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

REPLY BRIEF

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REPLY

I. The Circuit Split Is Real

Attempting to gloss over the division in the lower courts, Respondent asserts that the circuit split Petitioner identifies is "illusory." BIO 6. This characterization sharply contrasts with the numerous majority and dissenting opinions—including the opinions below—that recognize such a split exists.

As Petitioner explained, the courts of appeals have divided along three lines when applying *TransUnion* to determine whether a plaintiff has standing. Pet. 11–20. Respondent's contrary arguments ignore the language of these decisions and the implications of their reasoning.[1]

A. As Respondent admits, "[b]oth Petitioner *and the Third Circuit*" characterize the Eleventh Circuit's decision in *Hunstein* v. *Preferred Collection & Management Services*, 48 F.4th 1236 (11th Cir. 2022) ("*Hunstein III*"), "as purportedly using an element-based approach in a mailing vendor case under the FDCPA." BIO 6. Both Petitioner and the Third Circuit are correct. *Barclift* v. *Keystone Credit Servs., LLC*, 93 F.4th 136, 143–44 (3d Cir. 2024) (describing the "two different ways" in which the circuits have interpreted *TransUnion*).

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[1] Tellingly, in *TransUnion* itself this Court granted the petition for certiorari over a similar objection. Br. in Opp., *TransUnion LLC* v. *Ramirez*, 2020 WL 6695107 *26 (Nov. 6, 2020) ("[T]he alleged circuit splits simply reflect the varying facts of different cases.").

In *Hunstein III*, the en banc Eleventh Circuit required that, for a plaintiff to have standing "an alleged intangible harm" must contain all "element[s] 'essential to liability' under the comparator tort." *Hunstein III*, 48 F.4th at 1242; see also *id*. at 1245 ("[I]f an element from the common-law comparator tort is completely missing, it is hard to see how a statutory violation could cause a similar harm."). Although Respondent argues that the Eleventh Circuit did not really mean what it said, BIO 7, the dissent in *Hunstein III* makes clear that it did: it charged the majority with imposing an "element" test that was a replication of the "exact duplicate" test *TransUnion* disavowed because it "amount[ed] to a similar-in-*both*-kind-*and*-degree standard." *Hunstein III,* 48 F.4th at 1261, 1267 (emphasis in original).

The Seventh Circuit similarly applies an "elements test," and held that a plaintiff failed to analogize her claim to the tort of public disclosure of private facts because the claim lacked the "threshold element of publicity." *Nabozny* v. *Optio Sols. LLC*, 84 F.4th 731, 735 (7th Cir. 2023). Undercutting Respondent's argument that the Seventh Circuit's use of the word "element" was simply inartful, BIO 8, it repeatedly cited *Hunstein III* to support the proposition that the harm alleged must be "actionable" and that, therefore, allegations lacking "the publicity element" of the relevant privacy tort fell short. *Nabozny*, 84 F.4th at 736–38.

B. The Third and Tenth Circuits both disclaim applying the "elements" test yet require that a

plaintiff demonstrate at least some elements of the comparator tort. Contra Respondent, the Third Circuit recognized the overlap between its test and the traditional "elements" test, noting that its requirement that a disclosure be "public" could be seen as a requirement that a plaintiff satisfy the elements of the traditional tort, which include "publicity." *Barclift*, 93 F.4th at 146 n.4. Indeed, the dissent highlighted this confusion and criticized the majority for adopting the "element" test that it "purport[ed] to reject," *id.* at 149.

The Tenth Circuit similarly confused the distinction between the two tests when it positively cited *Hunstein III* and agreed that publicity *is required* for there to be a harm similar to that remediable by the tort of public disclosure of private facts. *Shields* v. *Professional Bureau of Collections of Maryland, Inc.*, 55 F.4th 823, 829 (10th Cir. 2022). By contrast, a proper application of the "kind of harm" test would consider only whether there was a third party who "gain[ed] unauthorized access to . . . personal information." *Barclift*, 93 F.4th at 157–58 (Matey, J. dissenting) (quotation marks omitted).

