measures to ensure that it distributed accurate information.

All class members in *TransUnion* had viable FCRA claims as a matter of statute. The issue for the Court was standing under Article III of the Constitution. As in *Spokeo*, the key question was whether the intangible harms claimed by the class members were sufficiently concrete. The Court echoed *Spokeo* in saying that intangible harms close to those traditionally recognized in the law were sufficient, including the loss of a constitutional right. 141 S. Ct. at 2204 (citing freedoms of speech and religion). The Court also repeated that courts must afford "due respect" to Congress's decision to create a private right of action for statutory violations, though without giving Congress a blank check to "transform something that is not remotely harmful into something that is." *Id.* at 2204-05.

The Court gave more specific meaning to this abstract guidance in its different treatment of two subclasses. For one subclass, TransUnion files listed them as "potential matches" for the suspected terrorist list, but TransUnion had never provided that information to any potential creditors during the relevant period. *Id.* at 2209. Those class members lacked standing, the Court said. The

undisclosed information simply had not caused them any harm. There was no evidence the members of that subclass had even known of the false information, let alone been affected by it. The plaintiffs also argued that the false information in those files put them at serious risk of having the false information disseminated to creditors in the future. The Court rejected that theory for standing, at least for a damages claim. *Id.* at 2210.

The other subclass in *TransUnion* presented an easier question. The misleading information about them was actually sent to third parties. The Court (including all four dissenters) agreed that those plaintiffs had standing. See 141 S. Ct. at 2208-09. The majority compared the misleading credit reports to the tort of defamation. The Court rejected TransUnion's attempt to distinguish its violations from defamation by arguing that merely "misleading" information was not literally false. The Court explained: "In looking to whether a plaintiff's asserted harm has a 'close relationship' to a harm traditionally recognized as a basis for a lawsuit in American courts, we do not require an exact duplicate." *Id.* at 2209.

For this case of zombie debt under the FDCPA, most significant is what the Court did *not* say about the plaintiffs who had standing. It did not ask for evidence that the disclosures caused financial harm, that they interfered with specific transactions, or that they altered the plaintiffs' lives or behavior. In short, it did not ask for any of the sorts of evidence of harm that the majority here and our court in other cases has demanded. The Court did not even ask for evidence of emotional harm or other

actual disruptions of the plaintiffs' lives. The successful plaintiffs in *TransUnion* asserted harm similar to that in a common-law case for defamation per se, where harm to reputation is presumed and damages may be awarded without more specific proof of harm. That was enough. 141 S. Ct. at 2208-09.

Spokeo and *TransUnion* made clear that a plaintiff's proof of all elements of a statutory cause of action does not necessarily show a concrete and particularized injury to satisfy constitutional standing. *TransUnion* went a step further in rejecting standing for damages claims based on only a risk of future harm. Both cases, however, emphasized the need to give considerable deference—"due respect"—to the judgment of Congress and to allow standing based on injuries similar, not identical, to those long recognized in law.[6]

III. Applying Spokeo and TransUnion Here

Plaintiff Pierre's claim easily satisfies the Supreme Court's standing requirements. She proved all elements of an FDCPA claim for a deceptive unfair practice. She satisfied the constitutional requirements of *Spokeo* and *TransUnion* by offering evidence of harms that, first, lie close to the heart of the protection Congress reasonably

6. *TransUnion* also noted that the plaintiffs who lacked standing had not presented evidence of emotional injury. The Court plainly left open the possibility that a plaintiff could show standing by showing that her knowledge of a serious risk caused its own emotional or psychological harm. 141 S. Ct. at 2211 & n.7. Our recent decisions close that door in this circuit.

tried to offer consumer debtors in the FDCPA, and second, bear close relationships to harms long recognized under the common law and constitutional law.

A. The Judgment of Congress

Congress wanted to provide a remedy for consumers subjected to abusive practices, including "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process." S. Rep. No. 95-382 at 2, *as reprinted in* 1997 U.S.C.C.A.N. 1695, 1696. In the statutory findings, Congress said abusive practices contributed to personal bankruptcies, marital instability, job losses, and invasions of privacy. 15 U.S.C. § 1692(a). The statutory reference to marital instability and the prohibitions on using threats, obscene language, and harassing calls, § 1692d, show that Congress recognized how such abusive practices could upset the lives of those targeted by them. See *Demarais v. Gurstel Chargo, P.A.*, 869 F.3d 685, 692 (8th Cir. 2017) (making this point in finding FDCPA standing based on mental distress resulting from attempt to collect out-of-statute "zombie" debt).

The emotional distress, confusion, and anxiety suffered by Pierre in response to the zombie debt collection effort fit well within the harms that would be expected from many of the abusive practices, regardless

of whether the debtor actually made a payment or took some other tangible action in response to them. Standing for Pierre thus fits well within Congress's judgments about actionable harms. As the Supreme Court said in *Spokeo*, Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." 578 U.S. at 341, quoting *Lujan*, 504 U.S. at 578.

B. Historical Guides

TransUnion added that Congress "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." 141 S. Ct. at 2205, quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018). But that is not what happened here. Midland's violation of the FDCPA and the intangible but real harms that Pierre suffered bear close relationships to those recognized in both tort law and constitutional law.

1. Tort Law Parallels

Start with intentional or reckless infliction of emotional distress. "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress...." Restatement (Second) of Torts § 46(1) (Am. L. Inst. 1965).[7] Such tort cases often pose issues about what

7. For the sake of (relative) brevity, this discussion of tort-law parallels draws primarily on the Restatement (Second) of Torts, published in the years leading up to and right around the enactment

conduct is "extreme and outrageous" and when emotional distress is sufficiently severe. In enacting the FDCPA and its remedy for statutory damages, Congress itself outlawed the conduct that harmed Pierre.

The emotional distress, anxiety, fear, and stress she experienced were foreseeable, and arguably intended, responses to defendant's attempt to collect the zombie debt. Congress told the federal courts to provide a damages remedy for such conduct. That choice is well within Congress's legislative powers over interstate commerce to go beyond the common law. "To say that there is no injury in this economy when a person receives a dunning letter demanding money that is not owed not only ignores the realities of everyday life, it also ignores the findings of Congress and constitutes a direct affront to a congressional prerogative at the core of the legislative function." *Markakos*, 997 F.3d at 785 (Ripple, J., concurring in judgment); *Demarais*, 869 F.3d at 692 (attempt to collect debt not owed caused real and foreseeable mental distress familiar to law).

The torts of defamation and invasion of privacy and remedies for them also bear close relationships to the FDCPA and its private right of action. As noted, *TransUnion* invoked the parallel to defamation per se to find standing for Mr. Ramirez and the other plaintiffs whose potential listing were sent to potential creditors. 141 S. Ct. at 2209. We drew upon the defamation per se

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of the FDCPA. The first and third Restatements, case law from around the nation, and other secondary sources offer further support for the points in the text.

parallel in *Ewing v. Med-1 Solutions, LLC*, 24 F.4th 1146, 1151-54 (7th Cir. 2022). We held correctly that FDCPA plaintiffs whose debts were reported without noting they were disputed had standing based on publication of false or misleading information to third parties. We relied on the obvious parallel to defamation per se. No more specific showing of injury was required.

Other FDCPA violations parallel the tort of invasion of privacy, including its branches for intrusion upon seclusion, unreasonable publicity given to a person's private life, and publicity that places a person in a false light before the public. See Restatement (Second) of Torts § 652A et seq. (Am. L. Inst. 1977); *Lupia v. Medicredit, Inc.*, 8 F.4th 1184, 1191-93 (10th Cir. 2021) (FDCPA plaintiff had standing based on harms akin to those caused by invasion of privacy in form of intrusion upon seclusion); *St. Pierre v. Retrieval-Masters Creditors Bureau, Inc.*, 898 F.3d 351, 357 (3d Cir. 2018) (FDCPA plaintiff had standing for harm akin to unreasonable publicity of private life branch of invasion of privacy).

The majority here, though, adopts a sweeping rejection of standing based on "psychological states" induced by FDCPA violations. We should instead recognize that, more generally, the common law has long authorized damages for emotional distress in a wide range of cases lacking tangible injury. Section 905 of the Restatement (Second) of Torts (Am. L. Inst. 1979) states that compensatory damages may be awarded for emotional distress. The comments explain that the principal element of damages in actions for assault and defamation, among other torts,

is "frequently the disagreeable emotion experienced by the plaintiff," § 905 cmt. c, and that the "mental distress known as humiliation" may also support a damages award, cmt. d. Section 924 states: "One whose interests of personality have been tortiously invaded is entitled to recover damages for past or prospective (a) bodily harm and emotional distress...." Comment a explains that this rule reaches assault (where no physical contact is made) and insulting conduct amounting to a tort. See also § 623 (emotional distress damages for defamation); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) ("the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering").

Consider the difference between assault and battery, with the question of standing in mind. What harm is suffered in an assault that stops short of battery? Not physical harm, but fear and emotional distress. Does that mean a victim of an assault lacks Article III standing to sue in federal court? Of course not. The fear and emotional distress are sufficiently concrete and particularized to support standing. The same should be true here, especially based on the policy choice by Congress to offer this protection for vulnerable consumers from abusive and deceptive bullying by debt collectors.

After *Spokeo*, I would not contend that every FDCPA violation can support standing. The Act outlaws some "bare procedural violations" that may not cause "injury in fact." But the violation that plaintiff Pierre experienced

with Midland's effort to pressure or trick her into paying the zombie debt, inducing fear, anxiety, confusion, and more general emotional distress, easily fits into this dimension of the common law of torts.

2. Constitutional Law Parallels

The "history and tradition" relevant to standing for intangible injuries are not limited to the common law. *TransUnion*, 141 S. Ct. at 2204. The United States Constitution protects people from many wrongs that may cause intangible injuries, including emotional distress and humiliation. A plaintiff may not recover damages for the "abstract" value of a constitutional right, *Memphis Comm. School Dist. v. Stachura*, 477 U.S. 299, 308, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986), but a plaintiff may recover for intangible emotional distress and humiliation caused by constitutional violations.

