No. 23-1327

IN THE

Supreme Court of the United States

PAULETTE BARCLIFT,

Petitioner,

v.

KEYSTONE CREDIT SERVICES, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Third Circuit err in following *TransUnion, LLC v. Ramirez,* 594 U.S. 413 (2021), when it concluded Petitioner's alleged harm from a debt collector providing private information to a mailing vendor was not "similar in kind" to the harm caused by public disclosure of private facts sufficient to confer Article III standing, without requiring element-matching with a common law tort?

2. Is it necessary to overrule *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), which provides well-reasoned guidance following *Spokeo, Inc. v. Robins,* 578 U.S. 330 (2016) in determining whether there is a concrete injury sufficient to confer Article III standing in cases involving intangible harms without requiring an element-matching test?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Keystone Credit Services, LLC states that it is a limited liability company with no stock and no parent company.

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JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on February 16, 2024. Pet. App. 1a. The petition for writ of certiorari was filed on June 17, 2024, after Justice Alito extended the time to file a petition for certiorari though June 17, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Keystone Uses a Mailing Vendor to Send Petitioner a Notice of Debt.

In October 2020, Petitioner received a notice-of-debt letter from Keystone. Pet. App. 2a. The letter informed Petitioner of an outstanding debt owed to Keystone. Pet. App. 2a, 56a. Keystone contracted with a mailing vendor to send Petitioner the letter on Keystone's behalf. Pet. App. 2a.

To facilitate sending the letter, Keystone provided the mailing vendor with Petitioner's name and address,

Petitioner's original creditor, the date Petitioner's debt became delinquent, and the balance of Petitioner's debt. Pet. App. 56a. Petitioner did not give Keystone consent to share this information. Pet. App. 3a, 57a.

B. Petitioner Files a Class Action Against Keystone Because She Did Not Consent to Keystone Providing Her Information to the Mailing Vendor.

In October 2021, Petitioner filed a class action against Keystone under the Fair Debt Collection Practices Act ("FDCPA"). Pet. App. 3a. Petitioner alleged Keystone violated 15 U.S.C. § 1692c(b), which prohibits debt collectors from communicating with third parties "in connection with the collection of any debt" without prior consent of the consumer. Pet. App. 3a, 57a–58a.

Petitioner claimed that sharing her information to the mailing vendor without her consent "violated her 'right not to have her private information shared with third parties.'" Pet. App. 58a. Petitioner claimed she consequently suffered embarrassment, stress, and reputational harm. Pet. App. 3a. The district court dismissed without prejudice Petitioner's complaint for lack of standing because Petitioner did not allege a concrete injury. *Id.*

Petitioner subsequently filed an amended complaint. Pet. App. 3a, 60a. The amended complaint included new allegations regarding the mailing vendor's operations. *Id.* Petitioner claimed the vendor "'employs hundreds of employees'" who "'can, or could, access'" Petitioner's personal information. Pet. App. 60a.

C. The District Court Determines Petitioner Lacks Standing Because She Did Not Allege a Concrete Injury and Dismisses the Complaint with Prejudice.

The district court dismissed Petitioner's amended complaint with prejudice. Pet. App. 4a, 68a. The district court explained a procedural violation of the FDCPA "does not automatically establish that [Petitioner] suffered an injury-in-fact" to establish standing. Pet. App. 63a. Rather, pursuant to Article III of the Constitution, Petitioner must proffer facts of a concrete injury sufficient to establish standing. Pet. App. 59a. Keystone's alleged violation of the FDCPA would need to bear a "'close relationship' to a harm that is traditionally recognized as providing a basis for a lawsuit." *Id.*

The district court determined Petitioner's claims most resembled the traditional common law tort of public disclosure of private facts. Pet. App. 4a, 59a. Such a claim requires a prima facie showing that private facts be *publicized*. Pet. App. 59a. More specifically, the complaint must assert that private facts were communicated either to the general public or "'enough people that the matter is substantially certain to become public knowledge.'" Pet. App. 63a.

The court reasoned Petitioner's new allegations "d[id] not suggest that [Petitioner's] private information was actually publicized" sufficient to allege a concrete injury. Pet. App. 64a, 67a–68a. Petitioner did not allege that even one of the mailing vendor's numerous employees accessed her information. Pet. App. 64a. Petitioner could not establish a concrete injury based on fear of a future injury. Pet. App. 65a. Even if the employees had accessed

Petitioner's information, Petitioner did not establish that the information shared with a contracted mailing vendor constituted *public* disclosure of private facts. *Id.* Thus, Petitioner did not have standing, and the district court lacked jurisdiction over her claims. Pet. App. 68a.

