No. 24-1491

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

LEE ANN SOMMERVILLE,
individually, and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

UNION CARBIDE CORPORATION and COVESTRO LLC,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of West Virginia, No. 2:19-cv-00878 (Hon. Joseph R. Goodwin)

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN TORT REFORM ASSOCIATION SUPPORTING APPELLEES, REHEARING EN BANC, AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held company has a 10% or greater ownership interest in the Chamber.

The American Tort Reform Association is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held company has a 10% or greater ownership interest in ATRA.

Amici are unaware of any publicly owned corporation, not a party to the appeal or an amicus, that has a financial interest in the outcome of this appeal.

/s/ Brian D. Boone
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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents over 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The American Tort Reform Association is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

[1] Amici certify that they have moved the Court for leave to file this brief. Amici also certify that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici curiae, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Amici's members have a strong interest in promoting fair and predictable legal standards, and some have faced or will face lawsuits like this one that involve claims for medical monitoring. Accordingly, Amici's members have a strong interest in ensuring that courts follow Supreme Court precedent on Article III standing.

INTRODUCTION

"To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no standing." *TransUnion v. Ramirez*, 594 U.S. 413, 417 (2021). "'Allegations of possible future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (cleaned up) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). In keeping with those foundational tenets of constitutional jurisprudence, the district court properly concluded that Plaintiff Lee Ann Sommerville lacked Article III standing for her medical-monitoring claim—a claim grounded only in a speculative risk of possible future harm.

Time and again, this Court has reaffirmed those same standing principles. *See, e.g.*, *Penegar v. Liberty Mut. Ins. Co.*, 115 F.4th 294, 302 (4th Cir. 2024) ("[R]isk of future harm . . . cannot, by itself, establish concrete injury to have standing to seek damages . . . ." (citing *TransUnion*, 594 U.S. at 436)); *O'Leary v. TrustedID, Inc.*, 60 F.4th 240, 245 (4th Cir. 2023) (plaintiff's failure to allege "an increased risk of identity theft" prompts "the kind of daisy chain of speculation that can't pass muster under Article III"); *South Carolina v. United States*, 912 F.3d

720, 727–730 (4th Cir. 2019) ("The Supreme Court has repeatedly held that an alleged harm is too 'speculative' to support Article III standing when the harm lies at the end of a 'highly attenuated chain of possibilities.'" (quoting *Clapper*, 568 U.S. at 410)); *Beck v. McDonald*, 848 F.3d 262, 266–67 (4th Cir. 2017) ("increased risk of future identity theft and the cost of measures to protect against it" does not constitute an injury in fact under Article III). But here, in a split decision, the panel majority departed from those principles, concluding that "Sommerville has Article III standing." Op. at 12.

Amici respectfully submit that the panel majority wrongly deviated from settled precedent, requiring rehearing en banc. "Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies'"—that is, matters in which the plaintiff has a "personal stake." *TransUnion*, 594 U.S. at 423 (citing *Raines v. Byrd*, 521 U.S. 811, 819 (1997)). That is why, to have standing in federal court, a plaintiff must show that she "suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up). "Requiring a plaintiff to

demonstrate a concrete and particularized injury . . . ensures that federal courts decide only 'the rights of individuals'" and not the kinds of "hypothetical or abstract disputes" that the Constitution leaves for resolution by the political branches. *TransUnion*, 594 U.S. at 423 (quoting *Marbury v. Madison*, 5 U.S. 137, 170 (1803)).

The injury-in-fact requirement is grounded not only in the Constitution but also in reason. It prevents claims that are unripe (because the plaintiff has not yet been harmed) or meritless (because the plaintiff will never be harmed), thereby providing faster access to courts for those with "reliable and serious" claims. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 443–44 (1997). It also ensures that defendants face liability—and plaintiffs secure recoveries—for only verifiable harms. If a claim for damages based on a speculative injury can be sustained in federal court, defendants would be targeted with suits by uninjured plaintiffs and judicial resources would be diverted from plaintiffs whose claims *are* based on concrete harm.

The panel majority's decision here opens the door to those consequences. The majority opinion conflicts with decades of settled precedent from this Court and the Supreme Court holding that an injury

premised on speculation about what *might* occur in the future does not suffice for Article III standing. In reaching that conclusion, the panel majority both misapprehended the nature of the alleged injury that Sommerville claims and also incorrectly relied on state law.

Rehearing en banc is necessary to align this case with this Court's and the Supreme Court's precedent. This Court should grant rehearing en banc, affirm the District Court's grant of summary judgment to Union Carbide and Covestro, and, in doing so, confirm that Article III standing requires plaintiffs to premise claims for damages on more than a mere possibility of future harm.

