23-367

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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,

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

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, IN SUPPORT OF PLAINTIFF-APPELLANT

MEGAN BARBERO
General Counsel

JEFFREY A. BERGER
Senior Appellate Counsel

MICHAEL A. CONLEY
Solicitor

ARCHITH RAMKUMAR
Appellate Counsel

Securities & Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9040
(202) 551-4886 (Ramkumar)
RamkumarA@sec.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Rules

Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, et seq.

Other Authorities

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission submits this amicus curiae brief under Federal Rule of Appellate Procedure 29(a)(2) to address an important legal issue related to Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b). Congress enacted Section 16(b) to deter corporate insiders from trading in their companies' securities on the basis of inside information. It included within the reach of Section 16(b) officers, directors, and beneficial owners. Congress defined beneficial owners to include individuals owning more than 10 percent of any class of an issuer's equity securities. Section 16(b) targets short-swing trading by these insiders—purchases and sales occurring within a period of less than six months—which Congress viewed as posing an acute risk of misuse of inside information. Section 16(b) provides that an issuer may recover any profits realized by an insider from short-swing trading in a suit brought by the issuer or by a shareholder on behalf of the issuer.

The Commission has a strong institutional interest in the law governing Section 16(b) because the provision is a "vital component of the Exchange Act." *Donoghue v. Bulldog Investors Gen. P'Ship*, 696

F.3d 170, 173 (2d Cir. 2012). Although only private actors may seek relief under Section 16(b), the Commission has a significant interest in the proper interpretation of Section 16 as a whole and it has filed amicus briefs addressing the scope of Section 16(b) on several occasions. *E.g.*, *Roth ex rel. Beacon Power Corp. v. Perseus LLC*, 522 F.3d 242, 247-48 (2d Cir. 2008) (noting that the Commission submitted an amicus brief opining on Section 16(b)); *see also Roth v. Foris Ventures LLC et al.*, No. 22-16632, Dkt. 22 (9th Cir. Feb. 10, 2023). Furthermore, the Commission, acting pursuant to congressional authority, 15 U.S.C. § 78p(b), has promulgated rules that effectively define the scope of the Section 16(b) private action, *see* 17 C.F.R. §§ 240.16b-1, b-3, b-5, b-6, b-7, and b-8.

QUESTION PRESENTED

Plaintiff Brad Packer, a shareholder of 1-800-Flowers.com, Inc. ("Flowers"), brought a Section 16(b) claim derivatively on behalf of Flowers seeking disgorgement of the short-swing profits that accrued to defendants that were beneficial owners of more than 10% of Flowers's stock. In *Bulldog*, 696 F.3d at 173, this Court held that a private plaintiff had Article III standing to bring Section 16(b) claims for short-

swing profits on behalf of an issuer. The district court here, however, dismissed Packer's action on Article III standing grounds, holding that *Bulldog* "must yield to the principles" that the court located in the Supreme Court's decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).

The question is whether the district court erred in ruling that *TransUnion* abrogated *Bulldog*, which held that plaintiffs have Article III standing to bring Section 16(b) actions.

BACKGROUND

A. In enacting Section 16 of the Exchange Act, Congress responded to a pervasive problem. "Prior to the passage of the Securities Exchange Act [of 1934], speculation by insiders—directors, officers, and principal stockholders—in the securities of their corporation was a widely condemned evil." *Smolowe v. Delendo Corp.*, 136 F.2d 231, 235 (2d Cir. 1943) (internal quotation omitted). Recognizing that "insiders may have access to information about their corporations not available to the rest of the investing public" and that these insiders could "reap profits at the expense of less well informed

investors," *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 243 (1976), Congress enacted Section 16.