Petitioner timely appealed to the Third Circuit. Pet. App. 4a.

D. The Third Circuit Modifies the District Court's Order to Dismiss the Complaint Without Prejudice and Affirms the Order As Modified.

The Third Circuit affirmed that Petitioner lacked standing to bring her suit. Pet. App. 2a, 20a–21a. A statutory violation alone does not satisfy Article III standing—the plaintiff still must allege a concrete injury. Pet. App. 6a (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)). The Third Circuit followed this Court's decision in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), in which the Court "provided additional guidance . . . to determine whether an intangible harm suffices as a concrete injury." Pet. App. 7a.

The Third Circuit extensively examined the ruling in *TransUnion*. Pet. App. 7a–9a. There, a credit reporting agency mistakenly noted on numerous files that certain consumers were a potential match to individuals on a national security threat list. Pet. App. 7a (citing *TransUnion*, 594 U.S. at 420). This Court found the consumers' alleged harm bore a "sufficiently close relationship" with the traditionally recognized tort of defamation. Pet. App. 8a (citing *TransUnion*, 594 U.S. at 433). However, "because publication is 'essential to liability' in a defamation claim," only those consumers

whose erroneous file notes were shared with a creditor had standing to sue. Pet. App. 8a–9a (quoting *TransUnion*, 594 U.S. at 434). *TransUnion* further rejected the notion that the credit agency "published" the consumers' information internally to its employees and mailing vendors. Pet. App. 9a (citing *TransUnion*, 594 U.S. at 434 n.6).

Likewise, the Third Circuit here determined Petitioner could not demonstrate her alleged injury bore a close relationship to the traditionally recognized harm of public disclosure of private facts. Pet. App. 14a. The root of the harm in public disclosure of private facts stems from offensive information disclosed to the public. Pet. App. 15a. Petitioner alleged only that Keystone shared information with a "'single ministerial intermediary,'" which did not amount to publicizing her information to *any* degree. Pet. App. 15a, 20a (quoting *Nabozny v. Optio Sols., LLC*, 84 F.4th 731, 736 (7th Cir. 2023)). Because Petitioner did not allege a harm similar in kind to one traditionally recognized, Petitioner did not have standing to bring her claim. Pet. App. 20a–21a.

The Third Circuit also determined the district court improperly dismissed the complaint with prejudice because this amounted to a decision on the merits. Pet. App. 21a. The court modified the district court's order to dismissal without prejudice and affirmed the order. *Id.*

REASONS FOR DENYING THE PETITION

The court of appeals correctly determined that Petitioner lacked Article III standing to assert a claim for violation of the Fair Debt Collection Practices Act, which prohibits debt collectors from communicating with third parties "in connection with the collection of any debt"

without prior consent of the consumer. Its disposition does not conflict with any decision of this Court or of any other court of appeals. Review is not warranted.

I. The Circuit Split Is Illusory.

Petitioner contends three different tests have been applied in the circuit courts to determine whether a plaintiff alleges a concrete intangible harm sufficient to establish Article III standing after this Court's decision in *TransUnion*. According to Petitioner, these tests are: (1) the elements-based approach in the Seventh and Eleventh Circuits; (2) the similar-in-kind approach in the Fifth and Sixth Circuits, and (3) a hybrid approach in the Third and Tenth Circuits. Pet. 12–19.

In practice, these purportedly distinct tests amount to nothing more than different labels attached to the same analysis. The circuits have correctly and consistently interpreted *TransUnion* to require courts to look for the alleged intangible harm's "close relationship" to a harm "traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion*, 594 U.S. at 425. No circuit split exists because each circuit reviews alleged harms under the similar-in-kind approach set forth in *TransUnion*, which Petitioner promotes as the "correct" test.

