No. 22-435

IN THE

Supreme Court of the United States

RENETRICE R. PIERRE,
Petitioner,

v.

MIDLAND CREDIT MANAGEMENT, INC.,
Respondent.

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

BRIEF OF *AMICI CURIAE* F. ANDREW HESSICK AND AMY J. WILDERMUTH IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are F. Andrew Hessick, Judge John J. Parker Distinguished Professor of Law, the University of North Carolina School of Law, and Amy J. Wildermuth, Dean and Professor of Law, the University of Pittsburgh School of Law. Both teach and write about federal courts, and they have an interest in the sound development of this field.

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made any monetary contribution to its preparation or submission. *Amici curiae* gave notice of their intent to file this brief to all parties in accordance with Rule 37.2 and all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The doctrine of standing seeks to enforce the provision of Article III of the Constitution limiting federal judicial power to deciding "Cases" or "Controversies." To establish Article III standing, a plaintiff must have suffered, or be in imminent risk of suffering, a concrete, particularized injury in fact. This Court has issued inconsistent decisions about whether emotional and psychological injuries satisfy this requirement. For example, the Court has said that fear of exposure to pollutants in a river, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000), the deprivation of aesthetic pleasure, *id.* at 183, and spiritual harms, *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp (ADAPSO)*, 397 U.S. 150, 154 (1970), all qualify as injuries sufficient to satisfy Article III. Yet, at the same time, the Court has held that a person who suffers distress at government disobedience of the law, *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982), anxiety from being at risk of suffering an illegal chokehold, *City of Los Angeles v. Lyon*, 461 U.S. 95 (1983), and fear of being subject to surveillance, *Laird v. Tatum,* 408 U.S. 1, 10 (1972), has not suffered an injury sufficient to support standing. Decisions out of the lower courts have been similarly inconsistent.

This Court's recent decisions in *Spokeo Inc. v. Robins*, 578 U.S. 330 (2016) and *TransUnion v.*

Ramirez, 141 S. Ct. 2190 (2021), do little clarify when Article III standing can rest on emotional and psychological injuries. In those cases, the Court recognized that intangible injuries such as psychological harm may satisfy Article III, but it did not provide a clear test for determining when they do so. Instead, the Court provided two guideposts. First, the Court stated that an intangible injury is sufficiently concrete if it has "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion*, 141 S. Ct. at 2204. Second, the Court stated that "Congress's views may be 'instructive'" because "Congress may 'elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.'" *Id.* at 2204-2205 (quoting *Spokeo*, 578 U.S. at 341).

But neither of these inquiries resolves when emotional injuries support standing and when they do not. Regarding the first guidepost, the common law traditionally has taken divergent views about emotional harms. In some contexts, such as assault and intentional infliction of emotional distress, psychological harm is actionable. In others, however, such as negligent infliction of emotional distress, psychological harm is not actionable. Further adding to the confusion, neither *Spokeo* nor *TransUnion* addresses how widely recognized or how longstanding a common law right to seek redress for a certain type

of psychological or emotional harm must be to be adequate to support standing.

As for the second guidepost, this Court has stated that, although a statute authorizing relief for a particular injury may be instructive on whether the injury supports standing, such a statute does not itself establish that the injury is sufficiently concrete. *TransUnion*, 141 S. Ct. at 2205; *see Spokeo,* 578 U.S. at 341 ("Article III standing requires a concrete injury even in the context of a statutory violation."). Consequently, Congress's decision to provide relief for psychological injuries does not resolve whether those injuries support standing. Moreover, the Court's caveat raises the fundamental query why developments in the common law may expand the scope of standing beyond its original bounds, as *Spokeo* and *TransUnion* suggest, but Congress cannot do the same by enacting a statute.

As these examples illustrate, *Spokeo* and *TransUnion* fail to provide adequate guidance regarding the circumstances under which Article III standing may rest on psychological or emotional injuries. Not surprisingly, as a result, the lower courts remain deeply divided about the extent to which emotional or psychological harm can support Article III standing.