Section 16(a) imposes disclosure obligations on statutory insiders, specifically "director[s]," "officer[s]," and "beneficial owner[s]." 15 U.S.C. § 78p(a)(1). Congress defined beneficial owners as those who own "more than 10 percent of any class of *any* equity security[.]" *Id.* (emphasis added). Directors, officers, and beneficial owners must file statements showing their ownership interest in "all equity securities" that are registered pursuant to the Exchange Act. 15 U.S.C. § 78p(a)(1)-(3). The same insiders must also disclose any "changes in ownership" of covered securities. 15 U.S.C. § 78p(a)(3); *Lowinger v. Morgan Stanley & Co. LLC*, 841 F.3d 122, 129 (2d Cir. 2016). The Commission can enforce Section 16(a) against insiders who fail to file requisite statements.

Section 16(b) creates strict liability for insiders who obtain short-swing profits. It provides that:

> For the purpose of preventing 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, 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) * * * within any period of

> less than six months * * * shall inure to and be recoverable by the issuer. * * * Suit to recover such profit may be instituted at law or 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[.]

15 U.S.C. § 78p(b). Issuers or shareholders can file suit in federal court within two years of when the beneficial owner, director, or officer realized the profits. *Id.*

Section 16(b) "places no significant restriction on the type of security adequate to confer standing. '[A]ny security' will suffice[.]" *Gollust v. Mendell*, 501 U.S. 115, 123 (1991) (quoting 15 U.S.C. § 78p(b)); *see also Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("[T]he word 'any' has an expansive meaning, that is one or some indiscriminately of whatever kind." (internal quotation omitted)). The "direct mandate of § 16(b)" is thus "that suit may be brought by the owner of any security without qualification." *Blau v. Mission Corp.*, 212 F.2d 77, 79 (2d Cir. 1954) (internal quotations omitted).

Congress's choice of a ten-percent threshold reflected the concerns that animated the statute—insiders leveraging access to information for profit. "The statutory reference to a ten percent beneficial owner rests on the presumption that an owner of this quantity of securities has

access to inside information." *Newmark v. RKO Gen., Inc.*, 425 F.2d 348, 356 (2d Cir. 1970); *id.* & n.7 ("[T]he reason for including ten percent beneficial owners within the definition of insiders must have been the determination that the owner of a quantity of stock that large is likely to be privy to such information." (citing 2 L. Loss, Securities Regulation 1060-61 (1961)). Congress's choice to include beneficial owners within Section 16(b)'s reach reflects its recognition that "shortswing speculation by stockholders with advance, inside information would threaten the goal of the Securities Exchange Act to insure the maintenance of fair and honest markets." *Kern Cnty. Land Co. v. Occidental Petroleum Co.*, 411 U.S. 582, 591 (1973) (internal quotation omitted).

Section 16(b) is unique because unlike "most of the federal securities laws," it "does not confer enforcement authority on the Securities and Exchange Commission." *Bulldog*, 696 F.3d at 174. It instead deputizes the "issuer" and its "security holders" as "policemen" to sue for relief and pursue "a private-profit motive to enforce the law's prohibition on short-swing trading by insiders." *Id.* (internal quotations omitted). When a "shareholder plaintiff pursues a § 16(b) claim on

behalf of an" issuer, the "real party in interest" is the issuer, which recovers any short-swing profits as a result of liability, and the derivative action is "a mere procedural device to enforce" the issuer's "substantive rights." *Id.* at 175-76 (internal quotations omitted).

B. Packer instituted this case in 2015 after Flowers declined to sue William C. Martin, Raging Capital Management, LLC—the company Martin runs—and Raging Capital Master Fund, Ltd. App. 20. The complaint alleges that the three defendants constituted a group that is a beneficial owner of more than 10% of Flowers's equity securities. *See* 15 U.S.C. § 78m(d)(3); App. 22. Defendants filed a motion to dismiss, contending, *inter alia*, that they lacked the voting power to be considered beneficial owners. The district court denied that motion, finding that "[a]n entity may be the beneficial owner of securities even when it only indirectly shares or possesses voting and investment power." *Packer on behalf of 1-800-Flowers.Com, Inc. v. Raging Capital Mgmt., LLC*, 242 F. Supp. 3d 141, 150 (E.D.N.Y. 2017).