Our circuit's pattern jury instructions for § 1983 cases reflect this settled law by allowing consideration of mental and emotional pain and suffering. Federal Civil Jury Instructions of the Seventh Circuit § 7.26 (2017). Such damages for intangible injuries can be appropriate for denials of free speech, free exercise of religion, or due process of law. See *Carey v. Piphus*, 435 U.S. 247, 264, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978) (mental and emotional distress constitute compensable injury in § 1983 cases); *Young v. Lane*, 922 F.2d 370, 374 (7th Cir. 1991) (recognizing prisoners could recover damages for denial of free exercise rights if they could show violations of clearly established law); *Williams v. Lane*, 851 F.2d 867, 876 (7th Cir. 1988) (same).

Damages for what the majority calls "psychological states" are also available for intrusions on privacy in violation of the Fourth Amendment and for threats of clearly excessive force under the Fourth Amendment. E.g., *Baird v. Renbarger*, 576 F.3d 340 (7th Cir. 2009) (affirming denial of qualified immunity where officer pointed submachine gun at persons who posed no danger at site of search involving suspected non-violent crime). Humiliating strip searches of prisoners, detainees, and suspects may violate Fourth and/or Eighth Amendment rights under some circumstances, and damages for the intangible humiliation and emotional distress can be appropriate. E.g., *Henry v. Hulett*, 969 F.3d 769 (7th Cir. 2020) (en banc).

These examples should be sufficient to make the general point: plaintiffs can establish standing in a wide variety of constitutional cases by alleging and showing they have suffered various forms of emotional distress.

Consider also the issue of standing in constitutional cases where plaintiffs seek or are awarded only nominal damages. The Supreme Court held in *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 209 L. Ed. 2d 94 (2021), that where the plaintiff proved completed violations of his First Amendment rights, his request for only nominal damages—without proof of compensatory damages—was sufficient to satisfy the redressability element of Article III standing. The Court made clear that the plaintiff still needed to show an actual injury in the form of a completed violation of his rights, *id.* at 802 n.*, but it's difficult to reconcile the majority's holding here with *Uzuegbunam*.

If standing had been lacking in *Uzuegbunam* for lack of injury, the Court would have been obliged to order dismissal for lack of standing, regardless of the redressability element.

Justice Thomas's opinion for the Court in *Uzuegbunam* provides a good survey of the history and importance of nominal damage awards in the common law and constitutional law going back to the earliest years of the Republic and in English courts. See *id.* at 798-800, discussing, e.g., *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508-09, F. Cas. No. 17322 (C.C. Me. 1838) (Story, J.). The general principle is that nominal damages are available and even presumed where a plaintiff proves a violation of her legal rights. If that's correct under both the common law and constitutional law, I have trouble seeing why Congress cannot authorize a modest damages remedy where a plaintiff's statutory rights are violated.

To sum up, if we follow the teachings of *Spokeo* and *TransUnion*—if we give "due respect" for Congress's judgment and recognize that Pierre's statutory claim and intangible injuries fit closely in legal history and tradition—then we should affirm. Article III, *Spokeo*, and *TransUnion* do not prohibit standing for this statutory claim. The FDCPA civil action is constitutional as applied to a host of violations that cause intangible but real injuries like Pierre's.[8]

8. One path toward more specific guidance for lower federal courts for these problems would be to embrace the distinction between private rights and public rights. Justice Thomas endorsed this analysis in his concurrence in *Spokeo*, 578 U.S. at 344-46, and

IV. The Seventh Circuit's Restrictions on Standing in Consumer Protection Cases

The majority reaches the opposite result by following several decisions this court issued beginning in December 2020, ordering dismissal of previously viable FDCPA claims for lack of standing. I focus here on those the majority relies upon to reject "psychological states," such as emotional distress, anxiety, and confusion, as grounds for standing here.

The key opinions supporting the majority's rejection of standing for Pierre are *Brunett v. Convergent Outsourcing, Inc.*, 982 F.3d 1067 (7th Cir. 2020), and *Gunn v. Thrasher, Buschmann & Voelkel, P.C.*, 982 F.3d 1069 (7th Cir. 2020).

In *Brunett*, the debt collector sent a letter offering to settle a debt but warning that the IRS would be notified

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his dissent in *TransUnion*: "At the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community." 141 S. Ct. at 2217. The distinction between private and public rights could go a long way to reconcile Supreme Court precedents on nominal damages with its conflicting and sometimes Delphic opinions on standing for intangible injuries. See also *Sierra v. Hallandale Beach*, 996 F.3d 1110, 1138-39 (11th Cir. 2021) (Newsom, J., concurring); William Baude, *Standing in the Shadow of Congress*, 2016 Sup. Ct. Rev. 197, 227-31 (2016). Plaintiff Pierre has easily shown standing under the majority opinions in *Spokeo* and *TransUnion*, and she would also have standing based on her assertion of a private right created by statute.

of any forgiveness of more than $600. The plaintiff said she had been confused and intimidated by the offer and the threat of notice to the IRS, and she had consulted a lawyer for advice. The panel found that she lacked standing. The opinion seemed to fear universal standing, equating standing based on the plaintiff's emotional distress and confusion from a misleading dunning letter *sent to her* with a taxpayer who wanted to know how her tax dollars were spent on covert projects. 982 F.3d at 1068-69, citing *United States v. Richardson*, 418 U.S. 166, 94 S. Ct. 2940, 41 L. Ed. 2d 678 (1974). Consulting a lawyer could not be enough, we said, lest we open the door to "universal standing." There is of course plenty of room between allowing a statutory claim for foreseeable harms suffered by the person targeted by the violation, on one hand, and "universal standing" on the other. *Brunett* did not address the "due respect" for congressional choices. Nor did it engage with the facts that the plaintiff was the intended target of the alleged deception and that the FDCPA is supposed to protect her from such deception and intimidation. Nor did *Brunett* consider whether the plaintiff's alleged injuries were closely related to injuries recognized under the common law.

In *Gunn*, a debt collector sent a letter threatening foreclosure to enforce a debt to a homeowners' association. The debtors did not pay up, and the collector sued in state court for breach of contract but not foreclosure. The debtors sued under the FDCPA on the theory that the threat to foreclose must have been deceptive because it would make no economic sense to seek foreclosure for a debt of just $2,000. 982 F.3d at 1070. The district

court had sensibly dismissed that unsympathetic suit on the merits. On appeal, however, our opinion instead found no standing. The debtors claimed standing based on annoyance and intimidation, without identifying how the allegedly deceptive threat had affected their actions. The *Gunn* opinion scoffed at the psychological effects of deceiving particular debtors, again comparing their claims to the very un-particularized claims in public-rights suits asserting taxpayer standing or environmental suits brought by citizens with no direct connection to the environment in question. The *Gunn* opinion's examples have little to do with the FDCPA or the harms that deceptive violations cause for the consumer-debtors it is intended to prevent or remedy. See 982 F.3d at 1071-72. And as in *Burnett*, the *Gunn* opinion did not address the "due respect" for Congress or the relevant common-law parallels.

Burnett and *Gunn* have been followed in several opinions that applied but did not otherwise justify the broad but mistaken view that emotional distress, anxiety, and other "psychological states" caused by FDCPA violations cannot support standing. A week after we issued *Gunn* and *Burnett*, a panel issued *Nettles v. Midland Funding LLC*, 983 F.3d 896 (7th Cir. 2020), where a debt collector violated the Act by sending a collection letter that overstated the amount of the debt by about $100. The debt collector took an interlocutory appeal from a denial of arbitration, but the panel ordered dismissal for lack of standing. Plaintiff Nettles apparently did little to support standing, arguing primarily that we should allow standing based on only a statutory violation. That would have been

contrary to *Spokeo*. Nettles also argued, as "something of an afterthought at oral argument," that annoyance and consulting a lawyer gave her standing. The *Nettles* panel said without elaborating that *Gunn* had rejected those grounds for standing. 983 F.3d at 900.

In *Pennell v. Global Trust Mgmt., LLC*, 990 F.3d 1041 (7th Cir. 2021), the plaintiff and her lawyer had notified her lender that she refused to pay the debt and that any future contact should be through her lawyer. A debt collector sent a dunning letter to the plaintiff anyway. The FDCPA prohibits bypassing a lawyer after such notice. 15 U.S.C. § 1692c(a)(2). Plaintiff sued, alleging that the direct communication caused stress and confusion, making her think that she had no rights under the Act. The district court found no violation because there was no showing that the debt collector had known of the plaintiff's demand to communicate only through her lawyer. The *Pennell* panel held instead that the plaintiff lacked standing, following the broad statement in *Brunett* that "confusion is not itself an injury" and adding that stress without "physical manifestations and no qualified medical diagnosis" was not sufficient for standing. 990 F.3d at 1045.[9]

9. After the appellate panel raised the issue of standing for the first time on appeal, the plaintiff argued that the letter harmed her by intruding on her privacy, relying on the obvious similarity to an invasion of privacy tort. The panel rejected this argument because the complaint had not included such an allegation. 990 F.3d at 1045. Under our usual practice, the plaintiff would have been entitled at least to amend her complaint (a) in response to the newly raised standing issue, and especially (b) in response to significant new precedents issued even after the oral argument in the case. See *Bazile v. Finance System of Green Bay, Inc.*, 983 F.3d 274, 281

Next in this series came *Markakos v. Medicredit, Inc.*, 997 F.3d 778 (7th Cir. 2021), which drew three separate opinions that illuminate the problem we face in this case. The debt collector sent Markakos two dunning letters listing different amounts for the debt and the wrong name of the creditor. The FDCPA requires a debt collector to state accurately the amount of the debt and the name of the creditor. 15 U.S.C. § 1692g(a)(1) & (2). The panel rejected the plaintiff's claim of an informational injury because she did not show that accurate information would have changed her response. The plaintiff also alleged confusion and aggravation, but the lead opinion rejected those grounds for standing based on *Gunn* and *Brunett*. 997 F.3d at 781.

