No. 24-

IN THE

Supreme Court of the United States

RAGING CAPITAL MANAGEMENT, LLC,
RAGING CAPITAL MASTER FUND, LTD.,
AND WILLIAM C. MARTIN,

Petitioners,

v.

BRAD PACKER, DERIVATIVELY ON
BEHALF OF 1-800-FLOWERS.COM, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Second Circuit apply the correct standard of law, under Article III of the United States Constitution and *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), to hold that Respondent Packer has standing to sue under Section 16(b) of the Securities Exchange Act of 1934 for a statutory violation alone, where the Second Circuit found an analogy between Section 16(b) and a common-law violation of fiduciary duty, but Respondent alleged no further injury?

2. Did the United States Court of Appeals for the Second Circuit err in finding that Respondent Packer has standing, under Article III and *Thole v. U.S. Bank N.A.*, 590 U.S. 538 (2020), based on an alleged breach of Section 16(b) and/or breach of common-law fiduciary duty where Respondent alleged no further injury?

PARTIES TO THE PROCEEDING

Petitioner Raging Capital Master Fund, Ltd. is a private investment exempted limited partnership incorporated in the Cayman Islands. It held a portfolio of securities in U.S.-based public corporations.

Petitioner Raging Capital Management, LLC is a Delaware limited liability company and an investment adviser registered under Section 203 of the Investment Advisers Act of 1940, which managed Raging Capital Master Fund, Ltd.'s securities portfolio.

Petitioner William Martin is the sole owner, managing member, and Chief Investment Officer of Raging Capital Management LLC.

Respondent Brad Packer is a plaintiff in the proceedings below as a representative of nominal plaintiff 1-800-Flowers.com, Inc.

Nominal plaintiff 1-800-Flowers.com, Inc. is a Delaware corporation with a class of equity securities that is registered with the Securities and Exchange Commission under 15 U.S.C. § 78l. Its shares trade on NASDAQ under the ticker FLWS.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Raging Capital Management, LLC has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

Packer v. Raging Cap. Mgmt., LLC, No. 15-cv-05933, United States District Court for the Eastern District of New York. Judgment appealed from was entered on March 13, 2023. A judgment previously appealed from was entered on August 20, 2019.

Packer v. Raging Cap. Mgmt., LLC, No. 23-367-cv, United State Court of Appeals for the Second Circuit. Judgment appealed from was entered on June 24, 2024. Petition for rehearing or rehearing *en banc* denied on August 8, 2024.

Packer v. Raging Cap. Mgmt., LLC, Nos. 19-2703-cv, 19-2852-cv, United States Court of Appeals for the Second Circuit. A previous judgment on appeal was entered on November 23, 2020.

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JURISDICTION

The Second Circuit issued its opinion on June 24, 2024. The Circuit Court denied Petitioner's timely petition for rehearing or rehearing *en banc* on August 8, 2024. (Pet. App. 48a–49a.) Petitioner seeks review upon writ of certiorari under the jurisdiction conferred by 28 U.S.C. § 1254.

STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are: United States Constitution, Article III, Section 2 (Pet. App. 50a); and Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (Pet. App. 51a–55a).

INTRODUCTION

In *Packer v. Raging Capital Management LLC*, 105 F.4th 46 (2d Cir. 2024), the Second Circuit addressed a straightforward question of law: could a plaintiff satisfy Article III standing merely by pleading breach of a federal statute, without any other injury? The statute in question, Section 16(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78p(b), establishes a cause of action for issuers and their representatives to

recover profits earned from trading within six months by statutory insiders, which include by statutory definition any person that beneficially owns 10% or more of any class of the issuer's equity securities. The Second Circuit answered the question in the affirmative, reasoning that Section 16(b) creates a relationship analogous to a fiduciary duty and that a breach of that duty satisfied the requirement of concrete injury under Article III.

Respondent Packer sued as a representative of the issuer, 1-800-Flowers.com, Inc. ("Flowers"). His concession that Flowers had not suffered any injury beyond the alleged breach of statutory duty was not surprising. Petitioners traded in shares of a junior class of voting stock and although they held 10% of the junior class, their actual voting power was approximately 1%. Petitioners had no role in corporate affairs and no access to confidential corporate information. While the statute designated Petitioners as "insiders," they were in reality outsiders. The *Packer* Court deemed Petitioners to be corporate fiduciaries even though they bore none of the attributes of a fiduciary. Respondent Packer purchased 10 shares of Flowers stock after Petitioners' trading was over, acting on guidance from his counsel who then represented him in this action.

The Second Circuit reversed the District Court ruling, which held that under *TransUnion v. Ramirez*, 594 U.S. 413 (2021), Respondent Packer did not have standing for the simple reason that Flowers had not suffered any injury or loss by virtue of Petitioners' trading. The District Court ruling was made on summary judgment at the close of discovery. The Circuit Court read *TransUnion* to require only that the statute invoked by the plaintiff

bear an analogy to a claim recognized at common law, which in the case of Section 16(b) was a claim for breach of fiduciary duty. The Circuit Court ruled that a breach of such a duty, by itself, sufficed to confer standing. The *Packer* Court did not look to see whether the undisputed facts fit within the common law analogue. In this case, Petitioners bore no resemblance to corporate fiduciaries since their nominal voting rights left them with no ability to influence corporate affairs. The Circuit Court did not disagree with the District Court's determination that Petitioners traded based on publicly available information. The Circuit Court found that fact irrelevant, however, in light of its prior holding in *Donoghue v. Bulldog Investors General Partnership*, 696 F.3d 170 (2d Cir. 2012)—decided before this Court's decision in *TransUnion v Ramirez*, 594 U.S. 413 (2021)—that a violation of Section 16(b) alone sufficed to confer standing. The *Packer* Court did not address this Court's holding in *Thole v. Bank USA Inc.*, 590 U.S. 538 (2020), on the apparent assumption that *Thole* was limited to ERISA claims.

The *Packer* Court's determination that Section 16(b) creates a statutory fiduciary duty is all the more fanciful in light of longstanding regulations adopted by the Securities and Exchange Commission (the "Commission" or "SEC") which exempt a large number of 10% beneficial owners from Section 16 of the Exchange Act when they trade in the ordinary course and have no plans to participate in corporate affairs. Rule 16a-1(a), 17 C.F.R. § 240.16a-1(a), adopted in 1991, exempts pension plans, banks, insurance companies, investment advisors and others from Section 16, reflecting the Commission's conclusion that trading by such entities does not harm issuers or the markets.

This Court's decision in *TransUnion v. Ramirez*, 594 U.S. 413 (2021) (Kavanaugh, J.), however, is clear that the Article III standing inquiry requires more than associating a statutory violation with a traditionally recognized harm, whatever label that violation may be given under the statute. "[E]ven though 'Congress may 'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status, it 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*, 594 U.S. at 426 (citations omitted). *TransUnion* recognizes that "Congress's views may be 'instructive,'" but "rejected the proposition 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.'" *Id.* at 425-26. Instead, *TransUnion* requires a two-step analysis: first, determining a historical analogue and, second, determining if the plaintiff suffered a similar injury to the historical analogue. *Id.* at 432-39.

The direct conflict between the *Packer* Opinion and *Thole v. U. S. Bank N.A.*, 590 U.S. 538 (2020) (Kavanaugh, J.), provides a second error. In *Thole*, the Supreme Court reviewed statutory breach of fiduciary duty claims asserted by ERISA plan participants against a plan trustee. The Court found that merely pleading a statutory violation, including a breach of "fiduciary duty" as defined by statute, 29 U.S.C. § 1109, was insufficient to satisfy Article III. The Supreme Court rejected the argument that "a plan fiduciary's breach of a trust-law duty of . . . loyalty itself harms ERISA defined-benefit plan participants even if the participants themselves have not suffered . . . any monetary harm." 590 U.S. at

542. The Court acknowledged that "ERISA affords . . . beneficiaries, and participants—including participants in a defined-benefit plan—a general cause of action to sue. . . . " *Id.* at 544. The Court responded: "But the cause of action does not affect the Article III standing analysis." *Id.*

The *Packer* Court's holding raises significant and recurring issues regarding Article III standing for claims asserted entirely pursuant to federal statutes. The Second Circuit's holding that *TransUnion* requires only that the federal statute bear a resemblance to a claim at common law is at odds with multiple other Circuit Courts, each of which correctly apply *TransUnion* to hold that plaintiff must also demonstrate actual injury arising from the breach. *See Wit v. United Behav. Health*, 79 F.4th 1068 (9th Cir. 2023); *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236 (11th Cir. 2022); *Dinerstein v. Google, LLC*, 73 F.4th 502, 511 (7th Cir. 2023) (Sykes, C.J.).

The Circuit Court's holding that a breach of fiduciary duty, alone, establishes standing is also at odds with several Circuit Courts, which have applied *Thole* and *TransUnion* outside of ERISA claims to find that a breach of a common-law duty of care, without injury, does not support Article III standing. *See Bhambhani v. Neuraxis, Inc.*, No. 22-1764, 2024 WL 2815063 (4th Cir. June 3, 2024) (no standing to bring fraudulent-misrepresentation claims without concrete injury); *In re Recalled Abbott Infant Formula Prod. Liab. Litig.*, 97 F.4th 525, 528 (7th Cir. 2024) (no standing to bring negligent-misrepresentation and breach-of-implied-warrant claims without concrete injury).

STATEMENT OF THE CASE

I. Legal Background

Section 16 of the Exchange Act establishes disclosure and trading restrictions for three classes of designated "insiders": (i) directors, (ii) officers, and (iii) ten-percent beneficial owners of "any class of any equity security . . . which is registered pursuant to Section 78l of this title." 15 U.S.C. § 78p(a)(1). This case focuses on the third category, ten-percent beneficial owners.

Section 16(a) requires statutory insiders to file reports detailing their transactions in an issuer's securities. 15 U.S.C. § 78p(a). These are filed on Forms 3, 4 and 5 with the U.S. Securities and Exchange Commission ("SEC" or "Commission") pursuant to regulations adopted by the Commission. 17 C.F.R. § 229.405.

Section 16(b) provides that any profit realized by a statutory insider based on purchases and sales within six months "shall inure to and be recoverable by the Issuer." *Id.* § 78p(b). The right of action granted by Section 16(b) is enforceable solely by the Issuer or by a shareholder in a representative capacity. Section 16(b) permits suit by "the owner of any security of the issuer in the name and on behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request." *Id.* Section 16(b) states that it was adopted "[f]or the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer."

The SEC has recognized that the application of Section 16 to ten-percent beneficial owners has proven

problematic. For this reason, in 1991, the Commission adopted Rule 16a-1(a), 17 C.F.R. § 240.16a-1(a) ("Rule 16a-1"), which exempts a broad range of financial institutions and other persons from the statute, provided their trading is in the ordinary course and without an intent to control the issuer. The exempt institutions include banks, insurance companies, registered investment advisers, employee benefit plans, and their principals. "[I]mplicit in these exemptions is 'an equitable consideration: that it would be unfair to place Section 16(b)'s strict liability for disgorgement of short-term profits on [such] investors who may possess no inside knowledge or purpose to engage in the management or to influence control of the issuer.'" *See Egghead.Com, Inc. v. Brookhaven Cap. Mgmt. Co.*, 340 F.3d 79, 84 (2d Cir. 2003). Persons covered by Rule 16a-1 are exempt from the statute's reporting and disgorgement provisions.

As the SEC regulations recognize, ten-percent beneficial owners often play no role in corporate affairs, and their trading may not harm issuers or other market participants. Litigation by private parties under Section 16(b) has continued, however, against non-exempt, ten-percent beneficial owners, even though they too may be passive investors, with no access to inside information and no ability to exercise corporate control. Trading by these investors may be based solely on their investment acumen, as is the case here.

The Second Circuit first addressed the question of standing under Section 16(b) for claims against ten-percent beneficial owners in *Donoghue v. Bulldog Investors General Partnership*, 696 F.3d 170 (2d Cir. 2012). There, a shareholder of a publicly traded issuer sued an investment

fund, Bulldog Investors, which had made a profit buying and selling shares within a six-month period. *Id.* at 172-73. Finding that the issuer had Article III standing, the Second Circuit explained that "where, as here, a plaintiff 's claim of injury in fact depends on legal rights conferred by statute, it is the particular statute and the rights it conveys that guide the standing determination." *Id.* at 178. The *Donoghue* holding relied upon the proposition that Congress can draft "statutes creating legal rights, the invasion of which creates standing, even though *no injury* would exist without the statute." *Id.* at 175 (emphasis added).

The Second Circuit reasoned that, under Section 16(b), ten-percent beneficial owners are akin to fiduciaries, and they breach a statutory "fiduciary" duty when they engaged in short-swing trading. *Id.* at 177–78. The Circuit Court found that it was sufficient for a Section 16 plaintiff 's "interest" in the case to "consist of obtaining compensation for, or preventing, the violation of a legally protected [statutory] right." *Id.* at 178.

In *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), and *Thole v. U. S. Bank N.A.*, 590 U.S. 538 (2020), this Court addressed the question of whether a statutory violation alone, without actual injury, could establish standing under Article III. *TransUnion* recognized that "Congress's views may be instructive," but "rejected the proposition 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." *Id.* at 425–26 (quotations omitted). In *TransUnion*, an entire plaintiff class had been awarded damages at trial based on violations of the Fair Credit

Reporting Act, 15 U.S.C. § 1681 *et seq*. *See id.* at 421–22. The Court found that the class members who had suffered actual injury through disclosure of their credit file had standing, while those with a mere statutory violation did not. *Id.* at 439.

In *Thole v. U. S. Bank N.A.*, 590 U.S. 538 (2020), the Court reviewed statutory breach-of fiduciary-duty-claims asserted by ERISA-plan participants against the trustee of a defined-benefits pension plan. The Court rejected the argument that "a plan fiduciary's breach of a trust-law duty of . . . loyalty itself harms ERISA defined-benefit plan participants even if the participants themselves have not suffered . . . any monetary harm." 590 U.S. at 542. The Court also addressed the contention that "ERISA affords . . . beneficiaries, and participants—including participants in a defined-benefit plan—a general cause of action to sue. . . . " *Id.* at 544. The Court answered, "the cause of action does not affect the Article III standing analysis." *Id.* Because the alleged wrongful acts by the Trustee had not harmed the plan participants, the Court ruled, they lacked standing. *See Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 332 (7th Cir. 2019) (Barrett, J., joined by Sykes, J.) ("Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions. [If a defendant's] violation of the statute did not harm [the plaintiff], there is no injury for a federal court to redress.").