After several additional years of litigation, including an appeal concerning factual issues about defendants' beneficial ownership that resulted in a remand, *Packer v. Raging Capital Mgmt., LLC*, 981 F.3d

148, 150 (2d Cir. 2020), defendants moved to dismiss on the ground that Packer lacked constitutional standing. App. 31-50. They contended that the intervening decision in *TransUnion* changed the law and foreclosed Packer's standing.

The district court granted defendants' motion. The court acknowledged *Bulldog*'s holding 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." 696 F.3d at 180; *see* App. 138-39. It concluded, however, that *Bulldog*'s holding "must yield to the principles announced in *TransUnion*," namely that Article III standing "requires a concrete injury even in the context of a statutory violation." App. 134, 140. According to the district court, because Packer failed "to point to or articulate any actual reputational harm to Flowers flowing from the Defendants' breach of Section 16(b)," Packer lacked Article III standing. App. 140.

SUMMARY OF ARGUMENT

TransUnion did not abrogate *Bulldog*. To the contrary, *Bulldog*'s holding regarding standing in the Section 16(b) context is consistent

with *TransUnion*'s analysis of Article III standing, particularly when, as here, a suit is premised upon an allegation of intangible harm. First, *Bulldog* identified a close common-law analog at the core of Section 16(b)'s cause of action: a breach-of-fiduciary-duty claim. The breach of that duty, by itself, inflicts a redressable injury upon issuers. And second, *Bulldog* properly hewed to Congress's decision to create a cause of action for issuers to claw back short-swing profits based on that common-law analog. Nothing more is required for standing under *TransUnion*.

In concluding that *Bulldog* is irreconcilable with *TransUnion* and that, post-*TransUnion*, Packer must identify actual reputational harm that Flowers suffered, the district court over-read *TransUnion*. The district court's ruling, if affirmed, would eviscerate Section 16(b); few, if any plaintiffs, would be able to demonstrate standing, contrary to Congress's intent to create a broad cause of action, albeit one with a limited remedy. The decision below should be reversed.

ARGUMENT

I. *Bulldog* correctly held that Section 16(b) plaintiffs have Article III standing because Section 16(b) closely resembles a common-law action for breach of a fiduciary duty.

Section 16(b) codifies the ability of an issuer—or a shareholder suing on the issuer's behalf—to obtain limited relief (the short-swing profits) and mirrors a common-law action by a corporation to recover profits stemming from a breach of a fiduciary duty of loyalty owed to that corporation. It is the breach of that duty, irrespective of particular direct harms flowing from the breach, which constitutes a redressable injury-in-fact for purposes of Article III standing.

At common law, a fiduciary's duty of loyalty was absolute. Even where there was "no fraud, no misuse of confidential information, [or] no outright looting of a helpless corporation," a fiduciary duty claim could still proceed because a fiduciary was "held to something stricter than the morals of the market place," something more than "honesty alone[.]" *Perlman v. Feldmann*, 219 F.2d 173, 176 (2d Cir. 1955) (concluding that defendants' actions "in siphoning off for personal gain corporate advantages to be derived from a favorable market situation d[id] not betoken the necessary undivided loyalty owed by the fiduciary

to his principal"). As articulated by the Restatement, the "fiduciary duty of undivided loyalty * * * is particularly intense so that, in most circumstances, its prohibitions are absolute for prophylactic reasons." Restatement (Third) of Trusts § 78 (2007).

Section 16(b) imposes an analogous duty by holding those who engage in short-swing trading strictly liable for any profits they obtained. Arnold Jacobs, AN ANALYSIS OF SECTION 16 OF THE SECURITIES EXCHANGE ACT OF 1934, 32 N.Y.L. Sch. L. Rev. 209, 344 (1987) ("The issuer's recovery of an insider's profit has common law antecedents."). It is a "blunt instrument" that "impose[s] a form of strict liability" and reflects Congress's belief 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." *Bulldog*, 696 F.3d at 174 (internal quotations and citations omitted); *accord Magma Power Co. v. Dow Chemical Co.*, 136 F.3d 316, 320 (2d Cir. 1998) ("No showing of actual misuse of inside information or of unlawful intent is necessary to compel disgorgement. Section 16(b) operates mechanically, and makes no moral distinctions, penalizing technical violators of pure heart[.]"). As Thomas Corcoran—

one of the drafters of the Exchange Act—explained, Section 16(b)'s rigid proscription is a practical necessity: "you have to have this crude rule of thumb, because you cannot undertake the burden of having to prove that the director intended, at the time he bought, to get out on a short swing." *Smolowe*, 136 F.2d at 235-36 (internal quotation omitted).