Both Petitioner and the Third Circuit cite *Hunstein v. Preferred Collection & Management Services*, 48 F.4th 1236 (11th Cir. 2022) ("*Hunstein III*"), and characterize it as purportedly using an element-based approach in a mailing vendor case under the FDCPA. Pet. 12–14; Pet. App. 10a. *Hunstein III* reasoned the consumer's claim

was "missing an element 'essential to liability,' under the comparator tort." *Hunstein III*, 48 F.4th at 1242. The "element" the majority in *Hunstein III* found missing was "publicity"; the court noted "Hunstein did not allege any publicity at all," which is an element essential *to the harm* set out in the common law comparator tort. *Id.* at 1249. Accordingly, the court simply could not engage in a degree-of-harm analysis of that "nonpublicity." *Id.*

A careful reading of the Eleventh Circuit's *Hunstein III* opinion reveals that its emphasis was not on each element of the comparator tort. 48 F.4th at 1242, 1244 (quoting *TransUnion*, 594 U.S. at 434). Rather, the court's focus remained on the element(s) *essential to the harm. Id.* at 1244-49. In other words, a plaintiff need not allege every element of the comparator tort, but the plaintiff must allege an element speaking to the *kind of harm* of the comparator tort. *Id.* As the court in *Hunstein III* said, "Private disclosure is not just a less extreme form of public disclosure. Publicity causes *qualitatively different harm,* one that is essential to creating the comparator tort in the first place. . . ." *Id.* at 1249. The court further explained "the harm at the core of [public disclosure] is based not on the fact that embarrassing information exists, but that the *public knows about it*." *Id.* at 1245 (emphasis added).

Contrary to the Third Circuit's and Petitioner's characterization of *Hunstein III* as using an element-matching approach, the court in *Hunstein III* closely followed the "path" *TransUnion* provided. 48 F.4th at 1249. In *Hunstein III*, the court of appeals explained "the harm at the core of [public disclosure] is based not on the fact that embarrassing information exists, but that the *public knows about it*." *Id.* at 1245 (emphasis added).

Hunstein III analyzed the "well-known and longstanding concept [of publicity] in American law" to determine whether the plaintiff alleged any degree of public communication. 48 F.4th at 1246-47. It found that private disclosure is not "any" degree, and therefore not a harm similar in kind, of public disclosure. *Id.* at 1249 ("Private disclosure is not just a less extreme form of public disclosure."). The court did not find plaintiff lacked standing because plaintiff did not allege all elements of a comparator tort. Rather, the Eleventh Circuit found plaintiff failed to allege a *harm* similar in kind to the harm of public disclosure—publicity. *Id.* at 1250.

Petitioner asserts the Seventh Circuit in *Nabozny* also adopted an elements-based test. Pet. 15–16. On the contrary, the Seventh Circuit applied its "in kind" test first established in *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458 (7th Cir. 2020), "even after [the ruling in] *TransUnion*." *Nabozny*, 84 F.4th at 736 (citing *Gadelhak*, 950 F.3d at 462). Because the "public-disclosure form" of privacy "protects against the humiliation" of disclosure of "scandalizing private information to public scrutiny," some degree of publicity is essential to public disclosure. *Id.* at 736–37. As was the case in *Hunstein III,* the Seventh Circuit uses the term "element" in describing the missing harm of the comparator tort, but its analysis actually hinges on reviewing the *kind of harm* alleged against the comparator tort.

Petitioner further claims the Tenth and Third Circuits adopted a hybrid test. Pet. 16–17. In *Shields v. Professional Bureau of Collections of Maryland, Inc.*, 55 F.4th 823 (10th Cir. 2022), the Tenth Circuit also examined whether a consumer has standing to bring a suit against a

creditor for using a mailing vendor to send a debt collection letter. *Id.* at 827. The plaintiff's allegations again most closely resembled public disclosure of private facts. *Id.* at 828. The court understood alleged harms "must be similar 'in kind, not degree.'" *Id.* (quoting *Lupia v. Medicredit, Inc.*, 8 F.4th 1184, 1192 (10th Cir. 2021)). The plaintiff consequently "did not have to plead and prove the [public disclosure]'s elements to prevail." *Id.* at 829. The plaintiff *did* have "to at least allege a similar harm." *Id.* The Tenth Circuit found the plaintiff did not allege a harm related to the public disclosure tort, which is "concerned with highly offensive information being widely known" because the defendant only shared the plaintiff's information with a mailing vendor. *Id.*

Consistent with *TransUnion*, the Third Circuit in the proceedings below explicitly adopted a "kind of harm" approach to the standing analysis. Pet. App. 13a. The court confirmed that Petitioner's allegations are most closely analogous to the tort of public disclosure of private information as the comparator tort. Pet. App. 14a. The court characterized the harm from public disclosure stemming from "the unreasonable publicity given to another's private life." Pet. App. 14a. Accordingly, the Third Circuit concluded "the harm from disclosures that remain functionally internal are not closely related to those stemming from public [disclosures]." Pet. App. 16a. Further, where personal information is shared "between a debt collector and an intermediary tasked with contacting the consumer, the consumer has not suffered *the kind of privacy harm* traditionally associated with public disclosure." *Id.* (Emphasis added). The Third Circuit expressly disavowed application of an element-matching test, and astutely observed that while there may be an

overlap between the "nature of the traditional harm" and an element of the traditional tort, the court was not engaging in "an exercise in element-matching." Pet. App. 16a n.4.