Judges Ripple and Rovner wrote separately in *Markakos*. They concurred in the judgment based on *stare decisis* but criticized the recent precedents restricting FDCPA standing. Judge Ripple pointed out that our court was effecting "a direct and complete frustration of Congress's attempt to regulate commerce in the manner that it has chosen." 997 F.3d at 783. *Spokeo* did not provide a "firm foundation for the construction of the ambitious

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(7th Cir. 2020) (remanding FDCPA case for possible amendment to pleadings to cure standing problem: "True, her complaint didn't detail such [a reliance] injury. But '[c]omplaints need not be elaborate.'"); see generally, e.g., *Runnion v. Girl Scouts of Greater Chicago and Northwest Indiana*, 786 F.3d 510, 519-20 (7th Cir. 2015) (when original complaint is dismissed, district courts should ordinarily allow at least one opportunity to amend the complaint unless it is certain that amendment would be futile or otherwise unwarranted, collecting cases).

enterprise that the court seems to be building at such a rapid pace." *Id.*; accord, *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1251 (7th Cir. 2021) (Hamilton, J., concurring). Judge Ripple criticized the recent opinions as having ignored the limits of *Spokeo* and the importance of both historical practice and congressional judgments. The substantive violations of the FDCPA in *Markakos* itself and other recent opinions were "a long way from an incorrect zip code on a credit report." 997 F.3d at 784.

Judge Ripple highlighted Congress's judgment about the need to protect consumers from abusive debt collection practices and its choice to rely on private enforcement. He also noted that the harms targeted under the FDCPA bear close relationships to harms recognized in fraudulent or negligent misrepresentation cases. *Id.* at 785. Judge Ripple's opinion recognized the genuine harms the FDCPA addresses, and that Pierre suffered in this case, in ways that our recent precedents have failed to:

> To say that there is no injury in this economy when a person receives a dunning letter *demanding money that is not owed* not only ignores the realities of everyday life, it also ignores the findings of Congress and constitutes a direct affront to a congressional prerogative at the core of the legislative function. The court's failure to recognize the injury that Congress saw and addressed simply testifies to our failure to appreciate how the people we judicially govern live, or more precisely, it testifies to our failure to defer

> to the congressional appreciation as to how our fellow citizens live. The Supreme Court's holding in *Spokeo* provides no justification for our embarking on such a precarious course. I fear we have given Congress's judgment too little attention and erected an unnecessary constitutional barrier to enforcement of the FDCPA.

Id. (emphasis added).

That concurring opinion apparently led the author of the lead opinion to defend the wisdom of the recent precedents. See 997 F.3d at 781-82. That defense did not, however, address the respect due to Congress's policy choices and the close relationships between the alleged harms and those long recognized in common law and constitutional law. That defense drew a further concurrence from Judge Rovner, who joined in the criticism of our recent standing precedents, carefully described the emerging circuit split, and hoped for further guidance from the Supreme Court. *Id.* at 785-89.

Most recently, in *Wadsworth v. Kross, Lieberman & Stone, Inc.*, 12 F.4th 665 (7th Cir. 2021), also cited by the majority here, we reversed a plaintiff's judgment under the FDCPA and ordered dismissal for lack of standing. An employer hired a debt collector to try to claw back a hiring bonus from a recent hire whom it had soon fired. The former employee sued the collector under the FDCPA for failing to provide notice of her rights under § 1692g(a) and failing to identify itself as a debt collector and its

efforts as an attempt to collect a debt. The district court had granted summary judgment for the plaintiff on the merits, but our panel found no standing.

To show standing, Wadsworth did not try to show she had made payments she would not have made but for the violations. She relied on what the panel brushed off as "*only* ... emotional harms"—personal humiliation, embarrassment, anxiety, stress, mental anguish and emotional distress. 12 F.4th at 668 (emphasis added). The panel rejected standing in broad terms: "As our bevy of recent decisions on FDCPA standing makes clear, anxiety and embarrassment are not injuries in fact," "stress" is not a concrete injury, and it is not enough for the plaintiff to be "annoyed" or "intimidated" by a violation or to experience "infuriation or disgust" or a "sense of indignation" or a "state of confusion." *Id.* Otherwise, the panel wrote, "then everyone would have standing to litigate about everything." *Id.*, quoting *Brunett*, 982 F.3d at 1068-69. The panel concluded that an FDCPA plaintiff can sue only if she suffered "a concrete harm that he wouldn't have incurred had the debt collector complied with the Act." *Id.* at 669, citing *Casillas*, 926 F.3d at 334.

Again, there is a *very* long distance between "everyone [having] standing to litigate about everything" and respecting the choice of Congress to enforce the FDCPA with a civil remedy for intangible but real and foreseeable injuries caused by deceptive debt collection practices that were aimed directly at the plaintiff.

The concurring opinions by Judges Ripple and Rovner in *Markakos* describe well where our recent FDCPA standing restrictions have erred. The most recent cases have paid only lip service to the Supreme Court's instructions in both *Spokeo* and *TransUnion* to give due respect to Congress's judgments about making harms actionable. Those decisions have also brushed off intangible harm like stress, fear, anxiety, confusion, and embarrassment as grounds for standing even though those harms have close relationships to harms long recognized under the common law. That brush-off started with the sweeping language and the fear of supposedly "universal standing" in *Gunn* and *Brunett*, without paying attention to both the congressional judgment and the many areas of common law that recognize such intangible but real harms and offer protection against them. We should overrule these cases' rejections of standing based on emotional distress, anxiety, and other psychological harm caused by FDCPA violations. I fear, however, that our circuit has committed itself so thoroughly to this mistaken path that now only the Supreme Court can provide a correction.

V. Other Circuits and Consequences

Most other circuits have not followed these errors, despite a national effort by debt collectors to persuade them to do so. The Third, Tenth, and Eleventh Circuits have been less restrictive in allowing standing for intangible injuries under the FDCPA. See *Lupia v. Medicredit, Inc.*, 8 F.4th 1184 (10th Cir. 2021) (FDCPA violations caused harms akin to those caused by invasion of privacy); *Hunstein v. Preferred Collection and Mgmt. Services*,

17 F.4th 1016 (11th Cir. 2021) (explaining that *Spokeo* and *TransUnion* do not require perfect congruence with common-law harms, but only those similar in kind and not in degree), vacated and rehearing en banc granted, 17 F.4th 1103 (11th Cir. 2021); *DiNaples v. MRS BPO, LLC*, 934 F.3d 275, 279-80 (3d Cir. 2019), following *St. Pierre v. Retrieval-Masters Creditors Bureau, Inc.*, 898 F.3d 351, 357-58 (3d Cir. 2018) (FDCPA violations caused harms akin to invasion of privacy).

Some decisions of the Sixth Circuit also take a broader approach to standing for intangible injuries under the FDCPA. See *Donovan v. FirstCredit, Inc.*, 983 F.3d 246, 252 (6th Cir. 2020) (FDCPA violations caused harm akin to invasion of privacy); *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 463 (6th Cir. 2019) (implying that claim that plaintiff had wasted time or suffered emotional distress would have supported concrete injury).

The Eighth Circuit found standing based on emotional distress in a case quite similar to this one. In *Demarais v. Gurstel Chargo, P.A.*, 869 F.3d 685 (8th Cir. 2017), the defendant law firm actually filed suit to try to collect a time-barred "zombie" debt, hoping for a default judgment based on the debtor's non-appearance at trial. After the debtor appeared twice in state court for trial, the law firm agreed to dismiss the case with prejudice. Yet it later served discovery requests on the debtor. The Eighth Circuit held that the debtor had alleged an injury in fact. The Eighth Circuit drew on the common-law torts of malicious prosecution, wrongful use of civil proceedings, and abuse of process. 869 F.3d at 691-92. "The harm of

being subjected to baseless legal claims, creating the risk of mental distress, provides the basis for both § 1692f(1) claims and the common-law unjustifiable-litigation torts." *Id.* at 692.

In language that could apply here, Judge Benton wrote for the court:

> Congress recognized that abusive debt collection practices contribute to harms that can flow from mental distress, like "marital instability" and "the loss of jobs." § 1692(a). "[B]ecause Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is ... instructive and important." *Spokeo*, [578 U.S. at 341]. Congress created a statutory right to be free from attempts to collect debts not owed, helping to guard against identified harms. * * * The alleged violations of Demarais's § 1692f(1) rights were concrete injuries in fact.

869 F.3d at 692. I agree.

Other Sixth and Eighth Circuit decisions have moved in the direction of restricting standing in such cases. In *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855 (6th Cir. 2020), the Sixth Circuit affirmed dismissal for lack of standing, with a majority opinion by Judge Nalbandian and a separate opinion from Judge Murphy. The debtor alleged that dunning letters gave him the false impression that an attorney had reviewed the case and found that

the debts were valid. The panel agreed that the debtor's anxiety was not fairly traceable to the collector's alleged violations, but the judges took different approaches to whether the debtor's anxiety amounted to an injury in fact that could support standing.

Judge Nalbandian looked at the question in detail. His opinion was skeptical but inconclusive on the question. Judge Murphy disagreed with those doubts and would have held that mental harm can support Article III standing. His opinion drew on the difference between private and public rights. 946 F.3d at 872, citing *Spokeo*, 578 U.S. at 343-48 (Thomas, J., concurring); see also William Baude, *Standing in the Shadow of Congress*, 2016 Sup. Ct. Rev. 197, 227-31 (2016) (endorsing reliance on that difference to decide standing on statutory claims asserting intangible harms). Judge Murphy recognized that the common law "typically" authorized no recovery for only mental suffering, but he also recognized the many exceptions in the common law and emphasized, per *Spokeo* and *Lujan*, that Congress may elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law. *Id.* at 873-74.[10]

10. In a later opinion by Judge Nalbandian for a different panel, the Sixth Circuit held that confusion and anxiety alone are not enough to support standing in an FDCPA case. *Garland v. Orlans, PC*, 999 F.3d 432, 438-40 (6th Cir. 2021). The *Garland* opinion is considerably more careful than our court's opinions rejecting anxiety or emotional distress as sufficient. I nevertheless believe, with respect, that *Garland* does not appreciate sufficiently either the judgment of Congress or the common-law relatives identified in Judge Murphy's opinion in *Buchholz*, the Eighth Circuit's analysis in *Demarais*, or the considerations I have laid out here.

The Eighth Circuit took a much narrower approach to FDCPA standing for intangible injuries in *Ojogwu v. Rodenburg Law Firm*, 26 F.4th 457, 463 (8th Cir. 2022), which distinguished *Demarais* and cited *Buchholz* and our decision in *Pennell* with approval for the proposition that stress and confusion were not sufficient. I should also note that the Eleventh Circuit's careful opinion in *Hunstein*, 17 F.4th 1016, has been vacated and is being considered en banc. 17 F.4th 1103 (11th Cir. 2021).

At this point, this circuit is at the far end of a circuit split on standing in FDCPA cases based on emotional distress, confusion, and anxiety. That split seems entrenched, at least pending further guidance from the Supreme Court.