Fiduciary responsibility was the focal point of the statute, and Congress enacted Section 16(b) to ensure that beneficial owners would be "fiduciaries as directors and officers were." *Am. Standard, Inc. v. Crane Co.*, 510 F.2d 1043, 1060-61 & n.31 (2d Cir. 1974); *see also* Peter J. Romeo & Alan L. Dye, Section 16 Treatise §§ 1.03[3][a]-[b], 8.01[1]-[4] (1994) (describing Congress's emphasis on fiduciary responsibility for beneficial owners in the statutory history of the Exchange Act). As this Court explained, "[t]he purpose of Section 16(b) was to prevent directors, officers and principal stockholders 'from speculating in the stock of the corporations to which they owed a fiduciary duty.'" *Am. Standard*, 510 F.2d at 1060 (quoting S. Rep. No. 73-1455, at 68 (1934)); *accord Adler v. Klawans*, 267 F.2d 840, 844 (2d Cir. 1959) ("The undoubted congressional intent in the enactment of § 16(b) was to discourage what was reasonably thought to be a widespread abuse of a

fiduciary relationship * * * [by] directors, officers, [and] 10% beneficial owners[.]"). Congress was reacting to "vicious practices unearthed at the hearings" leading to Section 16(b)'s enactment, which involved "flagrant betrayal" of "fiduciary duties" by insiders "who used their positions of trust and the confidential information which came to them in such positions, to aid them in their market activities." S. Rep. No. 73-1455, at 55; *accord Viacom, Inc. v. Gollust*, 909 F.2d 724, 727 (2d Cir. 1990), *aff'd Gollust*, 501 U.S. at 128 (describing this statutory history and concluding that Section 16(b) served the express "purpose of preventing the unfair use of inside information"). "Section 16(b) was enacted to 'bring these practices into disrepute and encourage the voluntary maintenance of proper fiduciary standards.'" *Blau v. Lamb*, 363 F.2d 507, 515, 519 (2d Cir. 1966) (quoting H.R. Rep. No. 73-1383, at 13 (1933)).

"The beneficial owner concept," for its part, "was intended simply to expand the class of putative fiduciaries." *Am. Standard*, 510 F.2d at 1061. Congress made beneficial owners of more than 10% of a company's securities liable to the same extent as directors and officers because such owners may be "privy" to information that ordinary

investors cannot access, *Newmark,* 425 F.2d 356 & n.7, and could leverage a "favorable market situation" by exploiting resulting information asymmetries. *Perlman*, 219 F.2d at 176; *see Lamb*, 363 F.2d at 515 ("The section's underlying purpose * * * is to prevent the 'unfair use' of information by insiders."). In setting the 10% threshold, Congress legislated based on the common-law principle that the duty of loyalty is not confined to officers and directors, but instead extends to all individuals who "in the course of [their] employment acquire[] secret information relating to [the] employer's business," and thus occupy "a position of trust * * * analogous in most respects to that of a fiduciary[.]" *Brophy v. Cities Serv. Co.*, 70 A.2d 5, 7 (Del. Ch. 1949); *see Diamond v. Oreamuno*, 248 N.E. 2d 910, 912 (N.Y. 1969) ("[A] person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit[.]").

Finally, the remedy created by Section 16(b)—disgorgement of short-swing profits—grew from common-law roots. "[T]he statute makes the fiduciary a constructive trustee for any profits he may make," *Gratz v. Claughton*, 187 F.2d 46, 51 (2d Cir. 1951), and "at

common law, an accounting surcharging a trustee for breach of his fiduciary duty was a readily available remedy." *Morrissey v. Curran*, 650 F.2d 1267, 1282 (2d Cir. 1981); *see CIGNA Corp. v. Amara*, 563 U.S. 421, 441-42 (2011) ("Equity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment. * * * [This] surcharge remedy extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary."). Section 16(b) extends a "common law" tradition of allowing recovery for a breach of a "fiduciary's duty to a beneficiary" even when no "actual unfair dealing" occurred. *Bulldog*, 696 F.3d at 177.