Petitioner attributes the final similar-in-kind test to the Fifth and Sixth Circuits. Pet. 17–19. Petitioner cherry-picks quotes from these cases to show the Fifth and Sixth Circuits use the "similar in kind" standard, which ignores the fact that *all* cases Petitioner discussed apply this standard. Additionally, none of the Fifth and Sixth Circuit cases cited have similar facts to this matter. "[T]his grab-bag of cases about different alleged harms, different common law analogues, and different statutory schemes" provides no evidence of Petitioner's manufactured circuit split. *Hunstein III*, 48 F.4th at 1249. To the extent different circuits have reached different outcomes while applying the same legal analysis, it is because they are considering materially different facts in different cases.

None of the cases on which petitioner relies (Pet. 11 – 19) identifies a circuit split on how to apply this Court's test set forth in *TransUnion*. In reality, the circuits have consistently applied the settled principles from this Court's Article III standing jurisprudence.

II. The Manufactured Circuit Split Is Not Outcome-Determinative.

Since this Court issued its opinion in *TransUnion* in 2021, four circuits have grappled with almost identical cases and drew the same conclusion—Petitioner does not have standing to bring her claims against Keystone.

The plaintiffs in *Hunstein III*, *Nabozny*, *Shields*, and this case, in the Eleventh, Seventh, Tenth, and Third Circuits, respectively, all brought claims against creditors under the FDCPA. The plaintiffs alleged an intangible harm resulted from the creditors sharing plaintiffs' debt information with mailing vendors. The plaintiffs argued they alleged a concrete injury sufficient to establish Article III standing based on the comparator tort of public disclosure of private facts. The claims were all dismissed by the trial courts. *See Hunstein III*, 48 F.4th at 1240; *Nabozny*, 84 F.4th at 732–33; *Shields*, 55 F.4th at 827–29; Pet. App. 2a–3a.

Petitioner characterizes the supposed split as outcome-determinative. Pet. 20. Nonetheless, all four circuits that addressed near-identical facts to this case affirmed dismissal of their respective plaintiffs' claims under similar reasoning. *See Hunstein III*, 48 F.4th at 1240; *Nabozny*, 84 F.4th at 732–33; *Shields*, 55 F.4th at 827–29; Pet. App. 2a–3a. This is so, despite Petitioner's contention that the four circuits use two different tests. Pet. 11–17.

III. The Third Circuit Decided Correctly.

This Court has explained that "the 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo*, 578 U.S. at 338 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) this is likely to be redressed by a favorable judicial decision." *Id.* To establish injury in fact, "a plaintiff must show that he or she suffered 'an invasion of a legally

protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Id.* at 1548 (quoting *Lujan,* 504 U.S. at 560).

The court of appeals correctly held that Petitioner failed to demonstrate that she suffered an injury in fact from the disclosure of information to Respondent's mailing vendor.

Petitioner mischaracterizes the Third Circuit's opinion as concluding that Petitioner "did not allege publicity sufficiently to plead the tort of public disclosure," claiming the court advanced an element-matching test to Article III standing. Pet. 21–22. That is not accurate. Rather, the court of appeals focused on the type of harm Petitioner alleged and concluded that "the harm from disclosures that remain functionally internal are not closely related to those stemming from public ones." Pet. App. 16a. The Third Circuit further concluded that information transmission that does not travel beyond a private intermediary and does not create a sufficient likelihood of external dissemination "cannot compare to a traditionally recognized harm that depends on the humiliating effects of public disclosure." Pet. App. 20a.