In this case, the Second Circuit again addressed the issue of Article III standing for claims involving a statutory violation of Section 16(b). Petitioners held shares in a junior class of common stock, with nominal

voting power, and no control over corporate affairs or access to inside information. While Petitioners held more than ten percent of the junior class, the junior class held only ten percent of the voting power overall. Petitioners therefore held approximately one percent of the voting power for all shares. On summary judgment, Respondent acknowledged the absence of any "injury" beyond the alleged statutory violation.

Analogizing Section 16 to a common law breach of fiduciary duty, the *Packer* court adhered to the *Donoghue* decision and held that a Section 16 plaintiff demonstrated actual injury, sufficient to satisfy Article III, merely by stating a claim for breach of the statute. As a result, every Section 16 plaintiff has Article III standing. The Second Circuit reasoned that the invasion of a Congressionally created right was sufficient to confer standing where that right was analogous to one at common law—here, a fiduciary duty. As in *Donoghue*, the Circuit Court found that Section 16(b) created a "fiduciary" relationship, and a breach of that relationship sufficed to satisfy Article III. The Court explained "The concrete injury that confers standing on Packer is, as we recognized in *Donoghue*, 'the breach by a statutory insider of a fiduciary duty owed to the issuer not to engage in and profit from any short-swing trading of its stock.'" 105 F. 4th 46, 55 (2d Cir. 2024) (quoting *Donoghue*, 696 F.3d at 180).

The *Packer* Court limited *TransUnion* to a requirement that courts find "a close historical or common-law analogue for the [ ] asserted" claim to support constitutional standing. *Id.* at 50 (quoting *TransUnion*, 594 U.S. at 424). The *Packer* Court explained, "*TransUnion* merely elaborated on [the Supreme Court's] 2016

decision in *Spokeo Inc. v. Robins*, which directed courts 'to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.'" *Id.* at 54 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339–40 (2016)). The Second Circuit thus held that *Donoghue* was unaltered by *TransUnion.*

The *Packer* court did not address *Thole v. U. S. Bank N.A.*, 590 U.S. 538 (2020), where this Court held that a breach of fiduciary duty, claimed in that case against an *actual* fiduciary, was insufficient to support Article III standing, absent actual loss or injury on the part of the plaintiff. *See Thole*, 590 U.S. at 544.

The Second Circuit has thus determined that the violation of a statutorily created duty, by itself, suffices to confer standing, even though in this case: (i) the issuer (Flowers) suffered no injury as Petitioners traded based on their own market insight, and (ii) the statutory duty was purely *de jure*, as Petitioners had none of the attributes of an actual fiduciary.

The Second Circuit decision opens the door to a wide variety of federal claims by plaintiffs who have not suffered actual injury but are able to analogize their statutory claim to one at common law. The *Packer* ruling is in direct conflict with *TransUnion*, *Thole* and multiple decisions by other circuit courts, all of which recognize that actual injury is an additional requirement in establishing Article III standing.

The *Packer* decision is also at odds with Second Circuit precedent.

In *Maddox v. Bank of N.Y. Mellon Tr. Co.*, 19 F.4th 58 (2d Cir. 2021), a different panel held that, after *TransUnion*, a statutory violation was by itself insufficient to confer standing. "We need not decide whether state legislatures have the same power Congress enjoys to recognize or create legally protectible interests whose invasion gives rise to Article III standing; *TransUnion* determined that Congress itself enjoys no such power." *Id.* at 64. The holding in *Maddox* could not have been clearer: "*TransUnion* established that in suits for damages plaintiffs cannot establish Article III standing by relying entirely on a statutory violation or risk of future harm: 'No concrete harm; no standing.'" *Id.* In *Harty v. West Point Realty, Inc.*, 28 F.4th 435 (2d Cir. 2022), another Second Circuit panel emphasized that labeling a claim in a manner consistent with recognized causes of action would not suffice to establish standing, absent concrete injury. "Even if the ADA labeled all violations of that act and its implementing regulations as discrimination. . . . *TransUnion* makes clear that a statutory violation alone, however labeled by Congress, is not sufficient for Article III standing." *Id.* at 444.

II. Factual Background and Procedural History

Petitioner Raging Capital Management, LLC ("Capital Management") purchased shares of 1-800 Flowers.com, Inc. ("Flowers") Class A common stock for its customer, Petitioner Raging Capital Master Fund, Ltd. ("Master Fund"), in 2014 and 2015. Petitioners filed reports with the SEC on Schedule 13G disclosing their positions and trading in Flowers, which showed purchases and sales while the Master Fund owned in excess of ten percent of Flowers Class A common stock. Petitioner Master

Fund earned a profit in excess of $4.9 million through the purchase and sale of Flowers' Class A common stock between May 2014 and February 2015.

Petitioners had no access to, and did not trade on, confidential information from Flowers. Petitioners held Class A common stock, which had junior voting rights. Their shares represented approximately one percent of the voting power for the election of Flowers' directors. The holders of Flowers Class B shares, which were not available to the public, controlled 90% of the voting power of Flowers' common stock. Petitioner had no seats or nominees on Flowers' Board of Directors. Petitioners were not fiduciaries of Flowers or its shareholders under Delaware law, or the law of any other state in the United States.

After consulting with counsel, Respondent Packer purchased ten shares of Flowers Class A common stock on July 2, 2015. On the same day, Respondent's counsel, Ostrager Chong Flaherty & Broitman P.C., transmitted a demand to Flowers to pursue claims under Section 16(b) against Petitioners. Flowers elected not to pursue the claims.

Respondent Packer filed a Complaint in the United States District Court for the Eastern District of New York on October 15, 2015, asserting a single count under Section 16(b) of the Exchange Act. 15 U.S.C. § 78p(b) on behalf of Flowers. By Stipulation dated April 3, 2016, the parties consented to have the case referred to a U.S. Magistrate Judge to "conduct all proceedings in this case including trial, the entry of final judgment, and all post-trial proceedings . . . in accordance with 28 U.S.C.

§ 636(c) and Fed. R. Civ. P. 73." No. 15-cv-05933, Doc. 028 (filed April 5, 2016). By decision dated March 10, 2017, the District Court denied Petitioners' motion to dismiss for failure to state a claim. *Id.* at Doc. 040 (filed March 10, 2017). At the conclusion of discovery each party moved for summary judgment. In a decision dated August 20, 2019, the District Court granted summary judgment to Respondent Packer, finding that the Master Fund was a beneficial owner of the Flowers Class A shares and that the delegation of investment authority to Capital Management was ineffective. *Id.*, 2019 WL 3936813 (E.D.N.Y. Aug. 20, 2019). The Second Circuit reversed on November 23, 2020, finding that issues of fact were presented regarding the Master Fund's alleged beneficial ownership and remanding for further proceedings. 981 F.3d 148 (2d Cir. 2020). Neither decision addressed standing.

On remand, Packer undertook additional discovery regarding his beneficial ownership theory. The case was later assigned U.S. Magistrate Judge James Wicks, who presided as a District Judge in accordance with the parties' consent. On December 7, 2021, Petitioners moved for summary judgment, arguing that Packer lacked standing under Article III and citing *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021).

The District Court granted Petitioners' motion by decision dated March 13, 2023. 661 F.Supp.3d 3 (E.D.N.Y. 2023). The District Court ruled that *TransUnion* required that "the plaintiff has suffered concrete harm." *Id.* at 15. The District Court found that "Packer ha[d] not made" a showing of concrete harm flowing from the violation of Section 16(b) "beyond the alleged statutory violation," noting that Packer failed to offer any "actual injury

allegations"—either in "the Complaint," "the opposition papers" or at "oral argument." *Id.* at 17.

The District Court rejected Packer's argument that *TransUnion* had no effect on the Second Circuit's holding in *Donoghue*. The District Court wrote: "[The] judicial landscape on standing following *TransUnion* ha[d] markedly changed." *Id.* at 10. The clear import of *TransUnion*, the District Court explained, was that "even though Congress possesses the power to 'elevate' pre-existing harms to 'actionable legal status,' it lacks the power to 'simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.'" *Id.* at 11 (quoting *TransUnion*, 594 U.S. at 426). The District Court explained that *Donoghue* focused "on the speculative harm that may or [may] not be caused in any individual case from insider trading—which is the harm Section 16(b) protects against," but "that speculative risk cannot in the wake of *TransUnion* automatically support Article III standing in a suit for damages." *Id.* at 13. The District Court further held, "[*Donoghue*'s] grant of standing once a violation of Section 16(b) is alleged, without a showing of concrete harm beyond that violation, must yield to the principles announced in *TransUnion*." *Id.* at 14. The District Court was careful to confine its opinion to the facts presented:

> To be clear, that is not to suggest that a plaintiff could never show concrete harm flowing from a violation of Section 16(b) to support standing, and nothing in this decision should be construed as such. The Court only finds that Packer has not made that showing here beyond the alleged statutory violation.

Id. at 17.

By decision dated June 24, 2024, the Second Circuit reversed. 105 F.4th 46. The Circuit Court rejected the premise that *TransUnion* had either clarified or altered the requirements for standing articulated in *Donoghue*. The Court interpreted *TransUnion* to require only that the claim created by federal statute have an analogue at common law. A breach of such a right, the Second Circuit held, constitutes concrete injury. *Id.* at 53. The *Packer* Court found irrelevant the undisputed fact that Petitioners had no actual, or even conceivable, fiduciary role; they bought and sold the issuer's shares based on publicly available information. The analogue at common law upon which the *Packer* Court relied therefore, does not address the facts in this case. The *Packer* Court also did not address the fact that the SEC itself had recognized that short-swing trading by ten-percent beneficial owners, in many cases, was not intended to fall within the sweep of Section 16(b); hence the adoption of Rule 16a-1(a), 17 C.F.R. § 240.16a-1(a).

Following the rationale set forth in *Donoghue*, the Second Circuit panel in *Packer* ruled that Section 16 provides standing to *all* issuers or shareholders who plead a claim, regardless of whether they allege an actual injury. *See* Oral Arg. Audio Recording at 14:15–45 (Judge Lohier: "that necessarily . . . means that in every Section 16(b) case, the [plaintiff] will have standing by virtue of having alleged a violation of 16(b)." Mr. Ostrager: "That's correct."), *available at* https://ww3.ca2.uscourts.gov/decisions/isysquery/dfb6bc5a-f7bc-4722-abd0-53f24ac8c281/211-220/list/.

Petitioners sought rehearing or alternatively rehearing *en banc*. Their motion was denied on August 8, 2024.

REASONS FOR GRANTING THE WRIT

I. The Question Presented Is One of Exceptional Importance with Far-Reaching Consequences for Federal Jurisdiction.

The question presented in this petition bears upon principles of standing and the scope of federal courts' jurisdiction: When does a plaintiff have standing under Article III of the U.S. Constitution to bring a private, civil action for the breach of a purely statutory duty, where the plaintiff suffered no injury from the breach, or claims a variety of "injury" unlike any known under the common law? This is a recurring question, and likely to arise more and more frequently as courts grapple with statutory rights created by Congress.

Federal courts' jurisdiction is limited to "'Cases' and 'Controversies' in which a plaintiff has a 'personal stake.'" *TransUnion LLC v. Ramirez*, 594 U.S. 413, 414 (2021) (quoting *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997)). This limitation serves to curb both judicial and legislative overreach, as the Court explained in *TransUnion*:

> [I]f the law of Article III did not require plaintiffs to demonstrate a "concrete harm," Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law. Such an expansive understanding of Article III would flout constitutional text, history, and precedent. . . .

> A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority.

Id. at 428–29 (emphasis in original). Therefore, as the Court has repeatedly held, "'Article III standing requires a concrete injury *even in the context of a statutory violation*.' . . . An injury in law is not an injury in fact." *Id.* at 426–27 (emphasis added) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016)); *accord Thole v. U.S. Bank N.A.*, 590 U.S. 538, 539 (2020) (involving a violation of duties imposed under ERISA). As the Fifth Circuit has extrapolated, "[e]ven a violation of the United States Constitution, without concrete injury, is not enough on its own to confer standing." *Abdullah v. Paxton*, 65 F.4th 204, 210 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 188 (2023).

To establish standing under Article III, "a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Thole*, 590 U.S. at 540. The issue in this case arises under the first of these requirements; that a plaintiff must show concrete, particularized, and actual or imminent injury.

Here, the alleged violation is one of entirely statutory creation pursuant to Section 16(b) of the Exchange Act, 15 U.S.C. § 78p(b). Section 16(b) creates a private cause of action by an issuer of securities (or shareholder) on the issuer's behalf to recover profits from short-swing stock

transactions made by directors, officers, and "beneficial owner[s] of more than 10 percent of any class of any equity security. . . ." *Id.*[1]

A violation of the statute requires no evidence of actual injury to the issuer or other shareholders, although there may be cases where financial injury occurs, including through an insider's access to non-public information. This, however, is not one of those cases. In *Packer*, the Second Circuit concluded that a violation of Section 16(b)—that is, the purchase and sale of a class of securities, or the sale and purchase, within six months by a 10% beneficial owner—without more, establishes standing sufficient to meet Article III. 105 F.4th at 52–53. The Second Circuit reasoned that Section 16(b) "effectively makes 10% beneficial owners into fiduciaries" and "constructive trustees of the corporation," regardless of whether they "were actually privity to inside information." *Id.* at 53 (alterations and quotations omitted). The duty extends to all ten percent beneficial owners. The court went on to equate a breach of this constructive trusteeship with "concrete injury" *per se*, contrary to this Court's decisions in *Spokeo*, *Thole*, and *TransUnion*.

Respondent Packer argued before the Second Circuit that Section 16(b) renders *any* ten-percent beneficial owner of *any* class of securities a "fiduciary," citing *Gratz v. Claughton*, 187 F.2d 46, 48 (2d Cir. 1951) (per Hand, Learned, C.J.); Oral Argument, *supra*, at 8:25–50 ("If

1. The term "short-swing transactions" refers to the conduct prohibited by Section 16(b): "any purchase and sale, or any sale and purchase, of any equity security of [an] issuer . . . or a security-based swap agreement involving any such equity security *within any period of less than six months*. . . ." (emphasis added)

the defendants are greater than 10% beneficial owners of any class, then they're fiduciaries.").

Notably, Section 16(b) does not even include the word "fiduciary," or impose the other duties typically associated with a fiduciary under the common law. 15 U.S.C. § 78p; *see, e.g.*, *Gantler v. Stephens*, 965 A.2d 695, 705–06 (Del. 2009) (fiduciaries are required to act "on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company"). Further, Petitioners have none of the characteristics of a majority-shareholder fiduciary under the common law. *See S. Pac. Co. v. Bogert*, 250 U.S. 483, 492 (1919) ("holders of a majority of *[all] the stock of a corporation*" have a fiduciary duty to minority shareholders only when the majority holder "dominate[s] [the corporation's] affairs"; it is "the fact of control" that "creates the fiduciary obligation" (emphasis added)). Here, there is no dispute that Petitioners did not and could not "dominate" or exercise any control over Flowers.

