No. 22-435

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

REPLY BRIEF

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I. There Is A Deep and Entrenched Circuit Split Requiring This Court's Intervention.

A. The Lower Courts Are Divided On Standing Under The FDCPA For Emotional and Other Intangible Injuries.

To forestall this Court's review, Respondent tries to wish away a clear circuit split; it insists that the Circuits' disagreement on standing to sue for emotional and other intangible injuries under the FDCPA is just "the consistent application of the same legal rules to a multitude of different facts." Opp. 16. That is inaccurate. There is undoubtedly an "important and growing circuit split" on the issue, one squarely presented here. App. 11a (Hamilton, J., dissenting).

1. Respondent studiously avoids Judge Hamilton's thorough analysis of the caselaw in the various Circuits. App. 41a-45a. As Judge Hamilton explained, the Seventh Circuit "is at the far end of a circuit split on standing in FDCPA cases based on emotional distress, confusion, and anxiety." App. 45a. Thus, unlike the Seventh Circuit, some "Circuits have been less restrictive in allowing standing for intangible injuries under the FDCPA." App. 41a-42a (citing *Lupia* v. *Medicredit, Inc.*, 8 F.4th 1184 (10th Cir. 2021); *Hunstein* v. *Preferred Collection & Mgmt. Servs.*, 17 F.4th 1016

(11th Cir. 2021); *DiNaples* v. *MRS BPO, LLC*, 934 F.3d 275, 279-80 (3d Cir. 2019)); *see* Pet. Br. 10-11.[1]

Judge Hamilton also explained that certain Sixth and Eighth Circuit decisions took a "broader approach to standing for intangible injuries under the FDCPA." App. 42a (citing cases). In particular, Judge Hamilton noted, the Eighth Circuit held that an FDCPA plaintiff's "'being subjected to baseless legal claims, creating the risk of mental distress,'" conferred standing. App. 42a-43a (quoting *Demarais* v. *Gurstel Chargo, P.A.*, 869 F.3d 685, 692 (8th Cir. 2017)); *see also Hagy* v. *Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018) ("anxiety" is a "concrete harm").

Simultaneously, "[o]ther Sixth and Eighth Circuit decisions have moved in the direction of restricting standing in such cases." App. 43a-45a (citing *Buchholz* v. *Meyer Njus Tanick, PA*, 946 F.3d 855 (6th Cir. 2020); *Garland* v. *Orlans, PC*, 999 F.3d 432 (6th Cir. 2021); *Ojogwu* v. *Rodenburg Law Firm*, 26 F.4th 457 (8th Cir. 2022)). *Cf.* Stern & Gressman, Supreme Court Practice 255 (10th ed. 2017) (an "intracircuit conflict" is a basis for certiorari "[p]articularly when [it] relates to a recurring and important issue"); *see*, *e.g.*, *Inyo Cnty., Cal.* v. *Paiute-Shoshone Indians*, 538 U.S. 701, 709 n.5 (2003) (certiorari granted to resolve

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[1] The Tenth Circuit has since ruled that an FDCPA plaintiff's "confusion and misunderstanding are insufficient to confer standing." *Shields* v. *Prof'l Bureau of Collections of Md., Inc.*, 55 F.4th 823, 830 (10th Cir. 2022).

issue as to which Ninth Circuit "expressed divergent views").

The result, Judge Hamilton explained in dissent, is a "deepening circuit split" that has become "entrenched" and requires "further guidance from the Supreme Court." App. 12a, 45a.

2. Beyond the cases addressed in Judge Hamilton's careful survey, the Fourth and D.C. Circuits conflict with the decision below.

The Fourth Circuit has squarely held—directly at odds with the holding below—that an FDCPA plaintiff's "emotional distress, anger, and frustration" establishes standing. *Ben-Davies* v. *Bilbaum & Assocs., P.A.*, 695 F. App'x 674, 676 (4th Cir. 2017) (quotation marks omitted); *see Moore* v. *Bilbaum & Assocs., P.A.*, 693 F. App'x 205, 206 (4th Cir. 2017) (same).

In *Ben-Davies* and *Moore*, a debt collector attempted to collect a debt "by demanding payment of an incorrect sum based on the calculation of an interest rate not authorized by law." *Ben-Davies*, 695 F. App'x at 676; *see Moore*, 693 F. App'x at 206. The plaintiffs suffered "actually existing intangible harms that affect[ed] [them] personally: 'emotional distress, anger, and frustration,'" which "established an injury in fact under Article III." *Ben-Davies*, 695 F. App'x at 676-77; *see Moore*, 693 F. App'x at 206.