The Court should grant review to provide sorely needed clarification regarding when psychological and emotional injuries support Article III standing.

ARGUMENT

This Court should grant review to clarify how Article III standing principles apply to emotional and psychological harms.

The doctrine of standing seeks to enforce the provision of Article III of the Constitution limiting federal judicial power to deciding "Cases" or "Controversies." *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). This Court has established general principles for determining what is required to meet that standard.

In particular, a plaintiff must allege an "injury in fact" that is both "fairly traceable" to the defendant's alleged unlawful conduct and "likely" to be "redressed" by the relief sought. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1148 (2009); *see DaimlerChrysler*, 547 U.S. at 342; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The plaintiff's injury must also be to "a legally protected interest," must be "concrete and particularized" and must be "actual or imminent, not 'conjectural or hypothetical.'" *Lujan*, 504 U.S. at 559-60. To qualify as "concrete," an injury must be de facto; "that is, it must actually exist." *Spokeo Inc. v. Robins*, 578 U.S. 330, 339 (2016). The injury must be real, and not abstract, though it does not need to be tangible. *Id.* For an injury to be "particularized" "it

must affect the plaintiff in a personal and individual way." *Id.*

This Court has repeatedly noted that the injury-in-fact element is a "key factor in dividing the power of government between the courts and the two political branches." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); *see DaimlerChrysler*, 547 U.S. at 342 (describing standing's requirements as an "essential and unchanging part of the case-or-controversy requirement of Article III"). Standing requirements ensure that the judiciary stays within its "province ... of decid[ing] on the rights of individuals," *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)), instead of operating as a "'vehicle for the vindication of value interests'" of "'concerned bystanders.'" *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).

This Court's precedents regarding how these fundamental principles of standing apply to emotional and psychological injuries are inconsistent, resulting in substantial confusion in the lower courts. The Court should grant review in this case to clarify when emotional and psychological harms qualify as an "injury-in-fact" sufficient to support Article III standing.

I. This Court's decisions regarding how the injury-in-fact requirement applies to emotional and psychological harm are inconsistent, resulting in substantial confusion in the lower courts.

A. As explained above, the function of the injury-in-fact requirement is to ensure that courts resolve only cases and controversies involving claims by parties with real injuries; courts are not a forum for interested bystanders to vindicate their beliefs. Emotional and psychological injuries do not fall neatly within either category.

On one hand, psychological injury is a factual injury. Mental distress is not a mere construct of the law; it is experienced by people in the form of sadness, stress, anxiety, and a host of other emotional states. It is also particularized. A person experiences mental distress personally, just as people experience physical pain personally. Psychological injury is also concrete in the sense that it is a real-world harm. In other words, mental distress is not merely an abstract concept or belief; people experience it, and its effects are observable.

On the other hand, mental distress is subjective and can have any number of causes. As a result, recognizing psychological injury as a sufficient basis for standing potentially opens the door for anyone who

is offended by a policy or action to bring suit in federal court to challenge it. In other words, if psychological injury is sufficient to support standing, then people offended by a government policy or action may be able to resort to the federal courts to attempt to implement their policy preferences, rather than addressing their concerns to the political branches.

This tension has led this Court to issue conflicting decisions on when psychological injury suffices for standing. *See* Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 Brook. L. Rev. 1555, 1571 (2016).

B. This Court has held that various types of psychological injuries qualify as a cognizable injury sufficient to support standing. For example, in *Laidlaw*, this Court held that a person had standing to challenge the discharge of pollutants into a waterway based on his "reasonable" "fear" of the potential effects of the pollution. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000); *see also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73 (1978) (acknowledging the injury of "the objectively reasonable present fear and apprehension regarding the effect of the increased radioactivity in air, land and water upon [appellees] and their property, and the genetic effects upon their descendants").