VI. Consumer Protection and Separation of Powers

I've explained in detail why our recent cases denying standing for many intangible injuries are wrong as a matter of standing doctrine and Supreme Court precedent. I conclude by noting some of the larger consequences and implications of those errors.

First, as Judge Ripple emphasized in his concurring opinion in *Markakos*, our court's series of decisions impose significant and unjustified constitutional restrictions on Congress's legislative powers. 997 F.3d at 784. The effect is to hold that the statute granting the civil remedy under the FDCPA, 15 U.S.C. § 1692k, is unconstitutional in many, and perhaps most, applications within the scope of the statutory language. Our opinions taking that step

have not yet engaged seriously with the analysis required under *Spokeo* and *TransUnion*.

Second, our errors have broad implications for many statutes beyond the FDCPA. Congress has exercised its legislative power to protect consumers in a host of statutes based on the finding that the common law has not provided sufficient protection for their interests. Those statutes typically do not limit their prohibitions to only unfair *results* for consumers, which might already be actionable under prior law. Instead, consumer protection statutes typically try to *prevent* the worst harms by imposing a range of procedural, informational, and substantive requirements to reduce the risk of harm. "Congress had every right to decrease the confusion and concomitant disincentive to use the credit markets caused by the profusion of sharp practices facilitated by modern technology." *Markakos*, 997 F.3d at 785 (Ripple, J., concurring in judgment).

Many consumer protection statutes authorize enforcement of those preventive measures by private rights of actions. The "due respect" that courts owe Congress in this field needs to include more respect for those policy choices. This is a basic issue of the separation of powers in our federal government. I do not suggest that Congress has an utterly free rein; *Spokeo* and *TransUnion* rejected that position. But we need to give much greater weight to the point in *Lujan, Spokeo*, and *TransUnion* that Congress may, in the exercise of policy judgment and legislative power, "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that

were previously inadequate in law." *TransUnion*, 141 S. Ct. at 2204-05, quoting *Spokeo*, 578 U.S. at 341, quoting in turn *Lujan*, 504 U.S. at 578.

Third, to the extent that the courts use standing doctrine to prevent effective enforcement of the FDCPA or other consumer protection statutes, Congress has other tools. One obvious alternative is to rely more on enforcement through federal agencies. Congress certainly has the power to impose civil or even criminal penalties for violations of regulatory statutes, and an agency enforcement action to impose such penalties would not encounter any standing obstacle. *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1251 (7th Cir. 2021) (Hamilton, J., concurring). That path would require a lot more public money and personnel than Congress has chosen to use so far. But these new restrictions on standing will naturally push Congress in that direction. See generally *TransUnion*, 141 S. Ct. at 2214-26 (dissenting opinions of Thomas and Kagan, JJ.).

For these reasons, I respectfully dissent. Judge Leinenweber in the district court decided this challenging case fairly and soundly. I would affirm the judgment of the district court in all respects.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED FEBRUARY 5, 2018

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 16 C 2895

RENETRICE R. PIERRE, Individually and on Behalf of others Similarly Situated,

Plaintiff,

v.

MIDLAND CREDIT MANAGEMENT, INC., a Kansas Corporation,

Defendant.

February 5, 2018, Decided
February 5, 2018, Filed

Harry D. Leinenweber, United States District Judge

MEMORANDUM OPINION AND ORDER

Plaintiff Renetrice Pierre ("Pierre") sued Defendant Midland Credit Management, Inc. ("Midland") on behalf of a class of plaintiffs (Count I) and herself individually

(Count II), alleging violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* Pierre now moves for summary judgment as to liability on both counts. (Pl.'s Mot., ECF No. 68.) Midland moves to strike (Def.'s Mot. to Strike, ECF No. 79) certain paragraphs from the documents Pierre files in support of her Motion. For the reasons stated herein, the Court grants Pierre's Motion for Summary Judgment and denies Midland's Motion to Strike.

I. BACKGROUND

Sometime in 2006 or 2007, Pierre opened and began to use a credit card account with Target National Bank ("TNB"). (Pl.'s Statement of Facts ("SOF"), ECF No. 70 ¶ 11; Def.'s Resps. to Pl.'s SOF, ECF No. 81 ¶ 11.) She eventually failed to pay off the balance (Pl.'s SOF ¶ 13) and later defaulted in March or April 2008. (Def.'s Resps. to Pl.'s SOF ¶ 14.) Thereafter, TNB sold the debt to Midland Funding, LLC, for which Defendant Midland Credit Management, Inc. is a debt collector. (Def.'s SOF Responses ¶¶ 7, 13.) In an effort to collect on that debt, Midland sent a dunning letter to Pierre on September 2, 2015. (*Id.* ¶ 17; *see*, Demand Let., Ex. 1 to Pl.'s Second Am. Compl. ("SAC"), ECF No. 40-1.) Pierre maintains, without contradiction by Midland, that the statute of limitations on a collection action for that debt had run by the time Midland sent the letter. (*See*, Pl.'s SOF ¶¶ 26-27; 735 ILCS 5/13-205.) That letter is the keystone in this case, so some description of it is necessary. The letter stated a current balance of $7,578.57 and listed Target National Bank as the original creditor to the debt. (Demand Let.)

The letter began by stating: "Congratulations! You have been **pre-approved** for a discount program designed to save you money." (*Id.* (emphasis in original).) The letter then presented three "options": Option 1 offered 40% off the advertised balance if Pierre paid by October 2, 2015; Option 2 offered 20% off if Pierre elected to make 12 monthly payments; and Option 3 invited Pierre to call Midland to discuss her options and perhaps pay only $50/month on the debt. (*Id.*) Finally, the letter included the following disclosure:

> The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it, we will not report it to any credit reporting agency, and payment or non-payment of this debt will not affect your credit score.

Id.

II. DISCUSSION

Pierre filed this action alleging that Midland violated the Fair Debt Collection and Practices Act, 15 U.S.C. § 1692, *et seq.* (the "FDCPA"). She pressed both individual claims and putative class claims, and on April 21, 2017, the Court certified a class of all persons with Illinois addresses to whom Midland sent, from March 7, 2015 through March 7, 2016, a letter containing the disclosure laid out above. (*See, generally*, Mem. Op. and Order, Apr. 21, 2017, ECF No. 59.)

Appendix B

This opinion now rules on two Motions before the Court: Pierre's Motion for Summary Judgment as to liability on both Count I (class claims) and Count II (individual claims), and Midland's Motion to Strike certain statements from the documents supporting Pierre's Motion. The Court addresses these in reverse order, and, for the reasons stated below, denies Midland's Motion to Strike and grants Pierre's Motion for Summary Judgment as to liability.

A. Midland's Motion to Strike

To establish a *prima facie* case for an FDCPA violation, a plaintiff must demonstrate (among other things, discussed below at Part II.B.1) that she incurred a debt arising from a transaction entered for personal, family, or household purposes. 15 U.S.C. § 1692a(5); *Pantoja v. Portfolio Recovery Assocs., LLC*, 78 F.Supp.3d 743, 745 (N.D. Ill. 2015) (hereafter, "*Pantoja I*") *aff'd*, 852 F.3d 679 (7th Cir. 2017) (hereafter, "*Pantoja II*"). Midland moves to strike (ECF No. 79) certain paragraphs from Pierre's declaration (ECF No. 72-3) and her Statement of Facts (ECF No. 70), asserting that these paragraphs state legal conclusions and not facts. Midland further suggests that if these paragraphs are struck as it requests, the result will be "fatal" to Pierre's lawsuit. (Pl.'s Mot. to Strike ¶ 2.) In the paragraphs at issue, Pierre states: "From 2007 to 2008, I used the TNB Card for personal, family, household items for me and my son. I never used the TNB Card for anything other than personal, family, household items, including for any business purpose" (Pierre Decl., ECF No. 72-3 ¶¶ 4-5), and "[I] used the

TNB Card only for personal, family, household purposes." (Pl.'s SOF ¶ 12.)

These statements may be lean, but in light of relevant case law and the lack of contrary facts before the Court, they are sufficient to demonstrate Pierre's personal use of the card. In *Pantoja I*, the defendant made the same argument Midland makes here: that the plaintiff failed to demonstrate he accumulated the at-issue debt for personal purposes. *Pantoja I*, 78 F.Supp.3d at 745-46. The *Pantoja* plaintiff never actually used the credit card in question, but had accumulated debt assessed from activation and late fees on the card. *Id.* The court found that the plaintiff had adequately demonstrated a consumer (*i.e.*, personal purpose) debt because undisputed evidence showed that the card was issued to the plaintiff personally, and no evidence in the record "even remotely suggest[ed]" that the card was issued for anything other than household purposes. *Id.* at 746. In another FDCPA case, the plaintiff noted in her deposition that she used her credit to buy "gas, clothes, things like that." *Gomez v. Portfolio Recovery Assocs., LLC*, No. 15 C 4499, 2016 U.S. Dist. LEXIS 79647, 2016 WL 3387158, at *2 (N.D. Ill. June 20, 2016). The defendant protested that the plaintiff could not establish her personal use of the credit, but the defendant cited no evidence to contradict plaintiff's assertions, despite having "every opportunity" to develop its evidence on this issue at the plaintiff's deposition. *Id.* The court ruled that merely questioning the sufficiency of the plaintiff's evidence was not a proper basis to dispute assertions in a statement of facts and accordingly plaintiff's assertions of personal use were deemed undisputed pursuant to Local Rule 56.1. *Id.*

Although the Court acknowledges that *Pantoja* and *Gomez* are not identical to the case at bar, these are differences without distinction. Pierre set forth that she used the (later defaulted-upon) card — which the parties do not dispute was issued to her personally, rather than to some business of hers — to buy household items for herself and her son, and that she never used the card for any business purpose. (Pierre Decl. ¶¶ 4-5; Pl.'s SOF ¶ 12.) Though Midland takes issue with the sufficiency of that description, Midland has not said it is untrue, nor has Midland put forward any evidence to contradict it. *Gomez*, 2016 U.S. Dist. LEXIS 79647, 2016 WL 3387158, at *2. And as in *Gomez*, Midland did not pursue this issue when it had the opportunity during Pierre's deposition. Accordingly, Pierre's assertion that her debt was consumer in nature is deemed an undisputed fact. N.D. Ill. Local Rule 56.1. Midland's Motion to Strike is denied.