Respondent admits the Fourth Circuit has split with the Seventh Circuit on the question presented. Opp. 15. Respondent tries to explain away the split on a number of grounds, all meritless.

Respondent first contends the Fourth Circuit decisions are irrelevant because they are unpublished. *Ibid.* But this Court regularly grants certiorari to resolve conflicts driven by unpublished decisions—and even to *review* such decisions. *E.g.*, *E. Associated Coal Corp.* v. *United Mine Workers*, 531 U.S. 57, 61 (2000) (certiorari granted to review unpublished Fourth Circuit decision "in light of disagreement" between that decision and other Circuits); *Lynce* v. *Mathis*, 519 U.S. 433, 436 (1997) (granting certiorari to resolve conflict between a Tenth Circuit case and an "unpublished order" of the Eleventh Circuit, the decision below).[2] Moreover, at least one member of this Court has criticized the Fourth Circuit for issuing unpublished decisions in significant cases, and urged review of an unpublished Fourth Circuit decision because it "deepen[ed] existing disagreement between the Courts of Appeals" over an important issue. *Plumley* v. *Austin*, 135 S.Ct. 828, 830-31 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari).

Respondent next tries to nitpick the Fourth Circuit decisions—it says, *inter alia*, they were at the pleading stage rather than after a full trial, pre-dated

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[2] *See also*, *e.g.*, *Old Chief* v. *United States*, 519 U.S. 172, 177 (1997) (reviewing unpublished decision); *Thompson* v. *Keohane*, 516 U.S. 99, 106 (1995) ("division of authority" involving published and unpublished circuit decisions); *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993) (reviewing an unpublished decision that conflicted with other Circuits); *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 452-54 (1993) (same).

TransUnion, and are not being followed by district courts in the Circuit. Opp. 15. This misses the mark. True, the decisions were at the pleading stage. So what? The substance of the standing inquiry is identical throughout the litigation. *See Va. House of Delegates* v. *Bethune-Hill*, 139 S.Ct. 1945, 1950-51 (2019).

Nor does it matter that the Fourth Circuit's decisions in *Ben-Davies* and *Moore* pre-date *TransUnion*. The question presented here was expressly left unresolved in *TransUnion*. There, this Court noted the possibility 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," and that such harm "could suffice for Article III purposes—for example, by analogy to the tort of intentional infliction of emotional distress." 141 S.Ct. 2190, 2211 n.7 (2021). But this Court took no position on the issue.

And district courts in the Fourth Circuit continue to follow *Ben-Davies* and *Moore* even after *TransUnion*—including in a decision that rejected the argument that "*Ben-Davies* was abrogated by ... *TransUnion*." *See*, *e.g.*, *Westerman* v. *Constar Fin. Servs., LLC*, 2021 WL 4554334, at *2 (D. Md. Oct. 5, 2021).[3]

Finally, the only district-court decision Respondent cites actually *confirms* that the courts still follow

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[3] *See also Brown* v. *Alltran Financial, LP*, 2022 WL 377001, at *5 (M.D.N.C. Feb. 8, 2022); *Pruitt* v. *Resurgent Cap. Servs., LP*, 2022 WL 2530408, at *6 (D. Md. July 7, 2022).

the Fourth Circuit's decisions post-*TransUnion*. In *Reimer* v. *LexisNexis Risk Solutions, Inc.*, the court could not have been clearer: "[T]his Court and the Fourth Circuit have found that emotional damages can support injury under the FCRA and ... the Fair Debt Collection Practices Act." 2022 WL 4227231, at *9 (E.D. Va. Sept. 13, 2022) (citing *Moore*, 693 F. App'x at 206).

The D.C. Circuit, too, is on this side of the split. Contrary to Respondent's view, the D.C. Circuit has expressly contemplated that "stress" and confusion afford standing under the FDCPA. In *Frank* v. *Autovest, LLC*, the D.C. Circuit held an FDCPA plaintiff "satisfied her burden at the pleading stage" by alleging, among other harms, "that she suffered 'agitation, annoyance, emotional distress, and undue inconvenience.'" 961 F.3d 1185, 1187 (D.C. Cir. 2020).

"[A]t the summary-judgment stage," however, the plaintiff failed to present *evidence* that she was "confused, misled, or harmed in any relevant way" due to the challenged conduct. *Id.* at 1187-88 (citations omitted). Said differently, although the plaintiff *claimed* the defendants' actions "caused her stress and inconvenience," she never "connected those general harms" to the challenged conduct at summary judgment, so the court found no standing. *Id.* at 1188.