C. The Fifth and Sixth Circuits apply the correct form of the "kind of harm" test, according to which a plaintiff can have standing to assert a claim based on a comparable *harm* even if the *claim* would not satisfy any elements of a comparator tort. This is the approach for which the dissents below and in *Hunstein III* advocated. Respondent attempts to disregard the positions reached by the Fifth and Sixth

Circuits because they have not yet decided a case involving a mailing vendor, but the reasoning those courts have adopted makes clear that they would find that someone in Petitioner's shoes has standing. See *Perez* v. *McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816, 822 (5th Cir. 2022) ("[A] plaintiff doesn't need to demonstrate that the level of harm he has suffered would be actionable under a similar, common-law cause of action."); *Dickson* v. *Direct Energy, LP*, 69 F.4th 338, 343–45 (6th Cir. 2023) (focusing on the "core" of the harm from the comparator tort and refusing to require an identical "scope of liability").

II. The Split Is Outcome-Determinative

Respondent argues that the split is not outcome determinative only by gerrymandering the analysis. Respondent ignores the Fifth and Sixth Circuits, even though, as noted above, the test those courts have adopted would lead to a different result in this case. Moreover, the dissent below expressly said that the outcome would have been different had the court, as the Fifth and Sixth Circuits do, applied the dissent's test—*i.e.*, the kind-of-harm test without any element-matching requirement. See *Barclift*, 93 F.4th at 160 (stating that the majority would have found standing had its reasoning not "veer[ed] into an unnecessary jot-for-jot exactness to some common-law cause of action"). The *Hunstein III* dissent made the same point. See 48 F.4th at 1268 (finding in similar mailing-vendor case that "[u]nder the sensible (and until today, consensus) kind-degree approach to the *Spokeo/TransUnion* 'close relationship' standard,

[the plaintiff] has standing here"). To all of this, Respondent has no answer.

III. The Third Circuit Wrongly Required Element-Matching Instead Of Analyzing If The Harm Was Similar In Kind

Although the opinion below purported to adopt the test proposed by the dissent in *Hunstein III*, which requires a harm merely "similar in *kind*" to harms cognizable at common law, Pet. App. 11a–13a (emphasis in original), it instead wrongly required Petitioner to allege harms that match an element of the comparator tort (publicity), see Pet. 8–10, 20–25.

A. As a threshold matter, Respondent contends that the Third Circuit's requirement that Petitioner plead the element of publicity was not actually an element-matching requirement at all, but simply part of analyzing whether the harm was similar in kind to recognized privacy harms. BIO 12. Not so.

The upshot of the Third Circuit's decision is that, because Petitioner failed to plead the element of publicity, the harm she alleged cannot be sufficiently concrete for Article III purposes. To be sure, the Third Circuit insisted that its "approach is not an exercise in element-matching" because it "focus[es] [its] inquiry solely on the harm." Pet. App. 16a n.4. But saying so does not make it so. The reality is that the majority emphasizes that publicity is an element of the common-law tort, and then concludes public disclosures must be meaningfully different from nonpublic ones. Its conclusory reasoning is telling: "[T]he harm from disclosures that remain functionally

internal," the majority asserts, "are not closely related to those stemming from public ones." Pet. App. 16a. This is not consistent with the kind-of-harms test, which only asks whether the alleged injury satisfies Article III's concrete injury requirement, not whether the allegations satisfy any element of a common law cause of action. Pet. 18–19 (collecting cases). The Third Circuit's is an element-matching approach in all but name. Compare *Hunstein III*, 48 F.4th at 12 ("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[.]" (emphasis added)).

Respondent tries to explain away this equivalence by arguing that the reason "there is an overlap between the nature of the traditional harm and an element of the traditional tort" is "'because a disclosure that remains nonpublic is unlikely to result in the type of humiliation associated with the traditional injury.'" BIO 13 (quoting Pet. App. 16a n.4). Like the Third Circuit's assertion, this conclusory statement does not make the approach the majority adopted any less dependent on the match between the publicity element of the traditional tort and the harm the court believed was required.

B. In any event, the Third Circuit's reliance on conclusory assertions that a plaintiff must allege the publicity element to satisfy Article III is wrong. Neither Respondent nor the majority explain *why* disclosure to a small group of people in a related

company does not result in similar humiliation as a public disclosure or, to the extent there is a difference, why it *matters* for standing purposes.