B. Pierre's Motion for Summary Judgment on Liability

On a summary judgment motion, the movant bears the burden of establishing that there is no genuine dispute of any material fact and that she is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Becker v. Tenenbaum-Hill Assocs., Inc.*, 914 F.2d 107, 110 (7th Cir. 1990). The court construes facts favorably to the nonmoving party and grants the nonmoving party all reasonable inferences in its favor. *Bagley v. Blagojevich*, 646 F.3d 378, 388 (7th Cir. 2011) (quoting *Ogden v. Atterholt*, 606 F.3d 355, 358 (7th Cir. 2010)).

Appendix B

1. Count I: Class Action Claims

Pierre alleges that Midland's letter violates the FDCPA because it falsely represents the character and legal status of the debt, 15 USC § 1692e(2), it is a deceptive communication, 15 USC § 1692e(10), and because Midland's use of the letter was an unfair or unconscionable means to attempt to collect a debt, 15 USC § 1692f. To prevail on her Motion as to Count I, Pierre need only prove that the class is entitled to summary judgment on any one of these bases. Because the Court finds that she so prevails on Section 1692e(10), the Court devotes its analysis to that issue.

To establish a *prima facie* case under the FDCPA, a plaintiff must prove: she is a natural person or "consumer" who is harmed by violations of the FDCPA; the debt arises from a transaction entered for personal, family, or household purposes; the defendant is a debt collector; and the defendant has violated a provision of the FDCPA. *Pantoja I*, 78 F.Supp.3d at 745 (citation omitted). Here, Pierre has shown there is no genuine issue of material fact as to whether she is a consumer who accrued her debt from a transaction entered into for personal, family, or household purposes (*see above*, at Part II.A), and that the defendant is a debt collector. (Def.'s Resps. to Pl.'s SOF ¶ 6.) Accordingly, the Court need only consider whether Pierre has shown an FDCPA violation as a matter of law.

In Section 1692e cases, the plaintiff proves a violation by showing that the debt collection language is misleading from the perspective of an unsophisticated

consumer. *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1019-20 (7th Cir. 2014). The unsophisticated consumer is "uninformed, naïve, and trusting, but possesses rudimentary knowledge about the financial world, is wise enough to read collection notices with added care, possesses reasonable intelligence, and is capable of making basic logical deductions and inferences." *Williams v. OSI Educ. Servs., Inc.*, 505 F.3d 675, 678 (7th Cir. 2007) (citations omitted) (internal quotation marks omitted). Whether collection language would confuse an unsophisticated consumer is an objective test. *Id.* at 677-78. Plaintiffs in Section 1692e cases may prevail by showing that the language is misleading or confusing on its face. When they cannot show that the language is plainly misleading, plaintiffs can still prevail by producing extrinsic evidence (such as consumer surveys) to demonstrate that unsophisticated consumers do in fact find the language misleading or deceptive. *Lox v. CDA, Ltd.*, 689 F.3d 818, 822 (7th Cir. 2012) (citing *Ruth v. Triumph P'ships*, 577 F.3d 790, 801 (7th Cir. 2009)). Finally, plaintiffs must show that the misleading language is material. *Lox*, 689 F.3d at 826 (citing *Hahn v. Triumph P'ships*, 557 F.3d 755, 757-58 (7th Cir. 2009)).

Pierre levies several arguments for how the dunning letter is impermissibly misleading. One argument in particular persuades the Court. When Midland sent Pierre the dunning letter in September 2015, the statute of limitations on any debt collection action had passed. 735 ILCS 5/13-205. Pierre thus bore no legal responsibility to pay that stale debt and could face no legal jeopardy whatsoever if she refused to pay it. However, under Illinois

law, had Pierre made a partial payment or promised to repay that debt, she could have revived the statute of limitations and subjected herself to the debt obligation anew. *Pantoja I*, 78 F.Supp.3d at 746 (*Ross v. St. Clair Foundry Corp.*, 271 Ill. App. 271, 273 (Ill. App. Ct. 1933)). Pierre argues that because the letter failed to warn of this possibility, the letter is misleading as a matter of law. The Court agrees.

The parties do not dispute that Midland's letter never warns of the possibility that certain actions could breathe new life into comatose debt. Instead, the parties argue at length over whether this omission even matters. Put more finely: Pierre says such an omission is fatal for Midland's FDCPA defense; Midland argues that the FDCPA does not require debt collectors to warn of the potential danger of revival, and so the omission is of no moment. Midland has some authority for its argument, but that authority is not controlling here and anyway runs contrary to an explicit ruling by the Seventh Circuit.

Midland leans heavily on a District of Kansas case in which its argument prevailed. In *Boedicker v. Midland Credit Mgmt., Inc.*, 227 F.Supp.3d 1235, 1236 (D. Kan. 2016), the plaintiff claimed that a Midland dunning letter violated the FDCPA by failing to warn that under Kansas law, a partial payment toward stale debt could renew the statute of limitations. The *Boedicker* court awarded Midland summary judgment, concluding that the FDCPA did not require such a warning. *Boedicker*, 227 F.Supp.3d at 1241-42. But there are some problems with Midland's proposed application of that ruling to this case. First,

the *Boedicker* court read *Pantoja I* differently than the Seventh Circuit did on appeal. *Boedicker* took care to distinguish *Pantoja I*, but later concluded (in language that Midland now borrows) that "[n]o case has determined that a debt collector must warn of a potential revival of a time-barred claim." *Id.* at 1241; Def.'s Resp. at 5. But two years earlier, *Pantoja I* determined just that. *Pantoja I* found a similar dunning letter deceptive under the FDCPA and observed:

> Upon receipt of the letter the only reasonable conclusion that an unsophisticated consumer (or any consumer) could reach is that defendant was seeking to collect on a legally enforceable debt, even if defendant indicated that it chose not to sue. **Nor would a consumer, sophisticated or otherwise, likely know that a partial payment would reset the limitations period, making that consumer vulnerable to a suit on the full amount** . . . [Further, the letter is deceptive on its face because it] does not indicate when the debt was incurred, only that "[b]ecause of the age of your debt, we will not sue you for it and we will not report it to any credit reporting agency." The letter is deceptive because it does not tell the consumer that the debt is time-barred and defendant cannot sue plaintiff to collect it, rather, it implies that defendant has chosen not to sue. **Nor does it tell plaintiff that the effect of making (or agreeing to make) a partial payment on a time-barred debt is to revive the statute of limitations for enforcing that debt**.

Pantoja I, 78 F.Supp.3d at 746 (citing *McMahon*, 744 F.3d at 1021) (emphasis added). Although this Court reads *Pantoja I* as imposing exactly the requirement both *Boedicker* and Midland eschew, *Pantoja II* eliminates any guesswork. In the Seventh Circuit, a debt collector must indeed warn of a potential revival of a time-barred claim:

> We agree with the district court's **two** reasons for finding that the dunning letter here was deceptive. First, the letter does not even hint, let alone make clear to the recipient, that if he makes a partial payment or even just a promise to make a partial payment, he risks loss of the otherwise ironclad protection of the statute of limitations. **Second, the letter did not make clear to the recipient that the law prohibits the collector from suing to collect this old debt. Either is sufficient reason to affirm summary judgment for the plaintiff**.

Pantoja II, 852 F.3d at 684 (emphasis added).

Midland next argues that even if a warning against possible revival were required ordinarily, no such warning would be necessary in this case because of Midland's policy "never to revive the statute of limitations after it expires." (Def.'s Resp. at 8 (citing Def.'s SOF ¶ 28, ECF No. 81).) Pierre takes umbrage with this defense on a number of grounds, but the most persuasive of them is that revivals of the statute of limitations are controlled not by Midland's policies, but by operation of law. *See, Pantoja I*, 78 F.Supp.3d at 746. A revival would be a hazard to Pierre, who may face suit by Midland if it changed its policies or by

someone else if Midland sold Pierre's debt to another, less principled collector. Further, the question in FDCPA cases is whether the at-issue language would mislead or deceive an unsophisticated consumer. *McMahon*, 744 F.3d at 1019. An unsophisticated consumer would not know about the dangers of revival (even assuming that Midland's letter adequately advises consumers of the statute of limitations in the first instance), and she would certainly not know about Midland's internal policies. *Cf. Lox v. CDA, Ltd.*, 689 F.3d 818, 825 (7th Cir. 2012) (finding, contrary to collector's contention, that an unsophisticated consumer may well consider dunning letter's discussion of possible fees a threat because consumer would not know of legal procedure dictating that such fees could not be imposed absent collector moving a court to do so).

Midland also relies on *Boedicker* for the proposition that because neither the Consumer Fraud Protection Bureau nor the Federal Trade Commission have determined that such warnings are necessary, Midland is free to omit them. (Def.'s Resp. at 4-6 (citing *Boedicker*, 227 F.Supp.3d at 1240-41).) Specifically, Midland points to: an outline of "proposals under consideration" at the CFPB that suggests that revival warnings might actually compound consumer confusion, rather than dispel it (Def.'s Resp. at 5-6); a consent order entered into between Midland and the CFPB in which the CFPB mandated that Midland use the disclosure language it used in the letter sent to Pierre (Ex. A to Def. Resp., ECF No. 82-1); and an FTC consent decree which did not require revival warnings, despite the FTC's apparent earlier consideration of requiring them in the decree.

(Def.'s Resp. at 6 n.10.) Though Midland never says so, it essentially argues that these administrative impressions are entitled to *Chevron* or *Skidmore* deference and should be adhered to. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944).

The Court cannot agree. First, the Seventh Circuit's explicit holding—that revival warnings are required—controls here. *Pantoja II*, 852 F.3d at 684. True, the Seventh Circuit did not consider in *Pantoja II* whether the sources Midland cites are entitled to deference. *Pantoja I* and *II* acknowledge the FTC consent decree mentioned here by Midland, but only to distinguish the language mandated therein from the language of the dunning letter *Pantoja* considered. The *Pantoja* cases express no opinion as to the deference, if any, that should be afforded the decree.