The Second Circuit held that, as a beneficial owner of ten percent of junior voting stock, with one percent of the voting power, Petitioner simply *is* a fiduciary by operation of Section 16(b). Under this theory, Congress would create a statutory, fiduciary duty for the holders of the equivalent of a single voting share.

The import of the Second Circuit's decision is that Congress, by analogizing *any* statutory duty to a fiduciary duty, can confer a private right of action upon one to whom that purported duty is owed, regardless of whether a breach of duty caused any physical, financial, reputational, impending, or other concrete harm recognized under

the common law. This holding would nullify the well-established requirement of concrete injury under this Court's Article III jurisprudence.

II. The Second Circuit's Decision Further Entrenches a Conflict Among the Circuit Courts.

In the decision below, the Second Circuit announced the following standard for concreteness of injury under Article III: "To determine whether an intangible injury is sufficiently concrete to confer constitutional standing, *TransUnion* instructed courts to identify a 'close historical or common-law analogue for the [ ] asserted injury.'" *Packer*, 105 F.4th at 50 (alteration in original) (quoting *TransUnion*, 594 U.S. at 414). The Second Circuit's single-step application of *TransUnion*, focused exclusively on analogy, conflicts with its sister circuits' interpretations. The Second Circuit analysis equates "concrete" harm with a breach of fiduciary duty—and equates a breach of Section 16(b) with a breach of fiduciary duty *per se*. Under the Second Circuit's decision, therefore, any plaintiff who pleads a breach of Section 16(b)—that is, short-swing trading by a ten-percent holder of any class of securities—establishes Article III standing.

In conflict with the Second Circuit's single-step analysis, the Seventh, Ninth, and Eleventh Circuits have applied a two-step analysis under *TransUnion* to determine Article III standing. Those Circuits have required an actual, concrete *injury* analogous to one at common law, in addition to a breach of a statutory duty.

For example, the Ninth Circuit has adopted the following two-stage test: first, "whether the statutory

provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights)," and second, "whether the specific [ ] violations alleged in [the] case *actually* harm[ed], or present[ed] a material risk of harm to, such interests." *Wit v. United Behav. Health*, 79 F.4th 1068, 1082–83 (9th Cir. 2023) (emphasis added) (holding ERISA plaintiffs had standing to challenge self-interested transactions where they alleged a "risk that their claims will be administered under a set of Guidelines that impermissibly narrows the scope of their benefits" and "the present harm of not knowing the scope of the coverage their Plans provide").

The Eleventh Circuit also adopted a two-stage analysis, asking, first, whether the complaint stated a "tangible [injury] like financial loss or physical injury," or at least an intangible injury like reputational harm, recognized at common law; and second, whether the elements of the alleged harm compared to the elements of a known common-law or statutory cause of action. *See Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1244–45 (11th Cir. 2022) (holding violation of Fair Debt Collection Practices Act is not analogous to tortious public disclosure: "[T]he disclosure alleged here lacks the fundamental element of publicity. And without publicity, there is no invasion of privacy—which means no harm, at least not one that is at all similar to that suffered after a public disclosure.").

The Seventh Circuit applied a similar, two-stage test with an added refinement. The court asked, first, whether the plaintiff had alleged "a concrete injury . . . *de facto*," meaning one that "actually exist[s]," whether it be "tangible [or] intangible." *Dinerstein v. Google, LLC*, 73

F.4th 502, 511 (7th Cir. 2023) (Sykes, C.J.) (quoting *Spokeo*, 578 U.S. at 340). Second, the Seventh Circuit ruling considered whether there was a "common-law analogue." *Id.* at 511. The plaintiffs had claimed that a hospital shared anonymized medical records with Google, LLC to develop artificial intelligence, in violation of the Healthcare Insurance Portability and Accountability Act ("HIPAA"), and analogous to a common-law "invasion of privacy." *Id.* at 512. The Seventh Circuit required more, noting that "an invasion of privacy is not a standalone tort; the term encompasses four theories of wrongdoing." *Id.* at 513 (emphasis and quotations omitted). Because "*TransUnion* requires us to nail down a *particular* common-law analogue," the court reasoned, it "assess[ed] whether any of the recognized privacy torts is sufficiently analogous to [the plaintiffs'] asserted injury." *Id.* (emphasis added) (alterations and quotations omitted). The court concluded that the analogous privacy torts required disclosure, while the plaintiff 's allegations of disclosure were merely hypothetical. The plaintiffs' alleged harm was, therefore, also "hypothetical": "[n]o concrete harm, no standing." *Id.* at 513–14 (quoting *TransUnion*, 594 U.S. at 442).

Several courts have applied *Thole* to hold that beneficiaries of a defined-benefit plan do not have standing to raise breach-of-duty claims if they have received, and will continue to be entitled to, payments due to them under the plan: Such beneficiaries have suffered no concrete injury. *See*, *e.g.*, *Winsor v. Sequoia Benefits & Ins. Servs.*, LLC, 62 F.4th 517, 528 (9th Cir. 2023); *see also Abdullah v. Paxton*, 65 F.4th 204, 209 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 188 (2023) (no standing for beneficiary of defined-benefit plan for Texas state employees).

Outside of the ERISA context, moreover, several Circuit Courts have followed *Thole* and *TransUnion* to hold that a breach of a common-law duty of care, without injury, does not support Article III standing. *See Bhambhani v. Neuraxis, Inc.*, No. 22-1764, 2024 WL 2815063, at *2 (4th Cir. June 3, 2024) (no standing to raise fraudulent-misrepresentation claims where plaintiff "failed to show that they suffered a cognizable injury"); *In re Recalled Abbott Infant Formula Prod. Liab. Litig.*, 97 F.4th 525, 528 (7th Cir. 2024) (no standing for plaintiffs raising product-liability claims for purely economic harm where plaintiffs' "alleged injury [was] hypothetical or conjectural").

Under the Second Circuit's analysis, by contrast, a breach of fiduciary duty is, itself, a cognizable harm sufficient to meet Article III's requirements; and a breach of Section 16(b) *is* a breach of a fiduciary duty. *Packer*, 105 F.4th at 53. The Second Circuit determined that the same principle applies, even when the statutory, "fiduciary" relationship is fictional and the defendant has none of the attributes of a common-law fiduciary. More to the point, the Second Circuit's analysis ignores *Thole* and cases following it, which explicitly held that a breach of fiduciary duty by an actual fiduciary, without *additional evidence of concrete injury*, does *not* confer standing. *Thole*, 590 U.S. at 542–43 (*see infra*, Section III).

III. The Second Circuit's Decision Conflicts with This Court's Prior Decisions.

The Second Circuit's decision squarely contradicts this Court's holdings in *Thole* and *TransUnion*. In *Thole*, the Court addressed the question of standing by beneficiaries

of a defined-benefit retirement plan who brought claims against their former employer under the Employee Retirement Income Security Act (ERISA). 590 U.S. at 540. This Court held that the plaintiffs who participated in the defined-benefit plan lacked standing because they held no "concrete stake in [the] lawsuit." *Id.* at 541. Under a defined-benefit plan, plaintiffs were entitled to a fixed sum each month regardless of the financial performance of the fund: the plaintiffs had "received all of their monthly benefit payments so far, and the outcome of [the] suit would not affect their [right to] future benefit payments." *Id.* at 540–43. The Court ruled:

> If [the plaintiffs] were to lose [the] lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny less. If [the plaintiffs] were to win [ ], they would still receive the exact same monthly benefits that they are already slated to receive, not a penny more.

Id. at 541. The Court rejected the plaintiffs' argument that the breach of duty under ERISA, alone, harmed plan participants." *Id.* at 542. Notably, the ERISA statute at issue in *Thole explicitly* imposes fiduciary duties upon plan managers, 29 U.S.C. § 1104, whereas here, Section 16 (b) does not.

Here, the Second Circuit reached the opposite conclusion. Citing its own, pre-*Thole* and pre-*TransUnion* decision, the Second Circuit held, first, that "Section 16(b) 'effectively makes 10% "beneficial owners [into] fiduciaries"'" and "short-swing transactions by such persons [into] 'breaches of trust.'" *Packer*, 105 F.4th at 53

(first alteration in original) (quoting *Donoghue*, 696 F.3d at 177). A breach of this statutory duty, the Second Circuit concluded, was sufficient "injury" to justify Article III standing. *Id.* at 53, 55.

In addition to reaching a conclusion at odds with *Thole*, the Second Circuit erred in its application of the analytical framework from *TransUnion*. While the court acknowledged *TransUnion*'s directive that courts identify a "close historical or common-law analogue for [an] asserted *injury*," *Packer*, 105 F.4th at 50 (emphasis added) (citing *TransUnion*, 594 U.S. at 424), the court instead found an analogy to a common law *duty* and *breach*—a breach of fiduciary duty—but never considered whether, on the facts of this case, the alleged *injury* was analogous at all.

The Second Circuit omitted the threshold step of the *TransUnion* two-stage analysis. Instead of inquiring, first, whether Packer alleged a "real, [ ] not abstract" injury, *TransUnion*, 594 U.S. at 424, the Second Circuit focused only on whether the alleged breach "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit." *Packer*, 105 F.4th at 52. Having drawn an analogy to a common-law breach of fiduciary duty, the *Packer* court ended the analysis. In doing so, the court ignored the caution from *TransUnion* that "a [statutory] 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*, 594 U.S. at 426. These errors were dispositive, as demonstrated by the conflict between the Second Circuit's opinion and *Thole*.

In reaching its conclusion, the Second Circuit held explicitly that *TransUnion* did not abrogate its decision in *Donoghue*, and "cautioned District Courts against preemptively declaring [its] caselaw ha[d] been abrogated by intervening Supreme Court decisions." *Packer*, 105 F.4th at 54. "Nothing in *TransUnion* undermined the analogue" between the duty imposed under Section 16(b) and common law fiduciary duty, the Second Circuit held. *Id.*

The Second Circuit further erred in finding *Donoghue* to be consistent with *TransUnion*. In *TransUnion*, this Court addressed claims by a class of consumers with alerts on their credit files indicating that their names were a "potential match" to names on the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) list of serious criminals. 594 U.S. at 419–20. All class members claimed the same "breach" of TransUnion's statutory duties under the Fair Credit Reporting Act. *Id.* at 418, 421, 439. Nonetheless, the Court held that only the 1,853 class members who claimed that TransUnion actually provided misleading credit reports to third-party business had Article III standing. *Id.* at 417. The remaining 6,332 class members, whose credit reports were *not* provided to third-party businesses, had "not demonstrated concrete harm and thus lack Article III standing." *Id.*

The Second Circuit's error arises in large part from a misapplication of this Court's reference to a "close historical or common-law analogue." *Id.* at 414. It is not enough that the Second Circuit found an analogy between the *cause of action* under Section 16(b) and a common-law breach of fiduciary duty—the court needed to find an analogy between the "asserted *injury*" and an *injury*

recognized at common law. *Id. TransUnion* provides an example of the difference: In *TransUnion*, the entire plaintiff class raised the same cause of action, *i.e.*, breach of the Fair Credit Reporting Act, which was analogous to a libel claim but that did not mean that all the plaintiffs had standing since many had not suffered *injury* analogous to a libel *injury*. *Id.* at 417.

Similarly, under Section 16(b), some plaintiffs may indeed suffer injury sufficient to invoke Article III standing. For example, where a shareholder is a corporate officer or employee, or a ten-percent owner who had access to non-public information, Section 16 finds a common law analogue. *See Diamond v. Oreamuno*, 24 N.Y.2d 494, 496 (N.Y. 1969); *Brophy v. Cities Serv. Co.*, 70 A.2d 5, 7 (Del. Ch. 1949). At the other end of the spectrum, a ten-percent, arms-length shareholder with no voice in the company's management, whose trading caused no loss of value or use of corporate information—like Petitioners here—causes no injury, concrete or otherwise.

An analogy between a common-law claim and a statutory claim cannot be ephemeral or abstract to establish Article III concrete injury; The analogy must also encompass at least some of the facts in each case that are critical to establish injury analogous to the injury at common law. *See Thole*, 590 U.S. at 540 (injury must be "concrete" and "particularized" to each plaintiff). The Seventh Circuit's decision in *Dinerstein* provides an illuminating example. There, the plaintiffs' statutory cause of action under HIPAA was "analogous" to a common-law breach of privacy claim at an abstract level, but the court looked further. *Dinerstein*, 73 F.4th at 513. The court concluded that facts of the case did not meet the

publication element of a recognized privacy claim—which, as the Court explained, is a critical part of a privacy claim because it establishes the injury caused by such claims. *Id.* at 513–14. The Second Circuit itself correctly applied this distinction between the hypothetical and the concrete in a 2022 unpublished decision, *Plutzer v. Bankers Tr. Co. of S. Dakota*, No. 22-561-CV, 2022 WL 17086483, at *2 (2d Cir. Nov. 21, 2022) (holding that, even if a plaintiff *could* establish standing where stock-ownership plan overpaid for assets, plaintiff there had "not adequately allege that overpayment occurred").

Here, the facts of the case do not reach *several* elements of a claim for common-law breach of fiduciary duty that are crucial to establishing injury, and thus should bear on Article III standing: Petitioners were, indisputably, not "fiduciaries" under the common law; Petitioners had no access to non-public information and any other property of Flowers; and Petitioners caused no loss of value or assets to Flowers, nor did they profit by usurping a corporate opportunity. The Second Circuit's analogy to breach of fiduciary duty in this case was entirely abstract, hypothetical, and does not establish Article III standing.

In summary, the Second Circuit overlooked a core mandate of *TransUnion*: "Article III standing requires a concrete injury even in the context of a statutory violation." *TransUnion*, 594 U.S. at 414 (quoting *Spokeo*, 578 U.S. at 331).

IV. This Action Presents an Ideal Opportunity for This Court To Resolve the Conflict.

This case presents an ideal opportunity for the Court to address the widening circuit split after *TransUnion*, and to establish a definitive framework for Article III standing for purely statutory violations.

The case before the Court presents the issue clearly. The issue of standing was addressed on summary judgment after several years of substantive briefing and discovery. Packer offered no evidence that Flowers lost value, assets, or anything else of concrete value due to Petitioners' alleged short-swing transactions. Nor did Packer offer evidence that any confidential information of Flowers was misused or misappropriated, or that its reputation was damaged. Packer asserted standing on behalf of Flowers based solely on a violation of Section 16(b), and on that basis alone.