This Court has also held that aesthetic injury suffices for standing. Again in *Laidlaw*, for example, the Court held that plaintiffs who alleged that they use the affected area and are persons "for whom the aesthetic . . . values of the area will be lessened," satisfied the injury-in-fact standing requirement. 528 U.S. at 183 (quoting *Sierra Club v. Morton,* 405 U.S. 727, 735 (1972)); *see also Lujan*, 504 U.S. at 562–63 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.").

Aesthetic injury of the type this Court has held sufficient to support standing is psychological in nature. It is the deprivation of the pleasure one derives from experiencing something beautiful or moving. *See* Bayefsky, *supra*, 81 Brook. L. Rev. at 1597 ("To say, as courts have done, that plaintiffs have 'aesthetic' or 'conservational' interests in 'an area of great natural beauty' is to call attention to the positive impact of that area on the plaintiffs' inner experience, as well as the mental or emotional loss that would attend the area's destruction." (quoting *Sierra Club*, 405 US at 728)).

Similarly, this Court has held that the "spiritual" injury resulting from the government's establishment of a religion may support standing. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp (ADAPSO)*, 397

U.S. 150, 154 (1970). Here again, the injury held adequate to support standing was psychological in nature: the affront one experiences when confronted with the government's support of religion. *See Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 619 (2007) (Scalia, J., concurring) (criticizing this Court's decisions resting standing on the "Psychic Injury" resulting from the establishment of religion); *Am. Legion v. Am. Humanist Assn.*, 139 S. Ct. 2067, 2099 (2019) (Gorsuch, J., concurring in the judgment) ("This 'offended observer' theory of standing has no basis in law.").

This Court has also held that the stigma a person experiences from being the victim of discrimination constitutes a cognizable injury. *See Allen v. Wright*, 468 U.S. 737, 757 n.22 (1984). Although the Court did not define it precisely, this sort of stigmatic injury is psychological insofar as it refers to a loss of sense of self-worth and subjective pain suffered by the victim of discrimination.

More generally, this Court has consistently recognized that a plaintiff has standing when faced with an "imminent" threat of an injury. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007). For example, a plaintiff who has not yet suffered physical harm has standing to sue to

challenge conduct that creates an imminent risk of physical harm. In that circumstance, it is the apprehension of an impending harm —and the desire to avoid that injury—that underlies Article III standing.

At the same time, this Court has also held that various other types of psychological injuries are insufficient to establish standing. For example, the "psychological consequence presumably produced by observation of conduct with which one disagrees" is "not an injury sufficient to confer standing." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). Thus, standing cannot rest solely on the mental distress caused by knowing that the government has violated the law. *See id*.

Likewise, the Court has held that the anxiety generated by fear that the plaintiff will be the victim of unlawful conduct is not sufficient to support standing. For example, in *City of Los Angeles v. Lyon*, 461 U.S. 95 (1983), this Court held that a person's anxiety that he would be subject to an illegal chokehold in the future was not a sufficient injury to support standing. Similarly, in *Laird v. Tatum,* 408 U.S. 1, 10 (1972), the Court held that fear of being the subject of government investigation was insufficient to support standing. *See also Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 418 (2013) ("[S]ubjective fear of surveillance does not give rise to standing.").

C. Lower court decisions have been similarly inconsistent. In some cases, they have held that emotional injuries can suffice for standing. For example, the Ninth Circuit held in *Chaudhry v. City of Los Angeles*, 751 F.3d 1096 (9th Cir. 2014), that the family of a man who was shot and killed by Los Angeles police officers had standing to sue. The court of appeals reasoned that the family members suffered emotional pain as a result of not being notified of the relative's death in a timely fashion and therefore not being able to bury him in accordance with their religion. *See id.* at 1100-10; *see also Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1050 (9th Cir. 2010) (upholding standing for a group of Catholic advocacy groups challenging a San Francisco resolution denouncing the Church's position on same-sex adoption based on the "spiritual or psychological harm" suffered because of the resolution).