However, as Judge Edmond E. Chang points out, several courts in this District have held that the consent decrees from both the FTC and the CFPB to which Midland now points should be afforded no deference. *Harris v. Total Card, Inc.*, No. 12 C 05461, 2013 U.S. Dist. LEXIS 131747, 2013 WL 5221631, at *7 (N.D. Ill. Sept. 16, 2013) (collecting cases); *accord, Richardson v. LVNV Funding, LLC*, No. 16 C 9600, 2017 U.S. Dist. LEXIS 179746, 2017 WL 4921971, at *4 (N.D. Ill. Oct. 31, 2017) (stating that these decrees do not warrant *Chevron* deference). Midland "cites no authority demonstrating that congress gave the FTC or the CFPB rulemaking

power under the FDCPA through the filing and settling of lawsuits against debt collectors," and Midland has not explained how or if the CFPB "proposals" it identifies were ever adopted or endorsed by the CFPB, as opposed to remaining proposals and nothing more. *Harris*, 2013 U.S. Dist. LEXIS 131747, 2013 WL 5221631, at *7 (citing *Vulcan Constr. Materials, L.P. v. Fed. Mine Safety & Health Review Comm'n*, 700 F.3d 297, 315 (7th Cir. 2012)). The Court will not extend deference on this basis to the sources cited by Midland.

As its final argument that it need not include a revival warning in its disclosure, Midland says that in Illinois, a partial payment does not revive the limitations period unless the paying party also makes a new and express promise to pay. (Def.'s Resp. at 5 n.8.) *Pantoja II* dealt with this also. The Seventh Circuit acknowledged that though there is some "room for disagreement" about the scope of Illinois law, that disagreement does not free debt collectors of the requirement to warn about the danger of statute of limitations revival. *Pantoja II*, 852 F.3d at 685. Whether a plaintiff makes a new promise or simply tenders a partial payment, either action puts her in a worse legal position than she would have been in had she done nothing. *Id.* Either she has revived the statute of limitations by her promise, or she has by her payment opened herself up to possible suit in which she would have to challenge the collector's reading of uncertain Illinois law. *Id.*

One further step is required. Pierre must also show that the dunning letter is materially misleading. *Lox v.*

CDA, Ltd., 689 F.3d 818, 822 (7th Cir. 2012). Arguing against materiality, Midland makes much hay of its claim that Pierre "never made any payments, [and] did not do anything different as a result of the letter." (Def.'s Resp. at 1 n.1.) Midland misses the point. Materiality does not hinge upon whether the plaintiff actually acted in reliance on a confused understanding, but rather whether the misleading letter "has the ability to influence a consumer's decision." *Lox*, 689 F.3d at 827 (quoting *O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938, 942 (7th Cir. 2011)) (internal quotation marks omitted). Such is the case here. A consumer receiving this dunning letter may well choose to pay up or promise to do the same, things she likely would not have done but for her receipt and misunderstanding of the letter. Thus, the letter may "lead to a real injury" — the newly revived vulnerability to suit, especially — and so the letter is materially misleading. *Id.*

In *Pantoja II* and here, the collector's silence about the significant risk of losing the ironclad protection of the statute of limitations renders the letter misleading and deceptive as a matter of law. Pierre and the class members are thus entitled to summary judgment as to liability on Count I.

2. Count II: Individual Claims

In Count II as in Count I, Pierre presses FDCPA claims based on Sections 1692e and 1692f. Her rationale for those claims is different here than in Count I, however, Count II's claims focus on Midland's contested right to charge interest on Pierre's debt. Pierre contends that

Midland has no such right, and so the dunning letter's "current balance," which Pierre alleges includes over $1,500 in interest, either falsely represents the debt amount (violating Section 1692e) or reflects Midland's attempt to collect an amount not expressly authorized by agreement or permitted by law (violating Section 1692f). (SAC ¶¶ 31-45.)

However, as the Court has already determined that the class Pierre represents is entitled to summary judgment as to liability in Count I, and Counts I and II are both premised upon violations of the FDCPA, the Court need not address the alternative arguments for individual relief Pierre raises in Count II. Everyone in the class is entitled to summary judgment on liability because they received the FDCPA-violative letter. Pierre also received the letter, so she is entitled to summary judgment on liability as well. Nothing more is needed.

III. CONCLUSION

For the reasons stated herein, Defendant Midland's Motion to Strike is denied. Plaintiff Pierre's Motion to Summary judgment as to liability on both Counts I and II is granted.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber
Harry D. Leinenweber, Judge
United States District Court

Dated: 2/5/18

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED JUNE 8, 2022

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 19-2993 & 19-3109

RENETRICE R. PIERRE, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiff-Appellee/Cross-Appellant,

v.

MIDLAND CREDIT MANAGEMENT, INC.,

Defendant-Appellant/Cross-Appellee.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 16 C 2895 — **Harry D. Leinenweber**, *Judge.*

On Petition for Rehearing and Rehearing En Banc

June 8, 2022, Decided

Before SYKES, *Chief Judge*, and EASTERBROOK, KANNE, ROVNER, WOOD, HAMILTON, BRENNAN, SCUDDER, ST. EVE, KIRSCH, and JACKSON-AKIWUMI, *Circuit Judges.*

Appendix C

SYKES, *Chief Judge*. On consideration of the petition for rehearing and for rehearing en banc filed on April 15, 2022, a majority of judges in active service voted to deny the petition for rehearing en banc. Judges Rovner, Wood, Hamilton and Jackson-Akiwumi voted to grant the petition for rehearing en banc. Accordingly, the petition for rehearing and rehearing en banc is DENIED.

Appendix C

HAMILTON, *Circuit Judge*, joined by ROVNER, WOOD, and JACKSON-AKIWUMI, *Circuit Judges*, dissenting. I respectfully dissent from the denial of rehearing en banc. This case presents an important question on the extent of Congress's power under the Constitution to regulate interstate commerce—its power to authorize private civil remedies for statutory violations that cause intangible but concrete injuries, including emotional distress, fear, and confusion.

Defendant Midland Credit Management violated the rights of plaintiff Pierre and a plaintiff class under the Fair Debt Collection Practices Act in trying to collect so-called "zombie" debts—debts on which Midland knew the statute of limitations had expired. See *Pantoja v. Portfolio Recovery Associates, LLC*, 852 F.3d 679 (7th Cir. 2017) (addressing merits of such claims). Midland tried to revive a debt that had been the subject of a suit against Pierre years earlier, ending in dismissal. Pierre was not fooled into paying on the debt, but she testified that Midland's attempt to revive the debt had caused her emotional distress and anxiety. Anyone who has experienced financial insecurity can easily understand her injuries. A jury awarded Pierre and the class statutory damages of $350,000. The panel reversed, however, finding that Pierre lacked standing even to bring this suit.

The constitutional issue here is whether a plaintiff who proves a violation of the Act in attempting to collect a debt from her can show standing based on injuries that are intangible but quite real. Such injuries may include emotional distress, stress, anxiety, and the distress that

can be caused by unlawful attempts to collect consumer debts.

The panel majority said no. Its key holding: "Psychological states induced by a debt collector's letter ... fall short." *Pierre v. Midland Credit Management, Inc.*, 29 F.4th 934, 939 (7th Cir. 2022). That holding, which followed several recent decisions of this court, has strayed far from the Supreme Court's more nuanced guidance on the power of Congress to authorize standing for statutory violations in *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), and *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021).

I. Spokeo and TransUnion

The *Pierre* majority opinion and the Seventh Circuit cases it followed have erred by painting with too broad a brush. They have failed to give the judgments of Congress the "due respect" the Supreme Court called for in *Spokeo* and *TransUnion*. They have overlooked close historical parallels—from both common law and constitutional law—for remedies for intangible harms caused by many violations of the FDCPA and other consumer-protection statutes.

In *Spokeo*, the defendant was a consumer reporting agency that generated profiles of individual consumers. Plaintiff Robins discovered that his Spokeo profile contained inaccurate information. He sued for an allegedly willful violation of the Fair Credit Reporting Act's requirement to use reasonable procedures to assure maximum possible accuracy of such information. The

Supreme Court held that the alleged statutory violation regarding his information was not enough, by itself, to establish the concrete and particularized injury in fact needed for constitutional standing. 578 U.S. at 342-43. The Court remanded for further consideration of standing.

Along the way, the Court said that a plaintiff must allege and prove a "concrete" injury, but the Court also made clear that an intangible injury could be concrete for purposes of standing. 578 U.S. at 340-41. The key question in *Spokeo* and in cases like Pierre's is when an intangible injury is sufficiently concrete. To answer that, *Spokeo* teaches, "both history and the judgment of Congress play important roles." *Id.* at 340. The Supreme Court told courts to consider "whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," and to treat the judgment of Congress as "instructive and important." *Id.* at 341.

Spokeo also cited *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992), for the proposition that Congress may elevate to the status of legally cognizable injuries harms that were previously not adequate to support a case. The *Spokeo* Court concluded that a violation of the FCRA's procedural requirements could result in cognizable harm, but memorably warned that a "bare procedural violation," such as a report of an incorrect zip code, would not be enough by itself to establish concrete harm. 578 U.S. at 342.[1]

1. On remand in *Spokeo*, the Ninth Circuit found that the plaintiff had alleged a sufficiently concrete harm to sue. Giving deference to the judgment of Congress, the Ninth Circuit found

Spokeo left plenty of room for debate about standing under consumer-protection statutes. The Court offered more guidance in *TransUnion LLC v. Ramirez*, another FCRA case. A credit reporting agency offered to tell creditors whether particular consumers might be on a government list of suspected terrorists, drug-traffickers, and others with whom business dealings are generally unlawful. Lots of law-abiding Americans share first and last names with people on the government's list, and TransUnion identified such people as "potential matches" for the terrorist list. When plaintiff Ramirez tried to buy a car, his name turned up as a potential match. The dealer refused to sell him the car. Ramirez sued TransUnion on behalf of a class for failing to use reasonable measures to ensure that it distributed accurate information.

As a matter of statute, all class members in *TransUnion* had viable FCRA claims. The issue for the Court was standing under Article III. As in *Spokeo*, the key question was whether the intangible harms claimed by the class members were sufficiently concrete. The Court echoed *Spokeo* in saying that intangible harms close to those traditionally recognized in the law were sufficient,

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that dissemination of false information in consumer reports posed a risk of serious harm and that consumers' interests in accurate information resembled reputational and privacy interests long protected under tort law. 867 F.3d 1108, 1113-15 (9th Cir. 2017). The court also concluded that the alleged inaccuracies regarding plaintiff Robins were neither harmless nor trivial, like the Supreme Court's hypothetical wrong zip code. *Id.* at 1116-17. The Supreme Court denied further review in the case. 138 S. Ct. 931, 200 L. Ed. 2d 204 (2018).

including the loss of a constitutional right. 141 S. Ct. at 2204 (citing freedoms of speech and religion). The Court also repeated that courts must afford "due respect" to Congress's decision to create a private right of action for statutory violations, though without giving Congress a blank check to "transform something that is not remotely harmful into something that is." *Id.* at 2204-05 (citation omitted).