By necessary implication, if the plaintiff *had* testified that she suffered confusion or "connected" her "stress" to the challenged conduct, the plaintiff *would* have had standing. And so, contrary to Respondent's interpretation that the *Frank* court "did not address"

whether emotional distress or confusion "if proved would have conferred standing," Opp. 15, the district court has read *Frank* otherwise. *See Magruder* v. *Capital One, Nat'l Ass'n*, 540 F. Supp. 3d 1, 8-10, 13 (D.D.C. 2021) (citing *Frank* while holding that FDCPA plaintiff's alleged "emotional harm" suffices for standing).

3. Respondent also ignores the plethora of FDCPA cases awarding actual damages for emotional injuries. *See* Br. of Amicus Curiae Public Citizen 7-9 & n.4 (collecting cases, including from the Fifth, Ninth, and Eleventh Circuits). Given *TransUnion*'s instruction that a plaintiff must "demonstrate standing separately for each form of relief sought," 141 S.Ct. at 2210 (quotation marks omitted), the decision below (and those of same-minded Circuits) necessarily conflicts with holdings that "[a]ctual damages under the FDCPA include damages for emotional distress," *Minnifield* v. *Johnson & Freedman, LLC*, 448 F. App'x 914, 916-17 (11th Cir. 2011); *see* Br. of Public Citizen 7-8 & n.4.

4. Last, Respondent claims that the Seventh Circuit did not really mean what it said when it held that "[p]sychological states induced by a debt collector's letter likewise fall short." Opp. 12, 17. The Seventh Circuit's broad statement of law, Respondent says, is limited to the "specific facts and circumstances" here. *Id.* at 17.

Respondent's distortion of the Seventh Circuit's decision finds no purchase in its text, as confirmed by

the four Circuit judges who expressed a view on rehearing. As Judge Hamilton—joined by Judges Rovner, Wood, and Jackson-Akiwumi—explained, "[t]he *Pierre* opinion . . . stated the rule broadly: 'psychological states,' including emotional distress, cannot support standing under the FDCPA." App. 82a. "That statement of the law . . . leaves no room for factual nuance and distinctions[.]" *Ibid.*; see *id.* n.3 (citing district-court cases "reading *Pierre* and its supporting cases that broadly"); *see also Shields*, 55 F.4th at 830 (reading *Pierre* to announce a broad rule of law).

B. The Circuits Are Deeply Divided Across Statutory Contexts About Standing For Emotional Harm.

There is also "persistent confusion" among the Circuits "after *TransUnion* and *Spokeo* about whether and when emotional or psychological injury is sufficiently concrete." Br. of *Amici Curiae* F. Andrew Hessick & Amy J. Wildermuth at 22; *see id.* at 7.

The Circuits have struggled to find a principled and consistent method for determining when statutory claims for emotional harm pass constitutional muster. Even as some courts reject standing for FDCPA plaintiffs, they confer standing for emotional injury in other contexts where Congress granted remedies. The Eighth Circuit, while recently restricting FDCPA standing (*supra* p. 2), held a plaintiff's "intangible emotional injury" sufficed (as did his tangible injury) for Fair Credit Reporting Act claims. *Rydholm* v. *Equifax Info. Servs. LLC*, 44 F.4th 1105, 1108 (8th Cir. 2022). The Third Circuit recently held that "in the

data breach context" "emotional distress" caused by a "plaintiff's knowledge of the substantial risk of identity theft" is a "concrete injury." *Clemens* v. *ExecuPharm Inc.*, 48 F.4th 146, 155-56 (3d Cir. 2022). Similarly, the Eleventh Circuit recently held that "emotional injury that results from illegal discrimination" under the Americans with Disabilities Act "constitute[s] a concrete injury," *Laufer* v. *Arpan LLC*, 29 F.4th 1268, 1274 (11th Cir. 2022).

No constitutional principle justifies this lack of uniformity. This Court's intervention is needed to untangle the confusion that has proliferated.

II. The Question Presented Is Important and The Decision Below Is Wrong.

The decision below truncates Congress's constitutional prerogative to create private causes of action, such as in the FDCPA, to enforce federal obligations.

1. The decision here implicates "the separation of powers between the legislative and judicial branches" regarding Congress's "power under the Constitution to create private causes of action under the [FDCPA] and other consumer protection statutes" for intangible injuries such as "emotional distress, stress, and harm to reputation." App. 11a (Hamilton, J., dissenting).[4]

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[4] A pending petition raises the question of standing under the Establishment Clause for emotional offense. *City of Ocala, Florida* v. *Rojas*, No. 22-278. However the Court answers *that* question, it will not resolve the issue here—i.e., Congress's constitutional authority to create *statutory claims*.