Similarly, in *Clayton v. White Hall Sch. Dist.*, 875 F.2d 676 (8th Cir. 1989), the Eighth Circuit held that "severe emotional distress and psychological distress" caused by racial discrimination in a hostile work environment was sufficient to establish an injury in fact to satisfy Article III standing requirements. *Id.* at 679.

In contrast, other decisions have held similar emotional injuries to be insufficient to support

standing. In *Humane Soc'y of the U.S. v. Babbitt*, 46 F.3d 93, 98 (D.C. Cir. 1995), for example, the D.C. Circuit held that plaintiffs had failed to satisfy Article III's standing requirements by demonstrating that they suffered "severe distress," which included "sleeplessness, depression, and anger," over a decision of the Secretary of the Interior exempting an Asian elephant from some protections afforded to endangered species. The court of appeals held that "general emotional 'harm,' no matter how deeply felt, cannot suffice for injury in fact for standing purposes." *Id.*

Similarly, in *Freedom From Religion Found., Inc. v. Zielke*, 845 F.2d 1463 (7th Cir. 1988), the Seventh Circuit held that plaintiffs did not have standing to challenge the City of La Crosse's display of a monument to the Ten Commandments in a city park. In reaching that conclusion, the court of appeals stated that "psychological harm that results from witnessing conduct with which one disagrees, however, [was] not sufficient to confer standing." *Id.* at 1467 (citing *Valley Forge*, 454 U.S. at 485–86).

II. This Court's decisions in *Spokeo* and *TransUnion* do not resolve when emotional and psychological injuries suffice for standing and have instead generated additional confusion.

In recent years, this Court issued two decisions—*Spokeo* and *TransUnion*—to address the kind of deep disagreements about the requirements of Article III standing described above. But neither *Spokeo* nor *TransUnion* resolves when emotional or psychological injury constitutes a cognizable injury in fact. To the contrary, those decisions have only generated additional confusion.

A. The Court held in *Spokeo* and *TransUnion* that the violation of a right alone does not provide a basis for standing, instead concluding that a plaintiff must allege a "concrete" factual injury. *See Spokeo*, 578 U.S. at 341 ("Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."); *see also TransUnion*, 141 S. Ct. at 2205. In so holding, this Court recognized that "intangible injuries," such as psychological or emotional harm, can be sufficiently "concrete" to establish Article III standing. *Spokeo*, 578 U.S. at 340; *see also TransUnion* 141 S. Ct at 2204 ("Various

intangible harms can also be concrete."). The Court also acknowledged that determining whether a particular intangible harm is sufficiently concrete may be difficult. *See Spokeo*, 578 U.S. at 340.

The Court did not announce a clear test to determine when intangible injury like emotional or psychological harm is sufficiently concrete to support standing. Indeed, the Court explicitly left open the question about the extent to which emotional injuries suffice. See *TransUnion*, 141 S. Ct. at 22011 n.7. But it did attempt to provide some guidance to help resolve the question.

First the Court stated that "chief" among the intangible injuries that constitute concrete harm are those "injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion*, 141 S. Ct. at 2204. In that regard, the Court stressed that "an exact duplicate in American history and tradition" is not necessary, but instead the relevant inquiry is whether the asserted injury has "a close historical or common-law analogue." *Id.* at 2204. For example, standing can rest on intangible harms such as "reputational harms, disclosure of private information, and intrusion upon seclusion" because those harms have historical or common-law counterparts. *Id.*

Second, the Court stated that "Congress's views may be 'instructive'" because "Congress may 'elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.'" *Id.* at 2204-2205 (quoting *Spokeo*, 578 U.S. at 341). At the same time, the Court cautioned that Congress's determination to create a cause of action is not dispositive, stating "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." *TransUnion*, 141 S. Ct. at 2205. Thus, "Article III standing requires a concrete injury even in the context of a statutory violation." *Ibid.*

B. The general principles described in *Spokeo* and *TransUnion* are not sufficient to create a clear test as to when emotional or psychological injuries are sufficient to support standing. *See Sierra v. City of Hallandale Beach, Fla.,* 996 F.3d 1110, 1116 (11th Cir. 2021) (Newsom, J., concurring) ("Applying the rules [of standing after *Spokeo*] has proven far more difficult than reciting them.").