Bulldog properly relied on the statute's common-law origins when it concluded that shareholders suing on an issuer's behalf possess Article III standing. In *Bulldog*, a shareholder brought suit under Section 16(b) on behalf of a fund against an entity that owned more than 10% of the fund's "common stock" and engaged in impermissible short-swing trading. 696 F.3d at 172-73. This Court observed that a "fiduciary duty was created by § 16(b), and it conferred upon [the issuer] an enforceable legal right." 696 F.3d at 177. It then noted that the

"deprivation of this right establishes Article III standing." "[B]ecause the issuer's right to profits under § 16(b) derives from breach of a fiduciary duty created by the statute in favor of the issuer, the issuer is no mere bounty hunter but, rather, a person with a cognizable claim to compensation for the invasion of a legal right." *Id.* at 178.

This Court viewed Section 16(b) as providing relief for an intangible harm—breach of fiduciary duty—with common-law roots. Accordingly, the Court held that Congress "created legal rights that clarified the injury that would support standing, specifically, 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." *Id.* at 180. *Bulldog* observed that the breach implicated by short-swing profits can have additional downstream consequences, including a diminishment of the issuer's "interest in maintaining a reputation of integrity, an image of probity," and reduced "public acceptance and marketability of its stock." *Id.* at 177-78 (internal quotation omitted). "This interest is injured not only by actual insider trading but by any

trading in violation of an insider's fiduciary duty, including the trading altogether prohibited by § 16(b)[.]" *Id.* at 178.[1]

II. *Bulldog* accords with the *TransUnion* decision.

The district court misapplied *TransUnion* in reaching the conclusion that *Bulldog* is no longer good law. In order for a Supreme Court decision to constitute an "intervening decision" that casts doubt on binding Circuit precedent, the Supreme Court "must have broken the link on which [this Court] premised [a] prior decision, or undermined an assumption of that decision." *SEC v. Rio Tinto plc*, 41 F.4th 47, 53 (2d Cir. 2022) (internal quotation omitted). *TransUnion* did neither.

[1] *Bulldog* comports with this Court's holdings in other contexts that individuals proceeding derivatively on a fiduciary-duty claim have Article III standing. *See Walton v. Morgan Stanley & Co., Inc.*, 623 F.2d 796, 798 & n.4 (2d Cir. 1980) ("[T]he recognition of standing of a shareholder to bring a derivative suit for the profits made by one who allegedly breached a fiduciary duty owed to the corporation accords with both federal and Delaware notions of standing."); *see also L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cnty., Inc.*, 710 F.3d 57, 67 & n.5 (2d Cir. 2013) ("LIHS and the Class have asserted their claims in a derivative capacity, to recover for injuries to the Plan caused by the Administrators' breach of their fiduciary duties. This is injury-in-fact sufficient for constitutional standing.").

In *TransUnion*, the Supreme Court reiterated that a harm is "concrete for purposes of Article III" if there is a "close historical or common-law analogue for the[] asserted injury." 141 S. Ct. at 2204. A facsimile "in American history and tradition," however, is not required. *Id.* The Supreme Court also underscored that "[v]arious intangible harms can also be concrete," including "reputational harms, disclosure of private information, and intrusion upon seclusion," as well as "harms specified by the Constitution itself." *Id.* And the Supreme Court instructed that courts "must afford due respect to Congress's decision" "to grant a plaintiff a cause of action to sue over the defendant's violation of [a] statutory prohibition or obligation." *Id.*

The details of *TransUnion* highlight why the decision does not undermine *Bulldog*. The plaintiffs who brought suit under the Fair Credit Reporting Act in *TransUnion* were individuals whose credit files contained information that inaccurately suggested they were "terrorists, drug traffickers, or [other] serious criminals[.]" *Id.* at 2201. The Supreme Court differentiated between two groups of plaintiffs: (i) a group whose [incorrect] information was "disseminate[d] to third-party creditors," and (ii) a group whose information was "maintain[ed]

internally" by a credit-reporting agency but not published externally. *Id.* at 2210. Although publication was not a statutory prerequisite to bring suit, the ruling turned on whether the plaintiffs could demonstrate that the credit-reporting agency had communicated the information to third parties.