The *TransUnion* Court gave more specific meaning to this abstract guidance in the different ways it actually treated the two subclasses. For one subclass, TransUnion files listed them as "potential matches" for the suspected terrorist list, but TransUnion had never provided that information to any potential creditors during the relevant period. *Id.* at 2209. The Court held that those class members lacked standing. The undisclosed information had not caused them any harm at all. It was as if, the Court said, a person had written a defamatory letter and then left it in a desk drawer. *Id.* at 2210. The plaintiffs argued that the false information in those files put them at serious risk of having the false information disseminated to creditors in the future, but the Court rejected that theory for standing, at least for a damages claim. *Id.*

The other subclass in *TransUnion* presented an easier question. The misleading information about them was actually sent to third parties. The Court agreed unanimously that those plaintiffs had standing. See 141 S. Ct. at 2208-09. The majority compared the misleading credit reports to the tort of defamation. The Court rejected TransUnion's attempt to distinguish its violations

from defamation by arguing that merely "misleading" information was not literally false. The Court explained: "In looking to whether a plaintiff's asserted harm has a 'close relationship' to a harm traditionally recognized as a basis for a lawsuit in American courts, we do not require an exact duplicate." *Id.* at 2209. The Court did not insist, however, on proof that members of that subclass had lost out on particular loans or purchases. *Id.*

II. Intangible but Concrete Injuries Under the FDCPA

Plaintiff Pierre's claim should easily satisfy the Supreme Court's standing requirements. She proved all elements of an FDCPA claim for a deceptive and unfair practice. She also satisfied the constitutional requirements of *Spokeo* and *TransUnion* by offering evidence of harms that, first, lie close to the heart of the protection Congress reasonably offered consumer debtors in the FDCPA, and second, bear close relationships to harms long recognized under the common law and constitutional law.

A. The Judgment of Congress

In enacting the FDCPA, Congress wanted to provide a remedy for consumers subjected to abusive practices. Those included:

> obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining

> in ormation about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.

S. Rep. No. 95-382 at 2, as reprinted in 1977 U.S.C.C.A.N. 1695, 1696. In the statutory findings, Congress said abusive practices contributed to personal bankruptcies, marital instability, job losses, and invasions of privacy. 15 U.S.C. § 1692(a). The statutory reference to marital instability and the prohibitions on using threats, obscene language, and harassing calls, see § 1692d, show that Congress recognized how such abusive practices could upset the lives of those targeted by them. See *Demarais v. Gurstel Chargo, P.A.*, 869 F.3d 685, 692 (8th Cir. 2017) (making this point in finding FDCPA standing based on mental distress resulting from similar attempt to collect out-of-statute "zombie" debt).

The emotional distress, confusion, and anxiety suffered by Pierre in response to this zombie debt collection effort fit well within the harms that would be expected from many of the abusive practices. That's true regardless of whether the debtor actually made a payment or took some other tangible action in response to them. Standing for Pierre thus fits well within Congress's judgments about actionable harms. As the Supreme Court said in *Spokeo*, Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." 578 U.S. at 341 (alteration in original), quoting *Lujan*, 504 U.S. at 578.

Judge Ripple made this point in his concurring opinion in *Markakos v. Medicredit, Inc.*, 997 F.3d 778 (7th Cir. 2021), highlighting Congress's judgment about the need to protect consumers from abusive debt collection practices and its choice to rely on private enforcement:

> To say that there is no injury in this economy when a person receives a dunning letter *demanding money that is not owed not only ignores the realities of everyday life, it also ignores the findings of Congress and constitutes a direct affront to a congressional prerogative at the core of the legislative function*. The court's failure to recognize the injury that Congress saw and addressed simply testifies to our failure to appreciate how the people we judicially govern live, or more precisely, it testifies to our failure to defer to the congressional appreciation as to how our fellow citizens live. The Supreme Court's holding in *Spokeo* provides no justification for our embarking on such a precarious course. I fear we have given Congress's judgment too little attention and erected an unnecessary constitutional barrier to enforcement of the FDCPA.

Id. at 785 (emphasis added). I agree. And the Supreme Court's later decision in *TransUnion* further reinforced that need for substantial deference to the judgment of Congress.

B. Historical Guides from Common Law and Constitutional Law

Defendant Midland's violation of the FDCPA and the intangible but real harms that Pierre suffered also bear close relationships to those recognized in both the common law and constitutional law. Those close relationships, as the Court taught in *Spokeo* and *TransUnion*, offer strong support for recognizing Pierre's standing here.

1. Common-Law Parallels

Start with the torts of intentional or reckless infliction of emotional distress. "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress...." Restatement (Second) of Torts § 46(1) (Am. L. Inst. 1965). Such tort cases often pose issues about what conduct is "extreme and outrageous" and when emotional distress is sufficiently severe. In enacting the FDCPA and its remedy for statutory damages, though, Congress itself outlawed the very conduct that harmed Pierre.

The emotional distress, anxiety, fear, and stress she experienced were foreseeable, even intended, responses to defendant's attempt to collect the zombie debt. Congress told the federal courts to authorize damages for such harms. That choice is well within Congress's legislative power over interstate commerce to go beyond the common law. *Markakos*, 997 F.3d at 785 (Ripple, J., concurring in judgment); *Demarais*, 869 F.3d at 692 (attempt to collect debt not owed caused real and foreseeable mental distress familiar to common law).

Appendix C

The torts of defamation and invasion of privacy and remedies for them also bear close relationships to the FDCPA and its private right of action. As noted, *TransUnion* invoked the parallel to defamation to find standing for the plaintiffs whose potential listings were sent to potential creditors. 141 S. Ct. at 2209; accord, *Ewing v. MED-1 Solutions, LLC*, 24 F.4th 1146, 1151-54 (7th Cir. 2022) (FDCPA plaintiffs whose debts were reported without noting they were disputed had standing based on publication of false or misleading information to third parties).

Other FDCPA violations parallel the tort of invasion of privacy, including its branches for intrusion upon seclusion, unreasonable publicity given to a person's private life, and publicity that places a person in a false light before the public, which rarely involve tangible injuries. See Restatement (Second) of Torts § 652A et seq. (Am. L. Inst. 1977); *Lupia v. Medicredit, Inc.*, 8 F.4th 1184, 1191-93 (10th Cir. 2021) (FDCPA plaintiff had standing based on harms akin to those caused by invasion of privacy in form of intrusion upon seclusion); *St. Pierre v. Retrieval-Masters Creditors Bureau, Inc.*, 898 F.3d 351, 357 (3d Cir. 2018) (FDCPA plaintiff had standing for harm akin to unreasonable publicity of private life branch of invasion of privacy). In fact, the Restatement (Second) teaches that a person who has established an invasion of privacy is entitled to recover damages for, among other things, "his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion." § 652H(b).

Thus, rather than rejecting standing based on "psychological states" induced by FDCPA violations, we should recognize that, more generally, the common law has long authorized damages for emotional distress in a wide range of cases lacking tangible injury. Section 905 of the Restatement (Second) of Torts (Am. L. Inst. 1979) states that compensatory damages may be awarded for emotional distress. The comments explain that the principal element of damages in actions for assault and defamation, among other torts, is "frequently the disagreeable emotion experienced by the plaintiff," § 905 cmt. c, and that the "mental distress known as humiliation" may also support a damages award, cmt. d. Section 924 states: "One whose interests of personality have been tortiously invaded is entitled to recover damages for past or prospective (a) bodily harm and emotional distress...." Comment a explains that this rule reaches assault (where no physical contact is made) and insulting conduct amounting to a tort. See also § 623 (emotional distress damages for defamation); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) ("[T]he more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.").

Consider also the difference between the torts of assault and battery with the question of standing in mind. What harm is suffered in an assault that stops short of battery? Not physical harm, but fear and emotional distress. Does that mean a victim of an assault lacks Article III standing to sue in federal court? Of course not.

The fear and emotional distress are sufficiently concrete and particularized to support standing. The same should be true here, where Congress made a policy choice to offer vulnerable consumers this protection from abusive and deceptive bullying by debt collectors.

Or consider claims for medical monitoring damages in cases where a person has been exposed to a dangerous toxin but has not yet shown symptoms of disease. The common law in many states has evolved to authorize such damages to protect plaintiffs from future harm and to address the anxiety and distress that such exposure can foreseeably cause. See, e.g., *Bower v. Westinghouse Electric Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (W. Va. 1999) (recognizing claim and collecting cases, including *Bourgeois v. A.P. Green Industries, Inc.*, 716 So. 2d 355 (La. 1998), and *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829 (3d Cir. 1990)).

Further common-law examples abound. To be sure, there has been plenty of room for debate about the requirements for emotional distress damages under the common law, especially in cases alleging only negligence. See, e.g., *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 429-38, 117 S. Ct. 2113, 138 L. Ed. 2d 560 (1997) (addressing scope of statutory remedies under Federal Employers' Liability Act for negligent infliction of emotional distress and for medical monitoring based on negligent exposure to asbestos). Those debates do not undermine Article III standing here.

The common law has been much more receptive to such damages in cases of intentional or reckless conduct. Pierre's claim here is for intentional conduct that foreseeably inflicted emotional distress and anxiety upon her. And in any event, *Spokeo* and *TransUnion* make clear that standing under federal statutes is not limited to the precise boundaries of the common law. The "close relationship" does not require "an exact duplicate." *TransUnion*, 141 S. Ct. at 2209. It would be extraordinary to claim that the Constitution restricts Congress's legislative powers to require congruence with the common law. And *Spokeo* and *TransUnion* both rejected that position.

Spokeo and *TransUnion* made clear that not every FDCPA violation can support standing. The Act outlaws some "bare procedural violations" that may not cause injury in fact. But a remedy for defendant's effort to pressure or trick Pierre into paying the zombie debt, inducing fear, anxiety, confusion, and more general emotional distress, fits comfortably with the common law of torts.