The trajectory of this case demonstrates the true driver of Packer's claim: legal fees. Packer purchased 10 shares of Flowers after conferring with counsel in this action, who later served a demand on Flowers, on the date of the purchase, to bring an action under Section 16(b). Packer made his purchase months after the alleged wrongful conduct by Petitioners. In *Thole*, this Court identified litigation driven solely by attorneys fees as in indicia that actual harm has not occurred. *See Thole*, 590 U.S. at 541 ("[A]n interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." (quotations omitted)).

If the Court grants this petition, the Court's guidance will provide clarity to legislators, courts, and potential plaintiffs. Courts need to understand the bounds of congressional authority to put new, private rights of action before the federal courts, especially in an age of ever-evolving transactional, privacy, and data-security concerns. Plaintiffs need to understand which types of "injuries" may be vindicated in federal court, in order to take measures to protect themselves from other, more ephemeral harms which the courts' constitutional authority does not reach.

V. The Second Circuit Erred In Finding Standing in This Action.

After drawing the analogy between Section 16(b)'s short-swing trading prohibition and common-law fiduciary duty, the Second Circuit essentially ruled that a violation of Section 16(b) *is* sufficient, without more, to confer constitutional standing. *Packer*, 105 F.4th at 56 n.55 ("It is the invasion of [the] legal right, without regard to whether the trading was based on inside information, that causes an issuer injury in fact."). Contrary to this Court's precedent, the Second Circuit thus found that a Section 16(b) plaintiff need *not* show concrete injury to satisfy Article III.

In addition to misapplying Supreme Court precedent (*see supra*, Section III), the Second Circuit failed to appreciate the vast gulf between the intent of Section 16(b) and the outcome achieved here. The Second Circuit accurately quoted the express intent of Section 16(b): to "prevent the unfair use of information which may have been obtained . . . by reason of [a close] relationship to

the issuer." *Id.* at 52–53 (quoting 15 U.S.C. § 78p(b)). As applied here, however, this "strict liability," as the Second Circuit termed it, *id.*, does not serve that congressional purpose.

There is no allegation that Petitioners had access to—much less relied upon—*any* non-public information. Petitioners are arms-length investors with no relationship to the issuer apart from owning the shares.

More to the point: the Second Circuit's reliance upon the common-law-fiduciary-duty analogy (in direct conflict with *Thole*, *see supra* at III) is especially far afield here. No shadow of a fiduciary duty ever attached. Under the laws of Delaware (the state of Flowers' incorporation), "a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation." *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113 (Del. 1994) (emphasis omitted) (quoting omitted)). Petitioners were nowhere near this majority threshold, had far less voting power: There is no dispute that Petitioners did *not* exercised control over Flowers. Under the Second Circuit's flawed interpretation of *TransUnion*, it is irrelevant that some Section 16(b) defendants (like Petitioners here) would never become fiduciaries. Nor does it matter that Petitioners' trading caused no concrete loss or risk of loss.

The Second Circuit ruled that *TransUnion* simply "reaffirmed" Congress's power to create a "legally protected interest," "the invasion of which creates standing, even though *no injury would exist without the statute*." *Packer*, 105 F.4th at 55 (citing *Donoghue*, 696 F.3d at 175) (emphasis added). But *TransUnion* is clear that

Congress "may *not* simply enact an injury into existence, using its lawmaking power to *transform something that is not remotely harmful into something that is*." 594 U.S. at 426 (citation omitted) (emphasis added). *TransUnion* mandates that federal courts inquire into whether each plaintiff has suffered a concrete injury, not merely whether the defendant has violated a statute. *See id.* at 430–39 (holding only those plaintiffs who had evidence of injury had standing, regardless of a jury verdict in favor of the entire plaintiff class).

> [A]n important difference exists between (i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law. . . . Congress may create causes of action for plaintiffs to sue defendants who violate [statutory] prohibitions or obligations. But under Article III, an injury in law is not an injury in fact.

Id. at 426–27. *TransUnion* thus created a limit on legislative power because "a regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority." *Id.* at 429.

Under the Second Circuit's approach, Congress or courts need only liken a statutory duty to a common-law duty, such as a fiduciary duty, to avoid *TransUnion*'s limitation. Take, for example, the Fair Credit Reporting Act ("FCRA") at issue in *TransUnion*: Congress could

evade the Article III standing requirement enforced by the Court there by clarifying that FCRA imposes a "limited fiduciary duty" on consumer reporting agencies to follow reasonable procedures to ensure accuracy, akin to a fiduciary's duty of care. *See Donoghue*, 696 F.3d at 177–78; *Packer*, 105 F.4th at 53. Under the Second Circuit's reasoning, the amended FCRA would provide standing to all 6,332 plaintiffs that this Court held had no standing in *TransUnion*.

The Supreme Court rejected the invocation of a label to avoid the constitutional requirement of concrete injury in *Thole*: plaintiffs could not simply "analogiz[e] to trust law" in order to evade the "concrete injury" requirement. 590 U.S. at 542–44. Even with the explicit creation of "fiduciary duties" under ERISA, the Court held that *Thole* plaintiffs lacked standing: The plan participants had received and would continue to be entitled to payments owed, and thus suffered no *actual injury* analogous to that of the trust itself. *Id.* at 543.

There is no rational distinction between the statutory, fiduciary-duty reviewed and rejected as a basis for Article III standing in *Thole*, and the duty implied by the Second Circuit here to justify its conclusion. Indeed, in *Thole*, the defendant was at least an undisputed fiduciary, while Petitioners here are undisputed non-fiduciaries at common law.

The Second Circuit's decision below may be an outlier when it comes to courts' interpretations of *TransUnion*, but the court's strained conclusion that *TransUnion* does *not* abrogate its decision in *Donoghue* demonstrates the consequences of inconsistency between the circuits in applying Article III standing.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JUNE 24, 2024

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 23-367-cv

BRAD PACKER, DERIVATIVELY ON BEHALF OF 1-800-FLOWERS.COM, INC.,

Plaintiff-Appellant,

v.

RAGING CAPITAL MANAGEMENT, LLC, RAGING CAPITAL MASTER FUND, LTD., WILLIAM C. MARTIN,

Defendants-Appellees,

1-800-FLOWERS.COM, INC.,

Defendant.

ARGUED: May 6, 2024
DECIDED: June 24, 2024

Appeal from the United States District Court
for the Eastern District of New York

No. 15-cv-5933, James M. Wicks, *Magistrate Judge*

Appendix A

Before: NEWMAN, CABRANES, and LOHIER, *Circuit Judges*.

In *Donoghue v. Bulldog Investors General Partnership*, 696 F.3d 170 (2d Cir. 2012), we evaluated whether the plaintiff had constitutional standing to bring a suit under Section 16(b) of the Securities Exchange Act of 1934, which requires owners of more than ten percent of a company's stock ("10% beneficial owners") to disgorge profits made by buying and selling that company's stock within a six-month window. If the company does not promptly sue to recover these so-called "short-swing" profits, a shareholder may sue the 10% beneficial owner on the company's behalf. We held that a violation of Section 16(b) inflicts an injury that confers constitutional standing.

This case, on appeal before us for the second time, presents the same question as *Donoghue*. The United States District Court for the Eastern District of New York (James M. Wicks, *Magistrate Judge*) reached the opposite conclusion as our panel, however. It determined that *TransUnion LLC v. Ramirez*, 594 U.S. 413, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021), which elaborated on the "concrete injury" requirement of constitutional standing, abrogated *Donoghue*. The District Court thus dismissed Plaintiff-Appellant Brad Packer's Section 16(b) derivative suit against Defendants-Appellees Raging Capital Management, LLC, Raging Capital Master Fund, Ltd., and William C. Martin, reasoning that Packer lacked constitutional standing because he did not allege a concrete injury. Packer appealed the judgment directly to our Court, as opposed to a District Judge, because the parties had agreed to Magistrate Judge jurisdiction

pursuant to 28 U.S.C. § 636(c)(1). Accordingly, we must decide whether Magistrate Judge Wicks is correct that *TransUnion* abrogated our decision in *Donoghue*.

We disagree. *TransUnion* did not abrogate *Donoghue*, and the District Court erred in holding that it did. First, a District Court must follow controlling precedent—even precedent the District Court believes may eventually be overturned—rather than preemptively declaring that our caselaw has been abrogated. Second, *TransUnion* did not cast doubt on, much less abrogate, *Donoghue*. To determine whether an intangible injury is sufficiently concrete to confer constitutional standing, *TransUnion* instructed courts to identify a "close historical or common-law analogue for the[] asserted injury." 594 U.S. at 424. In *Donoghue*, we had identified such an analogue for a Section 16(b) injury: breach of fiduciary duty. Because nothing in *TransUnion* undermines *Donoghue*, the District Court erred in dismissing Packer's Section 16(b) suit.

Accordingly, we **REVERSE** the March 13, 2023 judgment of the District Court dismissing the action for lack of constitutional standing and **REMAND** for further proceedings consistent with this opinion.

José A. Cabranes, *Circuit Judge*:

In *Donoghue v. Bulldog Investors General Partnership*, 696 F.3d 170 (2d Cir. 2012), we evaluated whether the plaintiff had constitutional standing to bring a suit under Section 16(b) of the Securities Exchange Act of 1934 ("Exchange Act"), which requires owners of more

than ten percent of a company's stock ("10% beneficial owners") to disgorge profits made by buying and selling that company's stock within a six-month window.[1] If the company does not promptly sue to recover these so-called "short-swing" profits, a shareholder may sue the 10% beneficial owner on the company's behalf.[2] We held that a violation of Section 16(b) inflicts an injury that confers constitutional standing.[3]

This case, on appeal before us for the second time, presents the same question as *Donoghue*. The United States District Court for the Eastern District of New York (James M. Wicks, *Magistrate Judge*) reached the opposite conclusion as our panel, however. It determined that *TransUnion LLC v. Ramirez*, 594 U.S. 413, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021), which elaborated on the "concrete injury" requirement of constitutional standing, abrogated *Donoghue*. The Court thus dismissed Plaintiff-Appellant Brad Packer's Section 16(b) derivative suit against Defendants-Appellees Raging Capital Management, LLC, Raging Capital Master Fund, Ltd., and William C. Martin (jointly, "Appellees"), reasoning that Packer lacked constitutional standing because he

1. *See* 15 U.S.C. § 78p(b).

2. *See Donoghue v. Bulldog Invs. Gen. P'ship*, 696 F.3d 170, 173 (2d Cir. 2012); *Olagues v. Icahn*, 866 F.3d 70, 72 (2d Cir. 2017); *see also Short-Swing Profits*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "short-swing profits" as "[p]rofits made by a corporate insider on the purchase and sale (or sale and purchase) of company stock within a six-month period").

3. *Donoghue*, 696 F.3d at 175-80.

did not allege a concrete injury.[4] Packer appealed the judgment directly to our Court, as opposed to a District Judge, because the parties had agreed to Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c)(1). Accordingly, we must decide whether Magistrate Judge Wicks is correct that *TransUnion* abrogated our decision in *Donoghue*.

We disagree. *TransUnion* did not abrogate *Donoghue*, and the District Court erred in holding that it did. First, a District Court must follow controlling precedent—even precedent the District Court believes may eventually be overturned—rather than preemptively declaring that our caselaw has been abrogated. Second, *TransUnion* did not cast doubt on, much less abrogate, *Donoghue*. To determine whether an intangible injury is sufficiently concrete to confer constitutional standing, *TransUnion* instructed courts to identify a "close historical or common-law analogue for the[] asserted injury."[5] In *Donoghue*, we had identified such an analogue for a Section 16(b) injury: breach of fiduciary duty.[6] Because nothing in *TransUnion* undermines *Donoghue*, the District Court erred in dismissing Packer's Section 16(b) suit.

Accordingly, we **REVERSE** the March 13, 2023 judgment of the District Court dismissing the action for

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4. *Packer v. Raging Cap. Mgmt., LLC*, 661 F. Supp. 3d 3, 17-18 (E.D.N.Y. 2023).

5. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021).

6. *Donoghue*, 696 F.3d at 177-80; *see also* Section II.B, *post*.

lack of constitutional standing and **REMAND** for further proceedings consistent with this opinion.

I. BACKGROUND

Unless otherwise noted, the relevant facts in this appeal are undisputed. We summarize them below.

Brad Packer, a shareholder of 1-800-Flowers.com, Inc. ("FLWS"), alleges that during a six-month period in 2014 and 2015, Appellees bought and sold FLWS stock while they were 10% beneficial owners of FLWS.[7] After FLWS declined to sue Appellees, Packer filed a shareholder derivative suit in the Eastern District of New York alleging that Appellees violated Section 16(b) of the Exchange Act.

In 2020, we vacated the judgment of the District Court (Gary R. Brown, *Magistrate Judge*) granting summary judgment to Packer, holding that questions of material fact remained as to Raging Capital's beneficial

7. Appendix ("A") 22-24; *see also* A23 (Complaint alleging that "the Raging Capital Group purchased at least 1,713,078 shares while a greater than 10% beneficial owner between April 30, 2014 and September 30, 2014, and that the Raging Capital Group then sold 1,580,504 shares while a greater than 10% beneficial owner between September 30, 2014 and January 31, 2015."). Although we assume without deciding that Appellees were in fact 10% beneficial owners of FLWS, we intimate no view on Appellees' beneficial ownership status, which is a merits question reserved for the District Court.

ownership status and discussed those questions.[8] On remand, the District Court (James W. Wicks, *Magistrate Judge*) granted Appellees' motion to dismiss.[9] The Court reasoned that Packer lacked constitutional standing to bring a Section 16(b) suit because Packer did not allege that he suffered a "concrete" injury.[10] The case returns to us on appeal.

II. DISCUSSION

In reviewing *de novo* the District Court's decision to dismiss for lack of constitutional standing, we "borrow from the familiar [Federal] Rule [of Civil Procedure] 12(b)(6) standard" to "constru[e] the complaint in plaintiff's favor and accept[] as true all material allegations contained therein."[11] We have appellate jurisdiction to review the dismissal order under 28 U.S.C. § 1291.

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8. *Packer v. Raging Cap. Mgmt., LLC*, 981 F.3d 148, 157 (2d Cir. 2020). The parties consented to Magistrate Judge jurisdiction for proceedings below. A6. A Magistrate Judge is a judicial officer of the United States District Courts appointed by the judges of the District Court to assist the District Judges in performing their duties. Because Magistrate Judges are neither nominated by the President nor confirmed by the Senate, they are not "Judges . . . of the . . . inferior Courts" as defined by Article III of the United States Constitution. Accordingly, their powers are limited by statute. *See* 28 U.S.C. § 636. In particular, their authority to enter judgment in civil matters requires the consent of the parties. *See id.* § 636(c)(1).

9. *Packer*, 661 F. Supp. 3d at 18.

10. *Id.* at 17-18.

11. *Donoghue*, 696 F.3d at 173.