First, it is not clear what exactly a court should consider in determining whether an injury is of the sort traditionally recognized as the basis for suit. *TransUnion* holds that standing is appropriate if the asserted injury has "a close historical or common-law analogue." *Id.* at 2204. It may be relatively easy to

identify the body of harms that could support an action in 1789 (although, as noted below, that is not always the case). But *TransUnion*'s test is disjunctive: an injury suffices if it has a historical ancestor *or* a common-law analogue. Standing accordingly may rest on an injury that bears a close relationship to a harm that provides the basis for a common law suit, even if that common law action was not historically recognized.

Thus, for example, *TransUnion* lists intrusion upon seclusion as an example of a tort that may provide the basis for standing. That tort is of relatively recent vintage, first being recognized in the late nineteenth century. *See* William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389 (1960) (tracing the tort's origins to *De May v. Roberts*, 9 N.W. 146 (Mich. 1881)).

Permitting standing to rest on common law torts creates significant uncertainty. Do all common law torts recognized by any state suffice? Or does the tort have to be widely recognized across the country? Does a tort, even if not recognized at the founding, need to have a long pedigree? Or can brand new developments in the common law suffice? How closely analogous to a common-law tort must an alleged injury be to support standing? And most confounding, why can developments in the common law expand the

scope of injuries sufficient to support standing when legislation enacted by Congress cannot?

Second, it is also often unclear how to apply this test in many situations. Consistent with standing's focus on the harms suffered by the plaintiff, the question under T*ransUnion* is not whether the defendant's conduct was wrongful; instead, it is whether the "harm" the plaintiff suffered could be the "basis for lawsuits in American courts." *TransUnion*, 141 S. Ct. at 2204. That inquiry does not provide a reliable test because the common law itself was often inconsistent in recognizing whether a harm could provide the basis for an action.

Psychological injury provides an example. In some instances, common law recognized psychological injury as sufficient to support recovery. For example, the ancient tort of assault imposed liability for "an attempt or offer to beat another, without touching him." 3 W. Blackstone, Commentaries on the Laws of England *120 (1769). Liability was not for a physical injury resulting from contact, but instead was for the apprehension of contact created by the "threatening manner" of the defendant. *Id.*; *see* Matthew Bacon, New Abridgement of the Law 154 (3d ed. 1768) (describing "assault" as including "drawing a sword and waving it in a menacing manner").

The same sort of liability was historically imposed for battery; which did not depend on physical harm, but instead would lie even for the "least touching of a person wilfully" that did not result in "actual suffering" 3 Blackstone, Commentaries *120.[2] Similarly, during the early twentieth century, courts recognized the tort of intentional or reckless infliction of emotional distress, which imposes liability for "extreme and outrageous" conduct that "intentionally or recklessly causes severe emotional distress." Restatement (Second) of Torts § 46 (1965); *see generally* John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 Marq. L. Rev. 789, 799 (2007) (describing the development of the tort).

In other circumstances, however, psychological injury was not sufficient to support a common law action. For example, courts refused to impose liability for negligent infliction of emotional distress, unless the alleged emotional injury is accompanied by some physical injury. *See Spade v. Lynn & B. R.R.*, 168 Mass. 285, 290, 47 N.E. 88, 89 (1897). Many courts continue to follow this rule. *Kircher*, *supra,* at 812 (explaining that the "physical manifestation" rule is used by a "majority of states"). Thus, exactly the same

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[2] Even today, the law recognizes that battery will lie for mentally distressing contact. See Restatement (Second) Torts § 18 (1965) (defining battery to include "harmful *or* offensive contact" (emphasis added)).