As to the plaintiffs in the first category, the Supreme Court concluded that they suffered an injury-in-fact, "namely, the reputational harm associated with the tort of defamation." *Id.* at 2208. In concluding that "longstanding American law" provided avenues for victims of defamatory statements to obtain relief, the Supreme Court rejected the argument that the disseminated statements needed to be "literally false," because the claim brought by the class did not need to be an "exact duplicate" of a defamation claim. *Id.* at 2209.

As for the plaintiffs in the second category in *TransUnion*, however, their inability to show publication of their credit reports meant they lacked Article III standing even though there was a statutory violation. "Publication is essential to liability in a suit for defamation," and there is "no historical or common-law analog where

the mere existence of inaccurate information, absent dissemination, amounts to concrete injury." *Id.* (internal quotation omitted).

Multiple recent decisions demonstrate the proper application of *TransUnion*, particularly its differentiation between the two categories of plaintiffs. This Court recently applied *TransUnion* in a case involving plaintiffs that resembled the second category of plaintiffs found not to have standing in *TransUnion*. *Maddox v. Bank of N.Y. Mellon Trust Co. N.A.*, 19 F.4th 58, 65 (2d Cir. 2021). In *Maddox*, the plaintiffs sued based on a bank's delay in recording the satisfactions of their mortgage, which, according to the plaintiffs, "impaired access to accurate financial information" and "created a false impression adverse to their credit status." *Id.* at 61. In concluding that the plaintiffs lacked standing, this Court rejected their efforts to rely on defamation as an analog because "unless the defamatory matter is communicated to a third person there has been no loss of reputation," and there was no evidence of such communication. *Id.* at 65 (internal quotation omitted). "[S]o far as is known," this Court explained, plaintiffs' information was viewed "by no one." *Id.*

A recent Sixth Circuit decision presents the other side of the coin—plaintiffs resembling the first category of *TransUnion* plaintiffs. *Dickson v. Direct Energy, LP*, 69 F.4th 338, 344-45 (6th Cir. 2023). In *Dickson*, the Sixth Circuit reversed a district court's dismissal of a claim brought under the Telephone Consumer Protection Act of 1991 for lack of Article III standing. It held that the "receipt of an unwanted" voicemail "resembled the common law tort of intrusion upon seclusion" because, "broadly speaking, unwanted telephone communications can qualify as injuries under this common law doctrine." *Id.*; *accord id.* at 345 ("The kind of harm vindicated by the intrusion-upon-seclusion tort is relatively broad. Foundationally, there is a common-law right to privacy, which simply reflects an individual's right to be let alone." (internal quotation omitted)). The Sixth Circuit also held that requiring plaintiffs to demonstrate that their harms "would state an independent claim at common law" was not "an appropriate measure of concreteness" because "*TransUnion* has since unequivocally clarified" that such "a prerequisite" "is *not* the applicable standard." *Id.* at 347 (emphasis in original); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020) (Barrett, J.) ("[W]hen [the Supreme Court] instructs

us to analogize to harms recognized by the common law, we are meant to look for a close relationship *in kind*, *not degree*." (emphasis in original) (internal quotation omitted)).