In *Donoghue*, a comprehensive and unanimous opinion for our Court, we held that a violation of Section 16(b) of the Exchange Act "causes injury . . . sufficient for constitutional standing."[12] The question before us is whether the Supreme Court's decision in *TransUnion* abrogated *Donoghue*. We hold that it did not.

A. Article III's Concrete Injury Requirement After *TransUnion*

Article III of the Constitution requires that plaintiffs establish standing to sue in federal court.[13] The Supreme Court has instructed that, to establish Article III standing—also known as constitutional standing—"a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief."[14] Injuries may be "tangible harms, such as physical harms and monetary harms," or—as here—"intangible harms," such as "reputational harms, disclosure of private information, and intrusion upon seclusion."[15]

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12. *Id.* at 180.

13. *See* U.S. CONST. art. III, § 2 (limiting federal judicial power to "Cases" and "Controversies"); *TransUnion*, 594 U.S. at 417.

14. *TransUnion*, 594 U.S. at 423.

15. *Id.* at 425.

In determining whether an intangible injury is sufficiently "concrete" to satisfy Article III, the Supreme Court, in the 2016 case *Spokeo, Inc. v. Robins*, advised courts to consider "history and the judgment of Congress," as well as whether the injury "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[16] Although "Congress may 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law,'" a statutory violation alone does not establish constitutional standing.[17]

Five years later, in *TransUnion LLC v. Ramirez*, the Supreme Court elaborated on *Spokeo* by instructing plaintiffs to identify "a close historical or common-law analogue for their asserted injury."[18] But the analogue need not be an "exact duplicate in American history and tradition."[19] *TransUnion* further held that "in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm."[20]

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16. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340-41, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016).

17. *Id.* at 341 (alteration adopted) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

18. *TransUnion*, 594 U.S. at 424.

19. *Id.*

20. *Id.* at 436.

This Circuit's approach to constitutional standing prior to *TransUnion* had distinguished between "substantive" and "procedural" rights.[21] But *TransUnion* "eliminated the significance of such classifications" by clarifying that whether a statute protects against substantive or procedural harm "is of little (or no) import."[22] Instead, *TransUnion* underscored *Spokeo*'s holding that what matters is "whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts."[23]

B. Section 16(b) and *Donoghue*

This is not the first time we have addressed a challenge to a shareholder's constitutional standing to sue under Section 16(b). We rejected a near-identical challenge to a Section 16(b) action in 2012. In *Donoghue v. Bulldog Investors General Partnership*, we categorically held that "short-swing trading in an issuer's stock by a 10% beneficial owner in violation of Section 16(b) of the Securities Exchange Act causes injury to the issuer sufficient for constitutional standing."[24]

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21. *See Maddox v. Bank of N.Y. Mellon Tr. Co., N.A.*, 997 F.3d 436, 446 (2d Cir. 2021), *opinion withdrawn and superseded on reh'g*, 19 F.4th 58 (2d Cir. 2021).

22. *Maddox*, 19 F.4th at 64 & n.2.

23. *TransUnion*, 594 U.S. at 424 (quoting *Spokeo*, 578 U.S. at 341).

24. *Donoghue*, 696 F.3d at 180.

In reaching this conclusion, we looked to the history and the judgment of Congress, noting that the enacted purpose of Section 16(b) is "to prevent 'the unfair use of information which may have been obtained by [a] beneficial owner, director, or officer by reason of his relationship to the issuer.'"[25] We explained that the "flat rule" of Section 16(b) "impose[s] a form of strict liability" by effectively prohibiting "an entire 'class of transactions' . . . 'in which the possibility of abuse' of inside information 'was believed to be intolerably great.'"[26] Its broad scope and strict liability are prophylactic. As Judge Learned Hand observed nearly 75 years ago, "if only those persons were liable, who could be proved to have a bargaining advantage, the execution of [Section 16(b)] would be so encumbered as to defeat its whole purpose."[27]

Thus, Section 16(b) "effectively makes 10% 'beneficial owners [into] fiduciaries' . . . at least to the extent of making all short-swing transactions by such persons in the issuer's stock 'breaches of trust.'"[28] Under the statute, 10% beneficial owners become "constructive trustee[s] of the corporation" irrespective of "whether the statutory

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25. *Id.* at 176 (quoting 15 U.S.C. § 78p(b)).

26. *Id.* at 174 (quoting *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 223, 132 S. Ct. 1414, 182 L. Ed. 2d 446 (2012)); *id.* at 176 (quoting *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422, 92 S. Ct. 596, 30 L. Ed. 2d 575 (1972)).

27. *Id.* at 176 (alteration adopted) (quoting *Gratz v. Claughton*, 187 F.2d 46, 50 (2d Cir. 1951) (L. Hand, *Chief Judge*)).

28. *Id.* at 177 (quoting *Gratz*, 187 F.2d at 49).

fiduciaries were actually privy to inside information or whether they traded with the intent to profit from such information."[29] In other words, Section 16(b) imposes a "fiduciary duty" on 10% beneficial owners, confers on securities issuers "an enforceable legal right to expect [the fiduciary] to refrain from engaging in any short-swing trading," and "compensates them for the violation of that right by allowing them to claim any profits realized from such trading."[30] "The deprivation of this right," we concluded, "establishes Article III standing."[31]

C. *TransUnion* Did Not Abrogate *Donoghue*

The District Court determined that Section 16(b) merely protects against "speculative harm," and found that the alleged violation did not pass Article III muster in light of *TransUnion*'s holding that "risk of harm" alone does not qualify as "concrete" harm.[32] The District Court acknowledged that *Donoghue* "unequivocally" held that

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29. *Id.* at 179 (alteration in original) (quoting *Gratz*, 187 F.2d at 48); *id.* at 177; *see also Gratz*, 187 F.2d at 49 ("[Section 16(b)] does indeed cover trading by those who in fact have no such [inside] information, but that is true as well of dealings between a trustee and his beneficiary: 'A trustee with power to sell trust property is under a duty not to sell to himself either at private sale or at auction, whether the property has a market price or not, and whether the trustee makes a profit thereby.'" (quoting Restatement Of Trusts § 170(1) cmt. b (1935))).

30. *Donoghue*, 696 F.3d at 177-78.

31. *Id.* at 177.

32. *Packer*, 661 F. Supp. 3d at 13-18.

a violation of Section 16(b) can establish constitutional standing, but it predicted that "the Second Circuit would likely come to the same conclusion if presented with the opportunity to reconsider its holding" in *Donoghue*.[33]

Presented with the "opportunity to reconsider" our holding in *Donoghue*, we part ways with the District Court's prediction, which rested on several errors.

First, the District Court declined to follow *Donoghue* because it found that "*TransUnion* and progeny . . . cast doubt on that controlling precedent."[34] That is the standard by which *this Court* reconsiders its own precedent.[35] District Courts, by contrast, are "obliged to follow our precedent, even if that precedent might be overturned in the near future."[36]

Indeed, we have cautioned District Courts against preemptively declaring that our caselaw has been abrogated by intervening Supreme Court decisions. In *United States v. Polizzi*, the District Court had concluded

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33. *Id.* at 13, 17 (hyphen omitted).

34. *Id.* at 14.

35. *See Medunjanin v. United States*, 99 F.4th 129, 135 (2d Cir. 2024).

36. *United States v. Wong*, 40 F.3d 1347, 1373 (2d Cir. 1994). In rare cases, a district court can decline to follow our precedent if it concludes that an intervening Supreme Court decision has so clearly undermined our precedent that it will almost inevitably be overruled. *See, e.g.*, *Wojchowski v. Daines*, 498 F.3d 99, 105-08 (2d Cir. 2007). This is not the rare case for the reasons discussed below.

that intervening Supreme Court decisions had "effectively rejected" ostensibly controlling Second Circuit caselaw.[37] We repudiated the District Court's approach, labeling it "less an application of existing precedent than a prediction of what the Supreme Court will hold when it chooses to address this issue in the future."[38] As in *Polizzi*, the District Court should have applied controlling precedent—*Donoghue*—rather than try to read the Second Circuit's tea leaves.

Second, the District Court compounded the error by misreading those tea leaves. *TransUnion* requires "a close historical or common-law analogue for the[] asserted injury" to support constitutional standing.[39] As *Donoghue* made clear, because Section 16(b) makes 10% beneficial owners into statutory fiduciaries, a close historical or common-law analogue to short-swing trading by a 10% beneficial owner is breach of fiduciary duty.[40] Just as a common-law fiduciary who "deals with the trust estate for his own personal profit" must account to the beneficiary "for all the gain which he has made," a statutory fiduciary who engages in short-swing trading owes its gains to

37. *United States v. Polizzi*, 549 F. Supp. 2d 308, 438 (E.D.N.Y. 2008), *vacated and remanded sub nom. United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009).

38. *Polouizzi*, 564 F.3d at 160.

39. 594 U.S. at 424.

40. *See* Section II.B, *ante*.

the corporation under Section 16(b).[41] The deprivation of these profits inflicts an injury sufficiently concrete to confer constitutional standing.[42] Nothing in *TransUnion* undermined the analogue we identified in *Donoghue*.

What's more, Article III's historical-analogue requirement did not originate in 2021 with *TransUnion*. The Supreme Court in *TransUnion* merely elaborated on its 2016 decision in *Spokeo Inc. v. Robins*, which directed courts "to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[43] And in 2018, in *Klein v. Qlik Technologies, Inc.*, we reaffirmed that *Donoghue* remained good law after *Spokeo*.[44]

So what changed between *Spokeo* and *TransUnion* to make the District Court believe that *Donoghue* had been abrogated? "[T]he lesson from *TransUnion*," the District

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41. *Barney v. Saunders*, 57 U.S. (16 How.) 535, 543, 14 L. Ed. 1047 (1853); *see also Donoghue*, 696 F.3d at 177 (quoting *Gratz*, 187 F.2d at 49) (drawing this analogy).

42. *See Donoghue*, 696 F.3d at 178 ("§ 16(b) . . . provid[es] the issuer, upon breach of the fiduciary duty created by that statute, with the right to any profits realized from the unfaithful insider's short-swing trading. . . . [T]he issuer's right to profits under § 16(b) derives from breach of a fiduciary duty created by the statute in favor of the issuer.").

43. 578 U.S. at 340-41; *see* Section II.A, *ante*.

44. 906 F.3d 215, 220 (2d Cir. 2018) (citing *Spokeo*, 578 U.S. at 338, then citing *Donoghue*, 696 F.3d at 175).

Court wrote, "is that 'Article III standing requires a concrete injury even in the context of a statutory violation.'"[45] But this "lesson" derives from *Spokeo*, not *TransUnion*.[46] And as we noted in *Donoghue*, "it has long been recognized that a legally protected interest may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."[47] The Supreme Court reaffirmed this principle in *TransUnion* itself.[48]

Next, the District Court pointed to *TransUnion*'s pronouncement that "in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm."[49] But the District Court was mistaken in determining that Section 16(b) protects against the risk of harm alone.

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45. *Packer*, 661 F. Supp. 3d at 11 (quoting *TransUnion*, 594 U.S. at 426).

46. *See TransUnion*, 594 U.S. at 426 ("As the Court emphasized in *Spokeo*, 'Article III standing requires a concrete injury even in the context of a statutory violation.'" (quoting *Spokeo*, 578 U.S. at 341)).

47. *Donoghue*, 696 F.3d at 175 (internal quotations and citation omitted).

48. *TransUnion*, 594 U.S. at 425 ("Congress may 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" (quoting *Spokeo*, 578 U.S. at 341)).

49. *Packer*, 661 F. Supp. 3d at 11 (quoting *TransUnion*, 594 U.S. at 436) (emphasis in *TransUnion*).

Packer does not base his standing argument on a risk of harm, nor did we rely on a risk-of-harm theory to find constitutional standing in *Donoghue*.[50] The concrete injury that confers standing on Packer is, as we recognized in *Donoghue*, "the breach by a statutory insider of a fiduciary duty owed to the issuer not to engage in and profit from any short-swing trading of its stock."[51]

Finally, the District Court noted that *TransUnion* had eliminated the distinction—previously employed by this Circuit in evaluating constitutional standing—between "substantive" and "procedural" rights.[52] But nothing in *Donoghue* turned on whether the right conferred by Section 16(b) is substantive or procedural.

In short, "because no intervening Supreme Court decision undermines the rationale relied on by the panel,"[53] *Donoghue* remains good law.

Appellees' remaining arguments attack our rationale in *Donoghue*. But "we remain bound by a prior decision of this Court until it is overruled either by this Court sitting *en banc* or by the Supreme Court, or until an intervening Supreme Court decision casts doubt on the prior ruling

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50. *See* A108, 112-13 (District Court oral argument); *Packer*, 661 F. Supp. 3d at 15 n.13 ("Plaintiff . . . admitted that his theory of harm . . . does not rest on a risk of harm.").

51. *Donoghue*, 696 F.3d at 180.

52. *Packer*, 661 F. Supp. 3d at 11.

53. *Polouizzi*, 564 F.3d at 161 (emphasis omitted).

such that the Supreme Court's conclusion in a particular case broke the link on which we premised our prior decision or undermined an assumption of that decision."[54] Neither the Supreme Court nor this Court sitting *en banc* has overruled *Donoghue*, and for the reasons set forth above, *TransUnion* casts no doubt on our holding. In any event, we conclude that Appellees' remaining arguments, most of which *Donoghue* already rejected, are without merit.[55]

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54. *Medunjanin*, 99 F.4th at 135 (alterations adopted) (quotation marks and citations omitted).

55. Appellees contend that they cannot be considered fiduciaries because they did not exercise control over FLWS, sit on its board of directors, or trade on inside information. *See* Appellees Br. at 30, 44. In *Donoghue*, we explained that this line of argument "confuses the wrongdoing that prompted the enactment of § 16(b)—trading on inside information—with the legal right that Congress created to address that wrongdoing—a 10% beneficial owner's fiduciary duty to the issuer not to engage in *any* short-swing trading." 696 F.3d at 177; *see also id.* at 179 ("§ 16(b) . . . confer[s] on securities issuers a legal right. . . . It is the invasion of this legal right, without regard to whether the trading was based on inside information, that causes an issuer injury in fact."). Indeed, a fiduciary's duty at common law "often required more than the avoidance of actual unfair dealing." *Id.* at 177. To the extent the fiduciary duty imposed on 10% beneficial owners differs from the duty at common law, *TransUnion* does not require an "exact duplicate" for the violation of a statutory right to constitute a concrete injury. 594 U.S. at 433.