kind of emotional distress sometimes is sufficient injury to support a cause of action and other times is not.[3]

The decision by Congress to create a cause of action to vindicate psychological interests does not remove this uncertainty. This Court has repeatedly held that "Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III." *TransUnion*, 141 S. Ct. at 2205; *see Spokeo,* 578 U.S. at 341 ("Article III standing requires a concrete injury even in the context of a statutory violation."); *see also Lujan*, 504 U.S. at 578. It is entirely unclear whether and under what circumstances Congress's enactment of a statute allowing recovery for emotional psychological injuries converts a psychological injury that would not support standing in the absence of the statute into an injury that does support standing. *See generally Sierra v.*

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[3] Furthermore, neither *Spokeo* nor *TransUnion* provides a cogent explanation for the decisions holding aesthetic injuries to be sufficient to establish standing. *See e.g., Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183 (2000), *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). Aesthetic injury does not have a clear historical or common law antecedent, but the Court did not suggest that it meant to overturn the swath of cases recognizing standing based on aesthetic injury.

City of Hallandale Beach, Fla., 996 F.3d 1110, 1116 (11th Cir. 2021) (Newsom, J., concurring in the judgment) ("[C]ourts considering the same statute[,] have found that seemingly slight factual differences distinguish the qualifyingly 'concrete' from the disqualifyingly 'abstract.'")

The many inconsistent decisions in the circuit courts highlight the persistent confusion after *TransUnion* and *Spokeo* about whether and when emotional or psychological injury is sufficiently concrete to satisfy the injury-in-fact-requirement.

For example, in *Garland*, the Sixth Circuit held that a plaintiff who allegedly suffered confusion and anxiety after receiving a letter asserting that his loan had been referred to be foreclosed did not have standing to assert a violation of the Fair Debt Collections Practices Act or the similar state debt collection statute. *See Garland v. Orlans, PC*, 999 F.3d 432, 437–38 (6th Cir. 2021).

Based on similar reasoning, the Second Circuit has held that a "tester" who allegedly suffered both an "informational injury" and an "emotional injury that resulted from discrimination" did not have standing to assert a claim for a violation of the Americans with Disabilities Act. *Laufer v. Ganesha Hosp. LLC*, No. 21-995, 2022 WL 2444747, at *2-3 (2d Cir. July 5, 2022).

In contrast, in similar contexts, other courts of appeals have adopted a more expansive view as to when emotional or psychological harm provides standing. For example, in *Laufer*, the Eleventh Circuit held that a plaintiff had standing based on the "frustration and humiliation" she experienced when she viewed a hotel's website that omitted accessibility-related information required by federal regulations. *Laufer v. Arpan LLC*, 29 F.4th 1268, 1274 (11th Cir. 2022).

Similarly, in *Laufer v. Acheson Hotels*, LLC, 50 F.4th 259, 275 (1st Cir. 2022), the First Circuit held that the same plaintiff with a disability who acted as a tester had standing to bring a claim against an inn that violated the Americans with Disability Act because she suffered "feelings of frustration, humiliation, and second-class citizenry."

Likewise, the Third Circuit held that a plaintiff had standing to sue his employer for putting sensitive personal information at risk when the employer's computers were hacked because he allegedly experienced "emotional distress" as a result of knowing about the "substantial risk of identity theft." *Clemens v. ExecuPharm Inc.*, 48 F.4th 146, 155–56 (3d Cir. 2022).

These cases cannot be reconciled on any principled basis. To the contrary, they demonstrate a deep split

among the circuits on the issue of whether and when "psychological states" such as "emotional distress" and "confusion" are sufficient to establish Article III standing. That split and the resulting inconsistent results and confusion have continued unabated after this Court's decisions in *Spokeo* and *TransUnion*. This case provides a good vehicle for the Court to provide badly needed clarity on this important legal issue.

CONCLUSION

The Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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