2. Constitutional Law Parallels

The "history and tradition" relevant to standing for intangible injuries under federal statutes are not limited to the common law. *TransUnion*, 141 S. Ct. at 2204. The Constitution protects people from many wrongs that may cause intangible injuries, including emotional distress and humiliation. A plaintiff may not recover damages for the "abstract" value of a constitutional right, *Memphis Comm. School Dist. v. Stachura*, 477 U.S. 299, 308, 106

S. Ct. 2537, 91 L. Ed. 2d 249 (1986), but may recover for intangible emotional distress and humiliation caused by constitutional violations.

Our circuit's pattern jury instructions for § 1983 cases reflect this settled law. They tell jurors to consider mental and emotional pain and suffering. Federal Civil Jury Instructions of the Seventh Circuit § 7.26 (2017). Such damages for intangible injuries can be appropriate for denials of free speech, free exercise of religion, or due process of law. See *Carey v. Piphus*, 435 U.S. 247, 264, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978) (mental and emotional distress constitute compensable injury in § 1983 cases); *Young v. Lane*, 922 F.2d 370, 374 (7th Cir. 1991) (recognizing prisoners could recover damages for denial of free exercise rights if they could show violations of clearly established law); *Williams v. Lane*, 851 F.2d 867, 876 (7th Cir. 1988) (same).

Damages for what the panel majority calls "psychological states" are also available for intrusions on privacy in violation of the Fourth Amendment and for threats of clearly excessive force under the Fourth Amendment. E.g., *Baird v. Renbarger*, 576 F.3d 340 (7th Cir. 2009) (affirming denial of qualified immunity where officer pointed submachine gun at persons who posed no danger at site of search involving suspected non-violent crime). Humiliating strip searches of prisoners, detainees, and suspects may violate Fourth and/or Eighth Amendment rights under some circumstances, and damages for the intangible humiliation and emotional distress can be appropriate. E.g., *Henry v. Hulett*, 969 F.3d 769 (7th Cir. 2020) (en banc).

Or consider how nominal damages affect standing in constitutional cases. The Supreme Court held in *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 209 L. Ed. 2d 94 (2021), that where the plaintiff proved completed violations of his First Amendment rights, his request for only nominal damages—without proof of compensatory damages—was sufficient to satisfy the redressability element of Article III standing. The Court made clear that the plaintiff still needed to show an actual injury in the form of a completed violation of his rights, *id.* at 802 n.*, but it's difficult to reconcile our court's approach to standing in Pierre's case with *Uzuegbunam*. If standing had been lacking in *Uzuegbunam* for lack of injury, the Court would have been obliged to order dismissal for lack of standing, regardless of the redressability element.

Uzuegbunam provides a good survey of the history and importance of nominal damage awards in the common law and constitutional law going back to the earliest years of the Republic and in English courts. See *id.* at 798-800, discussing, e.g., *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508-09, F. Cas. No. 17322 (C.C. Me. 1838) (Story, J.). The general rule is that nominal damages are available and even presumed where a plaintiff proves a violation of her legal rights. If that's correct under both the common law and constitutional law, it's also difficult to see why Congress cannot authorize a modest damages remedy under the FDCPA where a plaintiff's statutory rights are violated.[2]

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2. One path toward more specific guidance for lower federal courts for these problems would be to embrace the distinction between private rights and public rights, at least as regards

Under the teachings of *Spokeo* and *TransUnion*—giving "due respect" for Congress's judgment and recognizing that Pierre's statutory claim and intangible injuries fit closely in legal history and tradition—Pierre should have standing. Article III, *Spokeo*, and *TransUnion* do not prohibit standing for this statutory claim. The FDCPA civil action is constitutional as applied to a host of violations that cause intangible but real injuries like Pierre's.

More fundamental, the idea that intangible harms like emotional distress are not sufficient to support Article III standing is simply wrong—especially where Congress has authorized such claims under a federal statute. We should

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consumer-protection statutes. Justice Thomas endorsed this analysis in his concurrence in *Spokeo*, 578 U.S. at 344-46, and his dissent in *TransUnion*: "At the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community." 141 S. Ct. at 2217. The line between private and public rights could go a long way to reconcile Supreme Court precedents on nominal damages with its recent opinions on standing for intangible injuries. The distinction also offers a clear and manageable line between standing in cases like this one, where Pierre asserts a private right under the statute, and the "universal" standing feared by the *Pierre* majority and the cases it followed. See also *Sierra v. Hallandale Beach*, 996 F.3d 1110, 1138-39 (11th Cir. 2021) (Newsom, J., concurring); William Baude, *Standing in the Shadow of Congress*, 2016 Sup. Ct. Rev. 197, 227-31; John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1226-30 (1993) (recognizing that Congress may expand standing to full extent permitted by Article III but may not dispense with requirement of injury in fact, and arguing further that standing is "an apolitical limitation on judicial power," applying to both liberal and conservative causes).

have granted rehearing en banc because our circuit's law on this issue is out of step with the Supreme Court and places us at the far, most restrictive, end of a range of approaches by different circuits. See *Pierre*, 29 F.4th at 953-55 (Hamilton, J., dissenting). Our recent cases have restricted standing so sharply that we may be close to a tipping point, leaving at least the FDCPA largely neutered in the three states of the Seventh Circuit. Since this court has chosen to deny rehearing en banc and to continue on this course, however, the Supreme Court may need to revisit the subject of Congress's power to authorize standing for such intangible but real and concrete injuries under its statutes regulating commerce.

III. Case-Specific Arguments

The Answer to the petition for rehearing asserted several case-specific arguments for denying the petition. These arguments have little merit.

First, the Answer asserted that this case is really about fact-specific application of settled legal principles. Not at all. The *Pierre* opinion summarized recent cases and stated the rule broadly: "psychological states," including emotional distress, cannot support standing under the FDCPA. 29 F.4th at 939. That statement of the law is not "settled," and it leaves no room for factual nuance and distinctions that would let other plaintiffs pursue claims based on more severe emotional distress or worse invasions of privacy, for example.[3]

3. That is exactly how *Pierre* and its supporting cases are being argued and applied in the district courts. District judges are reading *Pierre* and its supporting cases that broadly. See, e.g.,

Second, the Answer argued that plaintiff Pierre's evidence of emotional distress in her deposition and trial testimony was not specific enough to support standing. On the contrary, Pierre testified in detail about the dunning letter and her reaction. The prospect of a revived $7,000 debt threatened her with financial catastrophe. She was confused and afraid that she might be sued again on this debt. (An earlier suit on the same debt had been dismissed years earlier.) Pierre described her "emotional duress," and she was anxious about the prospect of the cost and hassle of more litigation. She was afraid of repercussions if she did not answer the letter and if she did not accept one of the settlement options. She was also afraid that her

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Tataru v. RGS Financial, Inc., 2021 U.S. Dist. LEXIS 79413, 2021 WL 1614517 (N.D. Ill. 2021) (Tharp, J.); *Marcano v. Nationwide Credit & Collection, Inc.*, 2021 U.S. Dist. LEXIS 190811, 2021 WL 4523218 (N.D. Ill. 2021) (Aspen, J.); *Schumacher v. Merchants' Credit Guide Co.*, 2021 U.S. Dist. LEXIS 169930, 2021 WL 4080765 (N.D. Ill. 2021) (Lee, J.); *Gordon v. Collection Professionals, Inc.*, 2021 U.S. Dist. LEXIS 246250, 2021 WL 6108916 (C.D. Ill. 2021) (Bruce, J.); *Endres v. UHG I LLC*, 2022 U.S. Dist. LEXIS 26730, 2022 WL 462005 (W.D. Wis. 2022) (Conley, J.); *Choice v. Unifund CCR, LLC*, 2021 U.S. Dist. LEXIS 109919, 2021 WL 2399984 (N.D. Ill. 2021) (Coleman, J.); *Dixon v. Jefferson Capital Systems, LLC*, 2021 U.S. Dist. LEXIS 238563, 2021 WL 5908431 (S.D. Ind. 2021) (Magnus-Stinson, J.); *Patni v. Resurgent Capital Services, L.P.*, 2022 U.S. Dist. LEXIS 89364, 2022 WL 1567069 (N.D. Ill. 2022) (Guzmán, J.) (citing *Pierre*); *Masnak v. Optio Solutions, LLC*, 2022 U.S. Dist. LEXIS 68095, 2022 WL 1102020 (E.D. Wis. 2022) (Stadtmueller, J.) (citing *Pierre*). In several of these cases, and others, the broad arguments against standing based on emotional distress or confusion or other psychological states were made successfully by the same lawyers who told us in the Answer that the *Pierre* holding on standing is fact-specific.

credit rating would be hurt. Pierre sought out a lawyer. She had read the statement that Midland would not sue her on the debt, but she worried that Midland could refer the debt to another party who would sue her or hurt her credit rating. Her testimony on these topics appears in her deposition at pages 67, 79, 82, 84, 104, 108-09, 114-17, and 141. At trial, she described her surprise, confusion, and distress when she received the letter claiming she owed more than twice as much on a debt that she thought she had successfully disputed years earlier. Dkt. 262 at 52-73.

More fundamental to the issue of rehearing en banc, though, the *Pierre* majority stated the rule in broad terms. Emotional distress and other "psychological states" can never support standing under the FDCPA. No additional specificity from Pierre could overcome the panel's categorical bar. And again, that is how district courts are understanding and applying *Pierre* and our other recent decisions.

Finally, showing the greatest chutzpah, the Answer argues that Pierre waived reliance on common law analogs, theories, and cases raised for the first time in her petition for rehearing. The *Pierre* majority, however, based its denial of standing entirely on cases issued after oral argument in the case, including the majority's view of the 2021 *TransUnion* decision. Pierre was entitled to respond to the new precedents and reasons offered in the majority opinion. The assertions of waiver are baseless.

Plaintiff Pierre suffered just the sorts of intangible but real injuries—including emotional distress, anxiety,

fear, and confusion—that Congress foresaw and for which it enacted statutory remedies. We should have granted rehearing en banc and recognized her standing to pursue those remedies.

APPENDIX D — STATUTES AND REGULATIONS

15 U.S.C.A. § 1692e

§ 1692e. False or misleading representations

Effective: September 30, 1996

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of--

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to--

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court,

official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

Appendix D

15 U.S.C.A. § 1692f

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.