Appellees further argue that breaches of fiduciary duty do not confer constitutional standing in the absence of individual injury. *See* Appellees Br. at 32 (citing *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112 (2d Cir. 2009)). Again, we rejected this argument in *Donoghue*, reasoning that "the fiduciary obligation

Appellees acknowledge that their challenge to Packer's constitutional standing requires us to hold that *Donoghue* is no longer good law.[56] We decline the invitation. Accepting as true the complaint's allegation, as we must on a motion to dismiss, that Appellees are 10% beneficial owners, Packer has established constitutional standing to bring a Section 16(b) suit against them.

III. CONCLUSION

To summarize:

(1) *Donoghue v. Bulldog Investors General Partnership*, 696 F.3d 170 (2d Cir. 2012), which held that a violation of Section 16(b) of the Securities Exchange Act inflicts an injury that confers constitutional standing, remains good law.

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created by § 16(b) is not general, but rather confers a specific right on issuers to expect their insiders not to engage in short-swing trading." 696 F.3d at 178 (distinguishing *Kendall*).

Finally, Appellees invoke *Kern County Land Co. v. Occidental Petroleum Corp.*, which adopted a "pragmatic" approach to Section 16(b) for "borderline transactions," that is, "transactions not ordinarily deemed a sale or purchase." 411 U.S. 582, 594-95, 93 S. Ct. 1736, 36 L. Ed. 2d 503 & n.26 (1973); *see* Appellees Br. at 46-48. But the question before us is whether Packer has constitutional standing, not whether the alleged transactions qualify as borderline. In any event, the "*Kern County* exception" does not apply to Appellees' alleged trades because no party avers that Appellees' shares were "sold involuntarily." *Olagues v. Perceptive Advisors LLC*, 902 F.3d 121, 129 (2d Cir. 2018).

56. Oral Arg. Audio Recording at 30:14-31:28, 38:00-38:16.

(2) We do not suggest that Plaintiff-Appellant Brad Packer will ultimately prevail in his lawsuit. But at this stage in the litigation, he has adequately alleged constitutional standing to bring a Section 16(b) suit against Appellees.

Accordingly, we **REVERSE** the March 13, 2023 judgment of the District Court dismissing the action for lack of constitutional standing and **REMAND** for further proceedings consistent with this opinion.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED MARCH 13, 2023

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

15-CV-05933 (JMW)

BRAD PACKER, DERIVATIVELY ON BEHALF OF 1-800 FLOWERS.COM, INC.,

Plaintiff,

-against-

RAGING CAPITAL MANAGEMENT, LLC, RAGING CAPITAL MASTER FUND, LTD., WILLIAM C. MARTIN, AND 1-800-FLOWERS.COM, INC.,

Defendants.

March 13, 2023, Decided;
March 13, 2023, Filed

OPINION AND ORDER

WICKS, Magistrate Judge:

> "*In its constitutional dimension, standing imports justiciability . . . this is the threshold*

> *question in every federal case, determining the power of the court to entertain the suit.*"[1]

Standing to bring and maintain a federal lawsuit is rooted in the Constitution. That is, Article III is the cornerstone of federal court jurisdiction as it restricts the power of the judiciary to resolve only "cases" and "controversies." The Supreme Court has made clear over the years, most recently in *TransUnion LLC v. Ramirez*[2] that to establish constitutional standing, plaintiffs must show that they suffered an injury and identify the particular concrete harm flowing from that injury. Courts since *TransUnion* have grappled with the application of that seemingly simple concept in a variety of contexts, such as with the Fair Credit Reporting Act,[3] Fair Debt Collection Practices Act,[4] the Americans with Disabilities Act,[5] and the New York Labor Law,[6] to name

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1. *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

2. 594 U.S. ___, 141 S. Ct. 2190, 2203, 210 L. Ed. 2d 568 (2021).

3. *Rosenberg v. Loandepot, Inc.*, No. 21-CV-08719 (PMH), 2023 U.S. Dist. LEXIS 22495, 2023 WL 1866871, at *5 (S.D.N.Y. Feb. 9, 2023).

4. *Bush v. Optio Solutions, LLC*, 551 F. Supp. 3d 66, 2021 WL 3201359, at *3 (E.D.N.Y. July 28, 2021).

5. *Harty v. West Point Realty, Inc.*, 28 F.4th 435, 443 (2d Cir. 2022).

6. *Gillett v. Zara USA, Inc.*, No. 20-CV-3734 (KPF), 2022 U.S. Dist. LEXIS 143434, 2022 WL 3285275, at *6-7 (S.D.N.Y. Aug. 10, 2022).

a few. The principle that is clear now, however, is that merely satisfying the statutory standing requirements alone is simply not enough to enter federal court.

This Court is now faced with the latest "standing" challenge but in a different statutory context, namely, a derivative action brought under the Securities Exchange Act of 1934 ("Exchange Act"). More specifically, an action brought under Section 16(b)[7] for short-swing trading. Pre-*TransUnion*, this standing challenge would not have survived given the Second Circuit's clear holding in *Donoghue v. Bulldog Investors Gen. P'ship*, 696 F.3d 170 (2d Cir. 2012), *cert. denied*, 569 U.S. 994, 133 S. Ct. 2388, 185 L. Ed. 2d 1104 (2013) ("*Bulldog*"),[8] a comprehensive decision addressing this very issue. The question presented here, however, is whether a plaintiff, in a derivative action brought under Section 16(b), in light of the pronouncement in *TransUnion*, has Article III standing to bring and maintain the action. The parties sharply dispute whether Plaintiff has suffered an injury in fact to support Article III standing in the wake of *TransUnion*. In resolving this dispute, the Court must necessarily address whether *TransUnion* casts doubt on the continued validity of *Bulldog* under the facts presented here. This is an issue of first impression.

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7. 15 U.S.C. § 78p(b).

8. Indeed, Defendants early on in this very case did not raise constitutional standing as an impediment to this suit. (*See* DE 62 at 3 n.2 ("At oral argument, counsel for defendants conceded that the standing argument made in this case is inconsistent with existing Second Circuit law, effectively withdrawing that argument.").)

Appendix B

Before the Court at this not-so-nascent stage of the litigation is Defendants' Motion to Dismiss based upon Plaintiff's lack of constitutional standing. (DE 107.) The motion is opposed by Plaintiff. (DE 109.) Argument on the motion was held on February 28, 2023. (DE 112.)

For the reasons that follow, Defendants' Motion to Dismiss for a lack of standing is hereby **GRANTED**.

I. BACKGROUND

Plaintiff Brad Packer brings the instant suit, derivatively on behalf of 1-800-Flowers.com, Inc. ("Flowers") against Defendants Raging Capital Management, LLC ("RCM"), Raging Capital Master Fund, Ltd. ("Master Fund"), and William C. Martin for Section 16(b) of the Exchange Act, 15 U.S.C. § 78p(b). (DE 1.) Packer seeks disgorgement of profits for the purchase and sale of Flowers' shares by Defendants within a six-month period. (DE 1.) Section 16(b) requires a beneficial owner of greater than 10% of shares of an issuer, who purchases or sells the securities of that issuer within a period of less than six months, to disgorge those "short swing" profits. *See* 15 U.S.C. § 78p(b).

The Court assumes the parties' familiarity with the factual and procedural history of this case. (*See* DE 40 (Order on Motion to Dismiss); DE 62 (Order on Motion for Summary Judgment); DE 73 (Order on Appeal of Order denying Motion for Summary Judgment).) The following facts are taken from Plaintiff's Complaint (DE 1), and the parties' filings with respect to Defendants' Motion to Dismiss (DE 107-10).

Appendix B

Defendants are allegedly beneficial owners of more than 10% of Flowers' Class A common stock with junior voting rights. (DE 108.) In a six-month period between 2014 and 2015, Defendants bought and sold shares of Flowers and made short-swing profits. (DE 1.) During the relevant time period, Defendants owned shares amounting to approximately 1% of voting power necessary to elect Flowers' Board of Directors and Defendants did not hold seats on the board. (DE 108.) Plaintiff Packer was a Flowers' shareholder for the relevant time period. (DE 108.)

On October 15, 2015, Plaintiff filed a derivative suit on behalf of Flowers against Defendants for violating Section 16(b). (DE 1.) The parties consented to then-Magistrate Judge Brown's jurisdiction to conduct all proceedings and enter final judgment. (DE 27-28.) Thereafter, the parties engaged in discovery, and cross-moved for summary judgment. (DE 51, 53.) On August 20, 2019, Judge Brown denied Defendants' motion for summary judgment and granted Plaintiff's cross-motion for summary judgment. (DE 62.) On appeal, the Second Circuit reversed and remanded because genuine issues of material fact remained as to the question of Defendants' beneficial ownership. (DE 73.)

Subsequently, the parties filed a proposed pretrial order, which was approved for filing. (Electronic Order, dated May 26, 2021.) After changing quite a few hands, this case was ultimately reassigned to the undersigned. (DE 102.) Defendants had re-engaged in summary judgment motion practice, but that motion was deemed

withdrawn without prejudice to its renewal in light of the anticipated reassignment. (DE 102.) At the October 18, 2022 status conference, a briefing schedule was set for Defendants' Motion to Dismiss on the threshold question of Article III standing under *TransUnion* and the impact of that decision, if any, on the Second Circuit's decision in *Bulldog*. (DE 103.)

The fully briefed Motion to Dismiss was filed on January 20, 2023. (DE 107-10.) The parties appeared for an in-person oral argument before the undersigned on the motion on February 28, 2023. (DE 112.)

II. DISCUSSION

Though Defendants do not specify under which rule this motion is brought, the Court considers Defendants' Motion to Dismiss as one made under Rule 12(h)(3), which states: "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed R. Civ. P. 12(h)(3). The standards under Rule 12(h)(3) and 12(b)(1) are cut from the same cloth, in that they both require the application of an identical standard. *See Greystone Bank v. Tavarez*, No. 09-CV-5192 (SLT), 2010 U.S. Dist. LEXIS 85462, 2010 WL 3325203, at *1 (E.D.N.Y. Aug. 19, 2010) ("Except for the pre-answer limitation on Rule 12(b)(1) motions, the distinction between a Rule 12(b)(1) motion and a Rule 12(h)(3) motion is largely academic, and the same standards are applicable to both types of motions.").

Appendix B

The party seeking access to federal court always carries the burden of establishing Article III standing by "a preponderance of evidence that it exists." *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). In assessing the Court's subject matter jurisdiction, the Court is free to consider evidence outside of the pleadings. *See id.* at 113. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (quoting *Ex parte McCardle*, 74 U.S. 506, 514, 19 L. Ed. 264 (1868)).

Before addressing the merits of the motion, a review of the legal framework for Article III standing, in general, and in Rule 16(b) cases in particular, is warranted.

A. The Legal Framework

i. Article III Standing

Article III standing is a jurisdictional defense that cannot be waived and indeed may be asserted, by parties or the court, at virtually any stage of a litigation. *See Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016). The issue of standing is raised by Defendants only now—eight years into this litigation—as a direct result of the Supreme Court's landmark decision in *TransUnion*,

which clarified the analysis that the district courts must apply to determine constitutional standing.[9]

Article III of the Constitution "confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" *TransUnion*, 141 S. Ct. at 2203 (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997)). The essence or "core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). That is, standing is precisely "what it takes to make a justiciable case." *Steel Co.*, 523 U.S. at 102. Standing is derived from that limitation and rooted in the "idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984).

The judicial power derived from Article III "exists only to redress or otherwise to protect against injury to the complaining party." *Warth*, 422 U.S. at 499. The "irreducible constitutional minimum of standing" has three elements. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). A plaintiff "must

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9. Plaintiff briefly hints at what resembles a waiver argument (*see* DE 109 at 1-2 & n.1), however that argument is without merit. The Court is obligated to consider constitutional standing before considering the merits. "The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines." *United States v. Hays*, 515 U.S. 737, 742, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995) (internal quotation marks omitted).

show (i) that [the plaintiff] suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion*, 141 S. Ct at 2203 (citing *Lujan*, 504 U.S. at 560-61). "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.'" *Spokeo*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560). A "particularized" injury "must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1.

ii. Standing in the Wake of *TransUnion*

The judicial landscape on standing following *TransUnion* has markedly changed. Cases brought under federal statutes that may have wound their way through the courts years ago, are now viewed at the outset through the lens of *TransUnion*. Some have argued that indeed *TransUnion* interferes with Congressional powers. *See, e.g.*, Note, *Standing in the Way: The Courts' Escalating Interference in Federal Policymaking*, 136 Harv. L. Rev. 1222, 1243 (2023) ("The Supreme Court could retreat from its recent intrusions on the congressional power to confer standing, perhaps by rephrasing or otherwise limiting the reach of its most aggressive pronouncements of standing limits.").

The thrust of *TransUnion* appears on its face simple, as recognized by the Second Circuit: "No concrete harm, no standing." *Maddox v. Bank of New York Mellon Tr. Co.*,

N.A., 19 F.4th 58, 62 (2d Cir. 2021) (quoting *TransUnion*, 141 S. Ct. at 2200). Yet, application of this concept has yielded varying results, demonstrating that although simple in concept, the application can be quite challenging. *See*, *e.g.*, *Krausz v. Equifax Info. Servs., LLC*, No. 21-CV-7427 (KMK), 2023 U.S. Dist. LEXIS 25109, 2023 WL 1993886, at *8 (S.D.N.Y. Feb. 14, 2023) (standing under the FCRA); *Rosenberg v. Loandepot, Inc.*, No. 21-CV-08719 (PMH), 2023 U.S. Dist. LEXIS 22495, 2023 WL 1866871, at *5 (S.D.N.Y. Feb. 9, 2023) (no standing under FCRA); *Panebianco v. Selip & Stylianou, LLP*, No. 21-CV-5466 (DRH), 2022 U.S. Dist. LEXIS 23308, 2022 WL 392229, at *2 (E.D.N.Y. Feb. 9, 2022) (standing under the FDCPA); *Snyder v. LVNV Funding LLC*, No. 21-CV-7794 (CS), 2023 U.S. Dist. LEXIS 15521, 2023 WL 1109645, at *7 (S.D.N.Y. Jan. 30, 2023) (no standing under the FDCPA); *Frawley v. Med. Mgmt. Grp. of New York, Inc.*, No. 21-CV-8894 (VSB) (SLC), 2022 U.S. Dist. LEXIS 75235, 2022 WL 17812697, at *5-6 (S.D.N.Y. Apr. 25, 2022) (standing under the ADA); (no standing under the ADA).

To be "concrete," the injury must be "de facto," which means it must "actually exist" and must be "real" rather than "abstract." *Spokeo*, 578 U.S. at 340. Tangible harms such as physical or monetary harms readily qualify as concrete injuries. *TransUnion*, 141 S. Ct. at 2204. These can be identified with relative ease. "Intangible harms" are also considered sufficiently concrete when they are traditionally recognized intangible harms such as "reputational harms, disclosure of private information, and intrusion upon seclusion." *Id.* at 2204. This list is certainly not exhaustive; other intangible harms can also

be concrete. *See* 2 James M. Wagstaffe, *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, § 24-III, 24.22 (2022) (collecting cases regarding injuries that have been found to satisfy the injury-in-fact requirement).