The decision below has overridden Congress's authority to do so, effectively neutering the FDCPA.

"Congress clearly intended that private enforcement actions would be the primary enforcement tool of the [FDCPA]." *Baker* v. *G. C. Servs. Corp.*, 677 F.2d 775, 780-81 (9th Cir. 1982). Thus, even absent a split, certiorari is warranted because "[t]he effect" of the decision below "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[.]" App. 45a (Hamilton, J., dissenting); *cf.* Stern & Gressman 264 ("Where the decision below holds a federal statute unconstitutional … certiorari is usually granted because of the obvious importance[.]").

Indeed, as many unlawfully targeted consumers *cannot* pay debts, in many FDCPA cases "[t]he only actual damages that a plaintiff would be likely to incur would be for emotional distress." *Baker*, 677 F.2d at 780. These plaintiffs are out of luck in the Seventh Circuit—improperly undermining Congress's intent and authority to determine how and by whom statutory obligations are to be enforced.

Moreover, the decision below has broader implications for federal courts' authority to hear state-law claims. As *amicus* Public Citizen notes, "if an injury is not one that Congress may provide a right of action to redress in federal court, state statutes and common law must be equally inadequate to satisfy Article III's requirements." Br. of Public Citizen at 15; *see Gerber* v. *Herskovitz*, 14 F.4th 500, 506 (6th Cir. 2021) (Sut-

ton, C.J.) (if emotional harm did not suffice for standing, "a federal court sitting in diversity" would lack "authority" to hear certain state-law claims). The decision below logically implies an anomalous result—i.e., that Article III prohibits federal courts from hearing long-recognized state-law claims for emotional harm that state legislatures enacted and that state courts can adjudicate.

2. Respondent's defense of the decision below is unavailing. The Seventh Circuit did not purport to afford any respect, let alone "due respect," to Congress's judgment in the FDCPA, *TransUnion*, 141 S.Ct. at 2204, nor assess the plentiful historical and common-law support for the cognizability of a claim for emotional harm. "[M]ental and emotional distress" is "a personal injury familiar to the law." *Carey* v. *Piphus*, 435 U.S. 247, 263 (1978) (holding that "mental and emotional distress caused by the denial of procedural due process itself is compensable"); *see City of Los Angeles* v. *Lyons*, 461 U.S. 95, 107 n.8 (1983) (for standing, "[o]f course, emotional upset is a relevant consideration in a damages action"); Br. of Hessick & Wildermuth at 19; Br. of Public Citizen at 10-11. There is no warrant to displace Congress's judgment that the obligations it created in the FDCPA to prevent abusive collection practices should be enforced by private plaintiffs suffering emotional distress or confusion.

III. This Is An Ideal Vehicle To Decide The Question Presented.

Finally, Respondent throws out a laundry list of purported vehicle problems. But the question presented is squarely implicated in this case, and there is no impediment to review.

1. Respondent baselessly asserts that Petitioner failed to timely raise the argument that Congress's judgment matters and that her FDCPA claim has common-law analogs, because she argued it in her petition for rehearing en banc. Opp. 18-19. This contention, Judge Hamilton explained, evinces "the greatest chutzpah," given that the Seventh Circuit panel "based its denial of standing entirely on cases issued after oral argument in the case." App. 84.

In any event, where the lower "court actually passes on the issue sua sponte, the petitioner may properly present the question to the Supreme Court." Stern & Gressman 465-66. The court below was clearly aware of, and passed on, the points that Respondent incorrectly says were not raised below. App. 6a ("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."); App. 11a (Hamilton, J., dissenting) (criticizing majority for "overlooking close historical parallels—from both common law and constitutional law—for remedies for intangible harms caused by many violations of the FDCPA" and "failing to give the judgments of Congress the[ir] 'due respect'"). That is enough.

2. Respondent next asserts certiorari is not warranted because Petitioner's injuries are not traceable to Respondent's unlawful conduct. Opp. 19-20. Besides being wrong, that contention cannot provide a reason to deny review, because the question presented here was dispositive below. The Seventh Circuit did not address traceability, and if there is any question on traceability, it is for remand. *See*, *e.g.*, *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) ("[W]hen we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing.").

3. Finally, Respondent argues that the question presented is unlikely to have implications beyond this case. As noted, that contention carries no water.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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