The mere fact that publicity is an element of the common-law tort cannot supply the reason. An element necessary to show *liability* need not be required to allege *standing*. It is well-recognized that merits determinations and jurisdictional determinations must be treated separately. See *Steel Co.* v. *Citizens for a Better Env.*, 523 U.S. 83, 88–89 (1998) (emphasizing the distinction). In effect, the Third Circuit's analysis conflates liability and jurisdictional injury. Under a proper kind-of-harm test, liability and injury are distinct: a plaintiff alleging she suffered a traditionally recognized injury like humiliation would satisfy Article III's concrete injury requirement, even if the facts alleged would not satisfy any element of a common law cause of action. See *Calogero* v. *Shows, Cali & Wash, LLP*, 95 F.4th 951, 956–58 (5th Cir. 2024) (holding allegations resembling "traditional harm" suffice); accord *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 425 (2021).

Properly read, *TransUnion* undermines the Third Circuit's approach. This Court carefully distinguished between liability and injury, emphasizing that Congress could "elevate to the status of legally cognizable injuries concrete, *de facto* injuries," even if those "injuries . . . were previously inadequate in law." *TransUnion*, 594 U.S. at 425 (quoting *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 341 (2016)). Moreover,

TransUnion "specifically listed the 'disclosure of ***private*** information' as an example of a 'harm[] traditionally recognized as providing a basis for lawsuits in American courts,'" a statement that should have been dispositive here. Pet. App. 42a–43a (quoting *TransUnion*, 594 U.S. at 425) (emphasis added). And, as explained in the Petition, *TransUnion* had no problem holding plaintiffs "could bring their claims under the FCRA notwithstanding that their comparator tort, defamation, required a showing of falsity, and they did not allege falsity, 'an element all accepted as essential to a successful defamation claim.'" Pet. 22 (quoting *Hunstein III*, 48 F.4th at 1262 (Newsom, J., dissenting)). Respondent ignores these points.

C. Article III limits courts to "'Cases' and 'Controversies,'" thus ensuring that courts confine their work to the resolution of disputes "of a Judiciary Nature." *TransUnion*, 594 U.S. at 423–24. Beyond that stricture, what sorts of concrete injuries are worthy of remedy is a fundamentally legislative decision.

The Third Circuit's approach usurps Congress' authority to render that decision, "den[ying] Congress *any* breathing space" to elevate the concrete injuries in this and any similar case into viable causes of action. *Hunstein III*, 48 F.4th at 1262 (Newsom, J., dissenting). The concrete injuries alleged here illustrate the error: Petitioner alleged third parties "read (and not merely process[ed]) information about [her] alleged debt," Pet. App. 18a n.5, and claims to

have suffered "embarrassment, anxiety, and stress over the disclosure," *id.* at 44a. These injuries are neither novel nor abstract. They are the same injuries one suffers from widespread public disclosure of private information, even if the more limited disclosure may render them less consequential in certain circumstances. By drawing a bright line, however, between humiliation caused by public disclosure and humiliation caused by disclosure to some third parties, the Third Circuit improperly privileged its own intuition over Congress' judgment.

IV. If *TransUnion* Requires Element-Matching, This Court Should Reconsider *TransUnion*

A. To the extent that the Third Circuit's decision arguably applies *TransUnion* correctly, then this Court should grant certiorari on the second question presented: whether to overrule or modify *TransUnion*. An element-by-element approach to adjudicating constitutional standing would leave Congress "relegated to the role of scrivener, dutifully replicating and codifying preexisting common-law causes of action," *Hunstein III*, 48 F.4th at 1267 (Newsom, J., dissenting), wrongly "suggest[ing] a law trapped in amber." *United States* v. *Rahimi*, 144 S. Ct. 1889, 1897 (2024).

B. Respondent's attempts to justify an element-based approach to standing fail.

1. Respondent first says that *TransUnion* "correctly require[d] something more concrete and particularized than a mere alleged violation of a statutory right." BIO 15.

That is true, of course. "[B]are procedural violation[s], divorced from any concrete harm," cannot satisfy the injury-in-fact requirement. *Spokeo*, 578 U.S. at 341. In that sense, 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." *Hagy* v. *Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018) (Sutton, J.).