As the Third Circuit noted, "there is an overlap between the nature of the traditional harm (humiliation stemming from the public disclosure of offensive information) and an element of the traditional tort (publicity)." Pet. App. 16a n.4. But as the Third Circuit explicitly confirmed, its opinion "followed the Supreme Court's directive in *TransUnion*," and "focus[ed] our inquiry solely on the harm." *Id.*

Petitioner speculates that the Third Circuit based its decision "largely on footnote six" in the *TransUnion* opinion when it held that without public disclosure, the kind of harm Petitioner alleged was not similar in kind to the harm caused by the public disclosure of private information. Pet. 10. But as the Third Circuit made clear, it viewed the method of comparing "the kind of harm plaintiff alleges with the kind of harm caused by the comparator tort" as "more faithful to *TransUnion*" and followed that method. Pet. App. 13a. Accordingly, the court concluded that Petitioner "cannot demonstrate that the injury resulting from Keystone's communication of her personal information to a third-party mailing vendor bears a close relationship to a harm traditionally recognized by American courts," citing *TransUnion.* Pet. App. 13a–14a.

The Third Circuit's decision is consistent with the analysis required by *TransUnion* and correctly found that Petitioner had failed to allege "the harm that stems from both the offensive character of the information and its disclosure to the public." Pet. App. 15a. As the court explained, there is an overlap between the nature of the traditional harm and an element of the traditional tort "because a disclosure that remains nonpublic is unlikely to result in the type of humiliation associated with the traditional injury." Pet. App. 16a, n.4. Nonetheless, the court of appeals reaffirmed its analysis was in accordance with "the Supreme Court's directive in *TransUnion*" to focus solely on the harm. Finally, the court of appeals observed that "even though that inquiry necessarily considers whether a disclosure is 'public' (for lack of a better term), our approach is not an exercise in element-matching." *Id.*

The Third Circuit's decision is consistent with those of other courts of appeals and this Court's directive in *TransUnion*. In faithfully adhering to *TransUnion*'s methodology, the decision advances the Supreme Court's thorough analysis of and test for Article III standing in *Spokeo* and *TransUnion*. As this Court said in *Spokeo,* "[i]njury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" 578 U.S. at 339. By requiring an injury in fact be alleged in the form of a similar type of harm, the decision is correctly decided and for this reason too, review is not warranted.

IV. There is no reason to overrule or "correct" *TransUnion*.

Petitioner contends *TransUnion* should be overruled or corrected to the extent that it requires a plaintiff allege an intangible harm that matches the material elements of a common law tort. Pet. 25. The argument is based on a false premise—*TransUnion* does not require element-matching. Rather, *TransUnion* expressly focuses on the kind of harm alleged. Petitioner's argument is built like a house of cards on sand that collapses on even a cursory inspection.

TransUnion affirmed that a concrete harm (injury-in-fact) must be alleged, even for statutory violations created by Congress. *TransUnion*, 594 U.S. at 427. The court concluded the harm alleged in that case—being labelled a "potential terrorist" in credit reports sent to third parties—was a harm that bore a "close relationship" to the harm associated with the tort of defamation. *Id.* at 432. The court did not require an "exact duplicate"

of a traditionally recognized tort, only a sufficiently "close relationship" to the harm that would result from a defamatory statement. *Id.* at 433. Nothing in *TransUnion* requires or even suggests element-matching is the test for evaluating Article III standing.

According to Petitioner, this court's decision in *TransUnion* is "incoherent and wrong" in holding that a plaintiff's allegations must bear a sufficiently close relationship to a traditional tort. Pet. 26. Not so. *TransUnion* appropriately embraces the separation of powers between Congress and the judiciary by affirming a concrete-harm requirement. 594 U.S. at 429. *TransUnion*'s examination of the alleged harm for a "close relationship" with a tort established under longstanding American law correctly requires something more concrete and particularized than a mere alleged violation of a statutory right. *Id.* at 432. *TransUnion* adheres to the requirements for Article III standing articulated in *Spokeo* and there is no reason to overrule or "correct" the decision.

Moreover, stare decisis demands adherence to *TransUnion*. The doctrine of stare decisis militates against Petitioner's invitation. The doctrine of stare decisis should be adhered to; it "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827–30 (1991) (citing *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986)). Adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

Although adherence to precedent "is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Petitioner has not articulated any special justification for departing from the rule of law established in *TransUnion*. The *TransUnion* decision is not inconsistent with earlier Supreme Court precedent. Rather, the Court in *TransUnion* provided valuable guidance in interpreting Article III standing after *Spokeo*. Or as the Third Circuit puts it, *TransUnion* "built upon *Spokeo*." Pet. App. 7a. Petitioners has suggested no reason sufficient to warrant this Court taking the "exceptional action" of overruling *TransUnion*. *Id.*

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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