The bedrock of the concrete injury inquiry is whether the alleged injury "has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 141 S. Ct. at 2204 (quoting *Spokeo*, 578 U.S. at 341). With respect to Congressional enactment of statutes to redress certain harms, *TransUnion* explained that Congress's views on whether a particular harm is sufficiently concrete to constitute an injury in fact "may be instructive" and that courts are required to afford appropriate respect to "Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation." *Id.* at 2204.

TransUnion has made clear that even though Congress possesses the power to "elevate" pre-existing harms to "actionable legal status," it lacks the power to "simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *Id.* at 2205. Standing is derived from that limitation and rooted in "the idea of separation of powers." *See id.* at 2203.

Au fond, the lesson from *TransUnion* is that "Article III standing requires a concrete injury even in the context

of a statutory violation." *Id.* at 2205. Allegations of a statutory violation alone are insufficient. *See Maddox*, 19 F.4th at 62 ("In sum, *TransUnion* established that in suits for damages plaintiffs cannot establish Article III standing by relying entirely on a statutory violation or risk of future harm: 'No concrete harm; no standing.'" (quoting *TransUnion*, 141 S. Ct. at 2214)). Something more is required. Moreover, "in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm." *TransUnion*, 141 S. Ct. at 2211.

There is not a more apt example of *TransUnion*'s impact than what can be found in the Second Circuit's consideration and reconsideration of the *Maddox* case. The *Maddox* case involved an action based on an alleged delay by the lender in recording the satisfaction of a mortgage in violation of two New York state mortgage-satisfaction-recording statutes, N.Y. Real P. Law § 275; N.Y. Real P. Actions & Proc. L. § 1921. The issue of standing was raised pre-*TransUnion*, the court ruled, and then reconsidered its Opinion after *TransUnion*.

In its first decision in *Maddox*, the court noted that "a lender's delay in recording the satisfaction of a mortgage typically creates a cloud on title of real estate," and an action to clear a clouded title was a remedy traditionally recognized under New York common law. *Maddox v. Bank of N.Y. Mellon Trust Co., N.A.*, No. 19-1774, 997 F.3d 436, 446 (2d Cir. May 10, 2021) ("*Maddox I")*, *opinion withdrawn and superseded on reh'g*, 19 F.4th 58 (2d Cir.

2021) (*"Maddox II").* The court also found that such delays are similar to reputational based harms because they create "the false appearance that the borrower has not paid his debt," which harms the borrowers' reputation by making him look less creditworthy. *Id.* at 446-47. For this analogy, the court took note of the common-law analogue to reputational harm caused by publication of false information. *Id.*

On rehearing, in *Maddox II*, the Second Circuit *withdrew* its prior opinion in light of *TransUnion*. The court noted that *TransUnion* eliminated the "substantive" versus "procedural" distinction that the Second Circuit had developed following *Spokeo*, "since *TransUnion* eliminated the significance of such classifications, which had been a preoccupation." *Maddox II*, 19 F.4th at 64. The court acknowledged that *TransUnion* clarified that the harm the statute protects is of "little (or no) import" in the analysis of concrete harm, it is the harm to the plaintiff that matters. *Id.* at 64 n.2. The court noted that "the determinative standing issue [was] whether the Maddoxes suffered a concrete harm due to the Bank's violation." *Id.* at 64.

Maddox II recognized *TransUnion*'s holding that "in suits for damages plaintiffs cannot establish Article III standing by relying entirely on a statutory violation or risk of future harm: 'No concrete harm; no standing.'" *Id.* (quoting *TransUnion*, 141 S.Ct. at 2214). Indeed, not until that risk of future harm has materialized, will there be standing in such suits. *Id.* at 65 ("True, the Maddoxes may have suffered a nebulous risk of future harm . . . but that

risk, which was not alleged to have materialized, cannot not form the basis of Article III standing."). The Second Circuit has since reiterated that "*TransUnion* now makes clear that the 'material risk' standard applies only with respect to injunctive relief and that 'in a suit for damages[,] mere risk of future harm, standing alone, cannot qualify as a concrete harm.'" *Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 443 (2d Cir. 2022) (first quoting *TransUnion*, 141 S. Ct. at 2210-11; and then citing *Maddox II*, 19 F.4th at 64).

The *Maddox* duo provide a unique before and after snapshot of the Second Circuit's position with respect to the standing analysis in the wake of *TransUnion*. A violation of the statute alone there was initially found sufficient to support standing under then-existing precedent. Following *TransUnion*, not so. Concrete harm to the plaintiff—now the required showing—was missing.

iii. Section 16(b) and the *Bulldog* Decision

The fundamental goal of the Exchange Act is to "insure the maintenance of fair and honest markets." *Kern Cnty. Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 591, 93 S. Ct. 1736, 36 L. Ed. 2d 503 (1973). Congress sought to effectuate that goal through the enactment of Section 16(b). Section16(b) is designed to prevent and curb insider trading by three classes of individuals, the issuer's "directors, officers, and principal stockholders." *Bulldog*, 696 F.3d at 174 (finding the purpose of the statute is "to prevent an issuer's directors, officers, and principal stockholders 'from engaging in speculative transactions on

the basis of information not available to others.'" (internal quotation marks and citations omitted)); *see also* Arnold S. Jacobs, *Section 16 of the Securities Exchange Act*, § 3:3 (Sec. Law Handbook Ser. 2023) ("Congress intended to curb manipulation and unethical practices that result from the misuse of important corporate information. Section 16(b) was designed to protect outside stockholders against short-swing speculation by insiders."). The prohibition found in Section 16(b) is considered a flat-rule establishing strict liability without regard to whether the violator did in fact trade using inside information. *Bulldog*, 696 F.3d 174. That is, for a violation to occur, it is enough that short-swing trading took place during the proscribed period. *See id.* ("Congress determined that the 'only method . . . effective to curb the evils of insider trading was a flat rule taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great.'" (quoting *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422, 92 S. Ct. 596, 30 L. Ed. 2d 575 (1972)).

Under Section 16(b), corporate insiders, which includes beneficial owners that hold more than 10% of a corporation's shares, must disgorge profits obtained from buying and selling, or from selling and buying, the corporation's shares within a six-month period. *See* 15 U.S.C. § 78p(b). Section 16(b) creates a private right of enforcement for issuers of the stock or, in certain situations, shareholders on behalf of the issuer.[10] *See id.*

10. Flowers did not pursue this action on its own behalf, and the parties do not dispute that Packer has followed the statutory pre-requisites to file a derivative suit on Flowers' behalf. *See* 15 U.S.C. § 78p(b) (allowing any "owner of any security of the issuer"

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In *Bulldog*, the Second Circuit held that short-swing trading by a 10% beneficial owner of securities in violation of Section 16(b) causes an injury to an issuing corporation sufficient to support Article III standing. *Bulldog*, 696 F.3d at 180. There, the defendant engaged in short-swing trading while a 10% beneficial owner of the issuing corporation's stock. *Id.* at 173. The defendant argued that the derivative plaintiff failed to allege any actual injury to establish Article III standing. *Id.* at 172. *Bulldog* unequivocally held that through Section 16(b) Congress created a fiduciary duty upon statutory insiders and granted the corporation a legal right to expect them to refrain from any short-swing trading. *Id.* at 177. "The deprivation of this right establishes Article III standing." *Id. Bulldog* noted that "[w]hile this particular legal right might not have existed but for the enactment of § 16(b), Congress's legislative authority to broaden the injuries that can support constitutional standing is beyond dispute." *Id.* at 180.

Irrespective of the focus in pre-*TransUnion* decisions on the speculative harm that may or not be caused in any individual case from insider trading—which is the harm Section 16(b) protects against—that speculative risk cannot in the wake of *TransUnion* automatically support Article III standing in a suit for damages. Thus, even if some courts have framed the concrete harm associated with a Section 16(b) violation as grounded in the risk of harm, that framing does not pass muster now under *TransUnion*.

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to bring suit "if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter").

B. Application to the Facts

Defendants submit simply that in the wake of *TransUnion* and subsequent Second Circuit authority, the "legal theories that underpin" *Bulldog* are no longer valid. (DE 110 at 2-3.) In short, Defendants ask for dismissal based upon *TransUnion*, and urge this Court to ignore *Bulldog* as effectively overruled by *TransUnion*. (*See* DE 109 at 11.)

In support of the proposition that a Section 16(b) violation alone is sufficient to support Article III standing, Plaintiff relies principally on three cases: (1) *Bulldog*; (2) *Gollust v. Mendell*, 501 U.S. 115, 122, 111 S. Ct. 2173, 115 L. Ed. 2d 109 (1991); and (3) *Klein v. Cadian Capital Mgmt., LP*, No. 15-CV-8140 (ER), 2017 U.S. Dist. LEXIS 150211, 2017 WL 4129639 (S.D.N.Y. Sept. 14, 2017) ("*Klein* I"), *vacated on other grounds and remanded*, 906 F.3d 215 (2d Cir. 2018) as well as the Second Circuit's subsequent decision in *Klein*. According to Plaintiff, these decisions collectively stand for the proposition that once all of the statutory standing requirements are met under Section 16(b), then standing exists and the inquiry ends. And that is because Congress, according to Plaintiff, recognized that under certain circumstances, a fiduciary duty is statutorily created and if the prohibited conduct occurs, there is a real risk of harm, and that reputational harm is presumed. (*See* Transcript of Oral Argument at 22:18-23:12, Feb. 28, 2023 (hereinafter, "DE 114") ("[T]rading is reputational harm, equal sign. . . . And reputational harm is sufficient, which is what Congress said, which is what the Supreme Court said, and what the 2nd Circuit said.").)

Nothing more need be alleged or established by a plaintiff, so says *Bulldog*. Importantly, each of these decisions pre-date *TransUnion*. As to *TransUnion*'s effect on *Bulldog*, that forms the basis of the spot of bother on this motion. That is, should *TransUnion* be read so as to effectively invalidate *Bulldog*'s holding which would otherwise bind this Court under principles of stare decisis? Stare decisis[11] means that districts courts are bound by the decisions of their respective Circuit Courts of Appeal, "unless there is an intervening Supreme Court or *en banc* panel circuit decision that casts doubt on the controlling precedent." *Hoeffner v. D'Amato*, 605 F. Supp. 3d 467, 481 (E.D.N.Y. 2022) (alteration and internal quotation marks omitted). The intervening decision does not have to address an *identical* issue as the circuit court did, however, "there must be a 'conflict, incompatibility, or inconsistency' between the Supreme Court's decision and circuit precedent." *Id.* (quoting *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 155 (2d Cir. 2015)). "Unless a subsequent decision of the Supreme Court so undermines circuit precedent that it will almost inevitably

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11. Justice Benjamin Cardozo remarking on adherence to precedent, made the poignant observation that "[i]f judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer the mores of ours, they ought not to tie, in helpless submission, the hands of their successors." B. Cardozo, *The Nature of the Judicial Process* 152 (1921). This concept is the very foundation of our judicial system as envisioned by our founders. *See The Federalist No. 78* (Publius, a.k.a. Alexander Hamilton) (May 28, 1788) (noting that in order to "avoid arbitrary discretion . . . [judges] should be bound by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.").

be overruled, the district court must follow the circuit's decision." *Id.* (alteration and internal quotation marks omitted). Here, *Bulldog* on its face is no doubt controlling. However, *TransUnion* and progeny also no doubt cast doubt on that controlling precedent.

Bulldog's grant of standing once a violation of Section 16(b) is alleged, without a showing of concrete harm beyond that violation, must yield to the principles announced in *TransUnion*. Here, Plaintiff fails to point to or articulate any actual reputational harm to Flowers flowing from Defendants' breach of Section 16(b). Plaintiff's argument that a violation of Section of 16(b) caused reputational harm, even if said violation went unnoticed by all, cannot support Article III standing. Not only is the Complaint bereft of any actual injury allegations (*see* DE 1), neither the opposition papers (*see* DE 109) nor oral argument (*see* DE 114) identified any.

Indeed, Plaintiff takes his argument even further—bluntly positing that *TransUnion* simply has no effect on *Bulldog*. (*See* DE 114 at 27:14-16 ("And I don't think *TransUnion* makes a particle of change to this particular case.").) Instead, Plaintiff offers his own interpretation of *TransUnion*, as a case with limited applicability, geared toward only certain types of cases and statutes. (*See* DE 114 at 31:2-8 (describing the principles in *TransUnion* as an attempt to limit the number of plaintiffs in actions under "statutes like these credit reporting acts and the environmental cases").)

Plaintiff avers that "[i]t requires a wild leap of imagination to find any connection between [*TransUnion* and *Maddox*] and standing under Section 16(b)." (DE 109 at 14.) This argument has no legs to stand on. These decisions leave little to the imagination. Neither of the decisions cabined their holdings to the statutes at issue in the respective cases. *TransUnion* in no uncertain terms repeatedly stated: "No concrete harm, no standing." *TransUnion*, 141 S. Ct. at 2205. A statutory violation, of whatever statute, does not automatically establish injury in fact unless the plaintiff has suffered concrete harm. *See id.* at 2205. That holding is not tethered to any specific statute. And the Court lacks the power to impose such a limitation into that decision, especially where one clearly was not intended.

The parties do not identify, nor has the Court independently found, any decision squarely addressing *TransUnion*'s application to Section 16(b) of the Exchange Act, *yet*. The closest to the mark is District Judge Jesse Furman's decision a year ago in *City of Providence, Rhode Island v. Bats Glob. Markets, Inc.*, No. 14-CV-2811 (JMF), 2022 U.S. Dist. LEXIS 55941, 2022 WL 902402, at *1, 18 (S.D.N.Y. Mar. 28, 2022), which involved Section 10(b)[12] of the Exchange Act and cites to *TransUnion*. The court did not expressly analyze the impact of *TransUnion* on the Exchange Act. There, the plaintiffs alleged that the defendants "sold certain products and services to high-frequency trading ("HFT") firms—thereby purportedly giving the HFT firms an advantage over [p]laintiffs and

12. *See* 15 U.S.C. § 78j(b).

the investing public—and failed to fully disclose the effects of these products and services to the market." *City of Providence*, 2022 U.S. Dist. LEXIS 55941, 2022 WL 902402, at *1. The court found that the plaintiffs lacked standing since one could not identify any relevant trades that were made on its behalf, and as to four defendants, the plaintiffs could not point to evidence that a transaction causing actual harm occurred on any of those defendants' exchanges. *Id.* at 18 (citing *TransUnion*, 141 S. Ct. at 2208). The court stated that Plaintiffs were simply unable to point to any admissible evidence showing that plaintiffs' own trades were allegedly harmed by the defendants conduct, and thus, there was no injury-in-fact to support standing. *Id.* at 19.