This generality does not answer the question here—*i.e.*, what the appropriate test is for determining whether an asserted injury is sufficiently concrete. And, as explained above, there is no basis to believe (and Respondent offers none) that whether an asserted harm matches a harm that would satisfy the elements of a common-law tort should control the question. Thus, an element-for-element approach wrongly treats historical pedigree as a stand-in for concreteness and contradicts the history that *is* relevant—namely the historical understanding of judicially cognizable controversies, which Article III reflects. See Pet. 25–30. For example, legislatures had "considerable power to create new rights," Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 694 (2004), including private rights. Indeed, though the Court need not go so far in this case, "[h]istorically, common-law courts possessed broad power to adjudicate" those private rights "even when plaintiffs alleged only the violation of those rights and nothing more," *Spokeo*, 578 U.S. at 344 (Thomas, J., concurring). That is because, as the common-law has long recognized, a legal injury "imports damage in the nature of it." *Webb*

v. *Portland Mfg. Co.,* 29 F.Cas. 506, 508 (No. 17,322) (C.C.D. Me. 1838) (quotation marks omitted).

Moreover, thoughtful jurists have rejected Respondent's position, reasoning that an exact match at common-law is *not* required for Article III standing. See, *e.g.*, *Cranor* v. *5 Star Nutrition, L.L.C.*, 998 F.3d 686, 693 (5th Cir. 2021) (Oldham, J.) (The "inquiry is focused on types of harms protected at common law, not the precise point at which those harms become actionable."); *Farrell* v. *Blinken*, 4 F.4th 124, 133 n.7 (D.C. Cir. 2021) (Rao, J.) (holding that "[t]he right of election following the Revolution is not identical to the right to expatriate" and emphasizing that "our jurisdiction under the Constitution does not require an exact duplicate . . . in American history and tradition" (quotation marks omitted)); *Muransky* v. *Godiva Chocolatier, Inc.*, 979 F.3d 917, 926 (11th Cir. 2020) (Grant, J.) (The "fit between a new statute and a pedigreed common-law cause of action need not be perfect[.]"); *Krakauer* v. *Dish Network, LLC*, 925 F.3d 643, 653–54 (4th Cir. 2019) (Wilkinson, J.) (rejecting argument that "Article III's injury-in-fact requirement is not met until the plaintiff's alleged harm has risen to a level that would support a common law cause of action"); *Robins* v. *Spokeo, Inc.*, 867 F.3d 1108, 1115 (9th Cir. 2017) (O'Scannlain, J.) (rejecting proposition that "Congress may recognize a de facto intangible harm only when its statute exactly tracks the common law").

In sum, to borrow from a different constitutional context, if element-matching is required by

TransUnion, then the Court has wrongly superimposed a "dead ringer" requirement onto Article III. *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 3 (2022).

2. Respondent also contends that stare decisis "demands adherence to *TransUnion*." But Respondent does not meaningfully engage with the reasons for reexamining *TransUnion* (Pet. 25–31). Instead, it quotes from Justice Brandeis' dissent that 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).

Respondent misreads Justice Brandeis's opinion—and stare decisis principles generally. Justice Brandeis went on to explain, after all, what is now a commonplace, which is that the principle of stare decisis applies most strongly "*provided correction can be had by legislation*." *Ibid.* (emphasis added). By contrast, Justice Brandeis concluded, in "cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Ibid.*

Thus, "[i]n constitutional cases . . . the Court has repeatedly said . . . that the doctrine of *stare decisis* is not as 'inflexible.'" *Ramos* v. *Louisiana*, 590 U.S. 83, 119 (2020) (Kavanaugh, J., concurring in part); see *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 378 (2010) (Roberts, C. J., concurring) (The Court

"must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*[.]") (emphasis in original).

C. Without addressing any of the factors this Court considers in reexamining precedent—quality of reasoning, workability, reliance interests, etc.—Respondent just says that "Petitioner has not articulated" any "special justification" for reexamining *TransUnion*. BIO 16. That misses the mark. The term "special justification," as used in cases such as *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984), "merely describe[es] the Court's historical practice with respect to *stare decisis*." *Ramos*, 590 U.S. at 119 (Kavanaugh, J., concurring in part). And each of the factors that this Court historically considers in applying *stare decisis* is present here in spades. Pet. 25–31. Respondent does not supply any argument to the contrary.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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