Contrary to the district court's understanding, App. 146, *Bulldog* hews to the methodology that *TransUnion* endorsed. This Court identified a close, historical common-law analog to Section 16(b): claims based on a breach of a "fiduciary's duty to a beneficiary" regardless of whether any "actual unfair dealing" occurred. 696 F.3d at 177 (internal quotation omitted); *see Morrissey*, 650 F.2d at 1282. In view of the Supreme Court's instruction that an "exact" common-law "duplicate" is not required, *TransUnion*, 141 S. Ct. at 2209, the common law counterpart that *Bulldog* identified suffices for purposes of standing. And *Bulldog* accorded "due respect to Congress's decision" to give issuers a "cause of action," *TransUnion*, 141 S. Ct. at 2204, which is warranted "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016); *see Bulldog*, 696 F.3d at 178 ("[I]t is the particular statute and the rights it conveys that guide the standing determination.").

TransUnion and *Bulldog* "are consistent with one another," and *Bulldog* "remains vital." *Rio Tinto*, 41 F.4th at 53. Indeed, post-*TransUnion*, courts have continued to recognize that "intangible injur[ies]" can be "concrete," *Gerber v. Herskovitz*, 14 F.4th 500, 506 (6th Cir. 2021), including those underlying breach-of-fiduciary-duty claims.[2] As one example, the Tenth Circuit recently held that a group of farmers had Article III standing to sue their attorneys even though they "suffered no economic injury" because no such injury "was required for a claim involving breach of a fiduciary duty. [Minnesota] law treats a client's right to an attorney's loyalty as a kind of 'absolute' right in the sense that if the attorney breaches his or her fiduciary duty to the client, the client is deemed injured even if no actual loss results." *Kellogg v. Watts Guerra LLP*, 41 F.4th 1246, 1264 (10th Cir. 2022) (internal quotation omitted)).

[2] Moreover, Packer's Section 16(b) claim is not rooted in the common-law tort of defamation at issue in *TransUnion* and *Maddox* for which publication demonstrates a reputational harm that provides an injury-in-fact. Rather, the Section 16(b) claim springs from a breach-of-fiduciary-duty claim on which the statute is premised. That alone differentiates Packer's claim from the allegations in *Maddox* and the second group of plaintiffs who lacked standing in *TransUnion*.

The actionable harm under Section 16(b) falls into the category of "intangible harm[s]" that confers standing on Section 16(b) plaintiffs because breach-of-fiduciary-duty claims have "traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 578 U.S. at 340-41. Similarly situated litigants include plaintiffs bringing First Amendment claims, *see id.* at 340, as well as "certain tort victims even if their harms may be difficult to prove or measure," including victims of "slander *per se*." *Id.* at 341-42; *see Weldy v. Piedmont Airlines, Inc.*, 985 F.2d 57, 61-62 (2d Cir. 1993) ("[I]njury to the plaintiff * * * is presumed when the defamatory statement takes the form of slander *per se*.") (internal citation omitted).[3] Difficulties in ascertaining intangible harms, however, are not dispositive because concrete is not "necessarily synonymous with 'tangible.' Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete." *Spokeo*, 578 U.S. at 340.

[3] Section 16(b) does not require plaintiffs to allege reputational harm. But the analogy of slander *per se* illustrates how intangible harms, including Section 16(b) violations, can give rise to Article III standing.

III. Requiring Section 16(b) plaintiffs to demonstrate tangible or reputational harm would subvert Congress's aims.

The district court erred in holding that Packer lacked standing because he failed to "point to or articulate any actual reputational harm to Flowers flowing from Defendants' breach of Section 16(b)." App. 140, 145. By marrying the words "actual" and "reputational," the court appeared to fault Packer for failing to show measurable reputational harm to Flowers from the short-swing trading. But such tangible reputational harm is not a precondition to suit under Section 16(b), and the district court's holding, if affirmed, would undercut Congress's purpose by making actions to recover short-swing profits almost impossible.