Plaintiff also relies on *Klein v. Qlik Techs., Inc.*, 906 F.3d 215, 220 (2d Cir. 2018), *cert. dismissed*, 139 S. Ct. 1406, 203 L. Ed. 2d 633 (2019) (*"Klein II")*. In *Klein II*, the Second Circuit reiterated its holding in *Bulldog. See Klein v. Qlik Techs., Inc.*, 906 F.3d 215, 220 (2d Cir. 2018) ("We have previously found that there is a case or controversy in a Section 16(b) case so long as the party bringing suit is either the corporation that issued the securities in question or a current security holder of that corporation." (citing *Bulldog*, 696 F.3d at 175)). Nonetheless, that decision provides little guidance on the issue before the Court as it is certainly no indicator of the Second Circuit's view of *Bulldog* post-*TransUnion*.[13]

13. Plaintiff also enlists *Klein I* and *Myovant* in support of his argument. This reliance is unavailing since both cases applied a standing test derived from *Spokeo*—a test that has been since clarified by *TransUnion*. In *Klein I*, the injury resulting from a

Plaintiff next latches onto this idea that if this Court finds no standing, such a result would undoubtedly require ignoring the Supreme Court's precedent in *Gollust v. Mendell*, 501 U.S. 115, 111 S. Ct. 2173, 115 L. Ed. 2d 109 (1991). (DE 109 at 1.) That is not so. In *Gollust*, the Supreme Court in a unanimous decision, merely held that a plaintiff had statutory standing to sue under Section 16(b) even after that plaintiff's interest in the issuing corporation was exchanged during a merger for stock in the new corporate parent of the issuing corporation. *Gollust*, 501 U.S. at 117-18. There, the Court concluded

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violation of Section 16 (b), the court states, was the damage to the corporate issuer's "reputation of integrity and the marketability of its stock" due to insider trading, which is a "serious breach." *Klein I*, 2017 U.S. Dist. LEIS 150211, 2017 WL 4129639, at *6. In *Myovant*, the court found that since *Bulldog* concluded that Section 16(b) violations "carry a high risk of harm to the interest that Congress sought to protect," and "[i]n the vocabulary of *Spokeo* . . . were found to present a 'real risk of harm,'" *Bulldog* satisfied the "two-pronged test for standing to sue for bare procedural violations that the Second Circuit Court of Appeals has used after *Spokeo*." *In re Myovant Scis. Ltd. Section 16(b) Litig.*, 513 F. Supp. 3d 365, 371 (S.D.N.Y. 2021) (quoting *Spokeo*, 578 U.S. at 340).

When asked at oral argument, Plaintiff expressly admitted that his theory of harm to Flowers does not rest on a risk of harm. (DE 114 at 18:17-20 (stating that Plaintiff 's theory of harm rests not on a risk of harm and asserting: "No. There was actual harm.").) Thus, Plaintiff 's reliance on *Klein I* and *Myovant*, which characterize the sufficiency of standing under Section 16(b) post-*Spokeo* based on the risk of harm to the interest Congress sought to protect, lend no support to his argument whatsoever. Nonetheless, a risk of material harm can no longer support concrete injury in a suit for damages. *See* discussion *supra* II.A.iii.

that Section 16(b) only required a "plaintiff security holder to maintain some financial interest in the outcome of the litigation." *Id.* at 126. "[T]he stake of a parent company stockholder" satisfied continued standing and was consistent with Section 16(b) given "the congressional policy of lenient standing." *Id.* at 127. *Gollust* takes only a brief detour into Article III standing by noting that allowing a security holder to maintain a Section 16(b) action after losing all financial interest in the outcome of the litigation would raise "serious constitutional doubt" as to Article III standing. *Id.* at 125-26.

Though *Gollust* addressed a somewhat familiar factual situation, a derivative plaintiff's standing under Section 16(b), it tackled a materially different legal issue—*statutory* standing. Even *Klein II* makes clear that *Gollust* was merely a "statutory standing," not a "constitutional" standing decision. *See Klein*, 906 F.3d at 221 (discussing *Gollust*, 501 U.S. at 122). As the Second Circuit explained there, "[t]he Supreme Court has since clarified that what has been called statutory standing in fact is not a standing issue, but simply a question of whether the particular plaintiff has a cause of action under the statute." *See Klein*, 906 F.3d at 221 (internal quotation marks omitted).

Gollust, to the extent it addresses the existence of a cause of action under Section 16(b), has little applicability to the instant question of constitutional standing as far as concrete harm is concerned. Indeed, *Bulldog* even recognized as much. *See Bulldog*, 696 F.3d at 176 n.5 ("[W]e do not understand [*Gollust*] to hold that such an interest

is alone sufficient to demonstrate Article III standing in the absence of injury to the real party in interest, the issuer. Satisfaction of that standing requirement appears to have been undisputed and assumed in *Gollust*."). Whether Packer has met the statutory pre-requisites to maintain a Section 16(b) suit is not the issue before the Court on this motion. Thus, *Gollust* is not implicated or affected by the issues before the Court now.

The Second Circuit has since *continued* to recognize the significant impact of *TransUnion* on the standing analysis. The Second Circuit has even applied *TransUnion* to cases involving the Americans with Disabilities Act ("ADA"). In both *Harty* and *Laufer*, the Court rejected testers' attempts to hinge standing on violations of the statute without adequately showing concrete harm beyond that violation. In *Harty*, the tester alleged that since the defendant's "website d[id] not comply with the ADA, the website infringed his right to travel free from discrimination." *Harty v. West Point Realty, Inc.*, 28 F.4th 435, 443 (2d Cir. 2022). Plaintiff, however, did not allege any concrete plans to use the website to make future travel plans and since he asserted no such plans, he could not simply allege that his ability to travel was concretely harmed. *Id.* The court also rejected plaintiff's argument that he suffered an "informational injury" resulting from the deprivation of necessary information to make his travel choices because he did not allege any "downstream consequences from failing to receive the required information." *Id.* at 444. Notably, the court flatly rejected plaintiff's attempt to create injury due to alleged discrimination by the conditions present on the website.

Id. The court found that the complaint failed to specify how the website violated the ADA and discriminated against persons with disabilities. *Id.* And the court doubled down, stating that even if Congress had labeled all violations of the act as discrimination, "*TransUnion* makes clear that a statutory violation alone, however labeled by Congress, is not sufficient for Article III standing." *Id.* at 444 (citing *TransUnion*, 141 S.Ct. at 2205.)

In *Laufer*, the court rejected a similar argument because the plaintiff did not have any concrete plans to visit the location. *See Laufer v. Ganesha Hosp. LLC*, No. 21-995 (PWH), 2022 U.S. App. LEXIS 18437, 2022 WL 2444747, at *2 (2d Cir. July 5, 2022) (summary order). The court also rejected plaintiff's allegations of "frustration" and "humiliation" resulting from the discriminatory conditions on the website, which the court noted it had similarly rejected in *Harty.* 2022 U.S. App. LEXIS 18437, [WL] at *3. As bare allegations of discrimination in those cases were insufficient standing alone to establish concrete harm—here too, Plaintiff's argument that a violation of Section 16(b) without a showing of actual reputational harm is enough to establish concrete harm, is insufficient.

The Court finds no reason why, as Plaintiff advances, *TransUnion*'s Article III standing principles would not apply to securities statutes such as Section 16(b). *See* Erwin Chemerinsky, *What's Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. Rev. Online 269, 285-86 (2021) (discussing the possible implications of *TransUnion* on an array of federal statutes that "create[e] rights where this no common-law or historical analogue" such

as the standing under Section 16(b) where "no injury would exist without the statute"). There is no limiting principle in *TransUnion* to the contrary—nor any contained in Article III. At bottom, the notion in *Bulldog* that a violation of Section 16(b) *alone* sufficiently confers Article III standing upon the issuing corporation or derivative shareholder without more, cannot co-exist with *TransUnion's* pronouncement that a statutory violation and a cause of action *alone* are insufficient to support Article III standing without a showing of concrete harm to the plaintiff. In that respect, *Bulldog* cannot be squared with *TransUnion* and *TransUnion* controls. To be clear, that is not to suggest that a plaintiff could never show concrete harm flowing from a violation of Section 16(b) to support standing, and nothing in this decision should be construed as such. The Court only finds that Packer has not made that showing here beyond the alleged statutory violation.

The Second Circuit's recent decisions applying *TransUnion* indicate to this Court that the Second Circuit would likely come to the same conclusion if presented with the opportunity to reconsider its holding in *Bulldog. See, e.g, Maddox v. Bank of New York Mellon Tr. Co., N.A.*, 19 F.4th 58 (2d Cir. 2021) (withdrawing its prior opinion in light of *TransUnion*); *Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 443 (2d Cir. 2022) ("Last Term, the Supreme Court clarified that a plaintiff has standing to bring a claim for monetary damages following a statutory violation only when he can show a current or past harm beyond the statutory violation itself." (first citing *TransUnion*, 141 S.Ct at 2204-07; and then citing *Maddox II*, 19 F.4th at 63-64)).

III. CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss the action for a lack of standing is **GRANTED**, and the case is hereby dismissed. The Clerk of the Court is directed to enter judgment accordingly.

Dated: Central Islip, New York
March 13, 2023

SO ORDERED:

/s/ James M. Wicks
JAMES M. WICKS
United States Magistrate Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 8, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 23-367

BRAD PACKER, DERIVATIVELY ON BEHALF OF 1-800-FLOWERS.COM, INC.,

Plaintiff-Appellant,

v.

RAGING CAPITAL MANAGEMENT, LLC, RAGING CAPITAL MASTER FUND, LTD., WILLIAM C. MARTIN,

Defendants-Appellees,

1-800-FLOWERS.COM, INC.,

Defendant.

Appellees, William C. Martin, Raging Capital Management, LLC and Raging Capital Master Fund, Ltd., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

APPENDIX D — RELEVANT STATUTORY PROVISIONS

U.S.C.A. Const. Art. III § 2, cl. 1

Section 2, Clause 1. Jurisdiction of Courts
[Text & Notes of Decisions subdivisions I to VII]

<Notes of Decisions for *Constitution Art. III, § 2, cl. 1*, Jurisdiction of Courts, are displayed in multiple documents.>

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Appendix D

SEC. 16. [78p] DIRECTORS, OFFICERS, AND PRINCIPAL STOCKHOLDERS.

(a) DISCLOSURES REQUIRED.—

(1) DIRECTORS, OFFICERS, AND PRINCIPAL STOCKHOLDERS REQUIRED TO FILE.—Every person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) which is registered pursuant to section 12, or who is a director or an officer of the issuer of such security, shall file the statements required by this subsection with the Commission.

(2) TIME OF FILING.—The statements required by this subsection shall be filed—

(A) at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 12(g);

(B) within 10 days after he or she becomes such beneficial owner, director, or officer, or within such shorter time as the Commission may establish by rule;

(C) if there has been a change in such ownership, or if such person shall have purchased or sold a security-based swap agreement involving such equity security, before the end of the second business day following the day on which the subject

transaction has been executed, or at such other time as the Commission shall establish, by rule, in any case in which the Commission determines that such 2-day period is not feasible.

(3) CONTENTS OF STATEMENTS.—A statement filed—

(A) under subparagraph (A) or (B) of paragraph (2) shall contain a statement of the amount of all equity securities of such issuer of which the filing person is the beneficial owner; and

(B) under subparagraph (C) of such paragraph shall indicate ownership by the filing person at the date of filing, any such changes in such ownership, and such purchases and sales of the security-based swap agreements or security-based swaps[34] as have occurred since the most recent such filing under such subparagraph.

(4) ELECTRONIC FILING AND AVAILABILITY.—Beginning not later than 1 year after the date of enactment of the Sarbanes-Oxley Act of 2002—

(A) a statement filed under subparagraph (C) of paragraph (2) shall be filed electronically;

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34. Section 762(d)(5)(B) of Public Law 111–203 amends section 16(a)(3)(B) by inserting "or security-based swaps" after "security-based swap agreement". The amendment probably should have been to insert such language after "security-based swap agreements" but was executed here to reflect the probable intent of Congress..

(B) the Commission shall provide each such statement on a publicly accessible Internet site not later than the end of the business day following that filing; and

(C) the issuer (if the issuer maintains a corporate website) shall provide that statement on that corporate website, not later than the end of the business day following that filing.

(b)[35] For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) or a security-based swap agreement involving any such equity security within any period of less than six months, unless such security or security-based swap agreement was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security or security-based swap agreement purchased or of not repurchasing the security or security-based swap agreement sold for a period exceeding six months. Suit to recover such profit may be instituted at law or

35. The amendment made by suparagraph (D) of section 762(d)(5) of Public Law 111-203 was carried out below to reflect the probable intent of Congress. A hyphen between the words "Leach" and "Bliley" in the matter proposed to be struck is missing.

in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security or security-based swap agreement involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

(c) It shall be unlawful for any such beneficial owner, director, or officer, directly or indirectly, to sell any equity security of such issuer (other than an exempted security), if the person selling the security or his principal (1) does not own the security sold, or (2) if owning the security, does not deliver it against such sale within twenty days thereafter, or does not within five days after such sale deposit it in the mails or other usual channels of transportation; but no person shall be deemed to have violated this subsection if he proves that notwithstanding the exercise of good faith he was unable to make such delivery or deposit within such time, or that to do so would cause undue inconvenience or expense.

(d) The provisions of subsection (b) of this section shall not apply to any purchase and sale, or sale and purchase, and the provisions of subsection (c) of this section shall

not apply to any sale, of an equity security not then or theretofore held by him in an investment account, by a dealer in the ordinary course of his business and incident to the establishment or maintenance by him of a primary or secondary market (otherwise than on a national securities exchange or an exchange exempted from registration under section 5 of this title) for such security. The Commission may, by such rules and regulations as it deems necessary or appropriate in the public interest, define and prescribe terms and conditions with respect to securities held in an investment account and transactions made in the ordinary course of business and incident to the establishment or maintenance of a primary or secondary market.

(e) The provisions of this section shall not apply to foreign or domestic arbitrage transactions unless made in contravention of such rules and regulations as the Commission may adopt in order to carry out the purposes of this section.

(f) TREATMENT OF TRANSACTIONS IN SECURITY FUTURES PRODUCTS.—The provisions of this section shall apply to ownership of and transactions in security futures products.

(g) The authority of the Commission under this section with respect to security-based swap agreements shall be subject to the restrictions and limitations of section 3A(b) of this title.