The district court's reconfiguration of standing for Section 16(b) claims is problematic in two ways. Requiring a plaintiff to "point to" "actual" harm cannot be squared with the intangible—though real—nature of the harm from the breach of fiduciary duty targeted by the statute. After all, intangible means "impossible * * * to describe exactly." Cambridge Dictionary, "intangible," *available at* https://dictionary.cambridge.org/us/dictionary/english/ intangible; *see also Kellogg*, 41 F.4th at 1264 (holding that plaintiffs were not required

to show "actual loss" on top of the breach of fiduciary duty that constituted a concrete injury). *TransUnion* furnishes no basis for such a requirement; the Court recognized that intangible harms that "may be difficult to prove or measure" can nonetheless supply Article III standing despite not being "readily quantifiable." 141 S. Ct. at 2211 (emphasis omitted). Importantly, the Supreme Court did not require the plaintiffs who had standing in *TransUnion* to identify specific and actual consequences or harms resulting from the publication of their credit reports. *Id.* at 2208-09. It would be anomalous to conclude that Section 16(b) plaintiffs must identify a tangible impact of the short-swing trading at issue when no comparable barrier exists for plaintiffs bringing claims based on defamation, "suppression of free speech or religious exercise," or other claims "actionable without wallet injury." *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 268 (1st Cir. 2022) (internal quotation omitted).

Second, requiring Section 16(b) plaintiffs to demonstrate that an issuer suffered particularized reputational harm would improperly constrict the operation of Section 16(b). The issuer still suffers from a breach of fiduciary duty in the wake of short-swing trading—for which

it can recover the profits obtained by a beneficial owner—even if the issuer's reputation emerges unscathed. While in some situations, a Rule 16(b) plaintiff may also be able to identify a reputational injury—because the market views the short-swing trading as indicative of a problem with the issuer that affects the price of its securities—nothing in the text, purpose, or history of Section 16(b) indicates that Congress was concerned primarily with reputational harm.[4]

Grafting such a requirement onto Section 16(b) is antithetical to the provision's operation as a "flat rule." *Bulldog*, 696 F.3d at 174. "Had Congress intended that only profits from an actual misuse of inside information should be recoverable, it would have been simple enough to say so. Significantly, however, it makes recoverable the profit from any purchase and sale, or sale and purchase, within the period." *Smolowe*, 136 F.2d at 236; *accord Ceres Partners v. GEL Assocs.*, 918 F.2d 349, 362 (2d Cir. 1990) ("No proof is required of any

[4] The district court appeared to believe that "reputational harm is presumed" in a Section 16(b) action. App. 139. The court may have been reiterating the observation in *Bulldog* that one reason why issuers have an interest in avoiding breaches of fiduciary duties is to "maintain[] [their] reputation of integrity." 696 F.3d at 177-78. Nothing in *Bulldog* suggests, however, that reputational harm must be shown for standing to bring a Section 16(b) claim.

misleading representation or omission, or of any statement at all; indeed, not even the most complete disclosure is a defense against recovery of short-swing profits."). Consequently, courts have held that an issuer may hold a defendant liable for short-swing profits even without allegations or proof that the defendants had access to inside information, actually possessed inside information, or intended to profit or actually profited from such information. Jacobs, 32 N.Y.L. Sch. L. Rev. at 368-69 (collecting dozens of cases).

The district court's combination of these two factors, which departs from *TransUnion* and *Bulldog*, would unjustifiably restrict the Section 16(b) cause of action. Mandating that Section 16(b) plaintiffs show actual, reputational harm at the outset of a case imposes a significant, and often insurmountable, hurdle for issuers and shareholders suing on the issuers' behalf. In practice, this would reduce the likelihood that Section 16(b) suits would ever be brought, especially since the Commission lacks the ability to enforce Section 16(b). That is plainly not what Congress intended for a "vital component of the Exchange Act." *Bulldog*, 696 F.3d at 173.

CONCLUSION

This Court should reverse and remand for further proceedings.

Respectfully submitted,

MEGAN BARBERO
General Counsel

MICHAEL A. CONLEY
Solicitor

JEFFREY A. BERGER
Senior Appellate Counsel

/s/ Archith Ramkumar

ARCHITH RAMKUMAR
Appellate Counsel

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
(202) 551-4886 (Ramkumar)

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) and this Court's Rule 29.1(a)(3) because it contains 5244 words, excluding the parts of the brief exempted from the word count by Federal Rule of Appellate Procedure 32(f).

I further certify that this brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it uses a proportionally spaced, 14-point typeface.

/s/ Archith Ramkumar