ARGUMENT

I. ARTICLE III STANDING REQUIRES AN INJURY THAT IS CONCRETE AND PARTICULARIZED, NOT SPECULATIVE OR HYPOTHETICAL.

The Supreme Court has distilled Article III's standing requirements to three elements that, together, represent "the irreducible constitutional *minimum* of standing." *Lujan*, 504 U.S. at 560 (emphasis added). To have 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." *TransUnion*, 594 U.S.

at 423 (citing *Lujan*, 504 U.S. at 560–61). The first element—injury in fact—"is essential to the Constitution's separation of powers." *Id.* at 429. It helps ensure that federal courts stay within the bounds of Article III and "do not adjudicate hypothetical or abstract disputes" that are better left to resolution by the political branches. *Id.* at 423 (quoting *Marbury*, 5 U.S. at 170). That is why "'[a]llegations of possible future injury' are not sufficient" to establish Article III standing. *Clapper*, 568 U.S. at 409 (cleaned up) (quoting *Whitmore*, 495 U.S. at 158). If the claimed injury has not yet occurred, then the injury-in-fact inquiry is heightened: An "imminent" or "threatened" injury must be "*certainly impending* to constitute injury in fact." *Id.* (quoting *Whitmore*, 495 U.S. at 158).

Lujan, *Clapper*, *TransUnion*, and their progeny are a key part of federal jurisprudence because they keep the nation's federal courts within the bounds of their limited judicial role. They underscore that a justiciable injury in fact cannot be based on speculation about potential future harm and must instead be based on concrete harm that is grounded in the present. Put simply: "No concrete harm, no standing." *TransUnion*, 594 U.S. at 417.

Over the years, this Court has consistently adhered to those same principles and rejected standing premised on speculative or hypothetical harms. For example, in *O'Leary*, the Court found "an increased risk of identity theft" to be an injury insufficient to confer Article III standing because the plaintiff lacked "a nonspeculative connection between the alleged statutory violation and identity theft." *O'Leary*, 60 F.4th at 245. In *South Carolina*, the Court found "environmental, health, and safety risks" (associated with the state's being chosen as the permanent repository for certain hazardous materials) to be "too speculative" an injury to "give rise to a concrete injury-in-fact" for Article III standing purposes. *South Carolina*, 912 F.3d at 727. And crucially, in *Beck*, the Court deemed an "increased risk of future identity theft *and* the cost of measures to protect against it" too speculative to constitute an injury-in-fact. *Beck*, 848 F.3d at 266–67 (emphasis added). There are other cases, too. *E.g.*, *Penegar*, 115 F.4th at 302; *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 78 F.4th 622, 628–29 (4th Cir. 2023).

The panel majority departed from that long and well-reasoned line of cases, conflicting with the constitutional limits on Article III standing that they establish. In doing so, the majority opinion opened federal

courts' doors wide open to plaintiffs that lack sufficiently concrete injuries—posing both constitutional and practical challenges for defendants, plaintiffs, and courts alike. The Court should reconsider that decision and close those doors anew.

II. THE PANEL MAJORITY MISAPPREHENDED SOMMERVILLE'S INJURY.

In finding that Sommerville has Article III standing, the panel majority described Sommerville's injury as "'exposure *itself* to 'environmental toxins' tortiously emitted by the Plant Owners . . . and 'the concomitant need [to pay] for medical testing' *today* to mitigate an increased risk of illness." Op. at 13 (quoting *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 430 (W. Va. 1999)). But that does not suffice to show Article III injury in fact; any claimed need for medical testing *today* is premised solely on speculation that Sommerville might develop an illness *in the future*.

As Chief Judge Diaz correctly observed in his dissent, "Sommerville claims that she's at an increased risk of developing cancer and that the risk creates a present need for medical monitoring—*the costs of which* are her injury in fact." Op. at 31 (Diaz, C.J., dissenting). "[T]o confer Article III standing, these costs must be based on a future harm that is

'certainly impending.'" *Id.* (citing *Clapper*, 568 U.S. at 409, 416). But there is nothing "certainly impending" about a presently perceived risk of developing a condition in the future.[2] Put another way, if the increased risk of developing an illness is purely speculative, then any purported "need" for medical testing today to monitor that risk is also necessarily speculative. The increased risk of possibly developing a medical condition in the future is nothing more than a speculative risk. Such a speculative future risk finds no support for Article III standing in any of this Court's or the Supreme Court's precedents.[3]

Consistent with its characterization of Sommerville's injury, the panel majority deemed *Beck* "inapposite." Op. at 17. It posited that "Sommerville's alleged injury does not rest on an 'attenuated chain of possibilities'" because "[i]t exists *already*"—referring again to the alleged

[2] Indeed, the record here shows that (1) Sommerville has never incurred any medical costs related to her alleged exposure (JA1640–42), (2) no medical professionals have ever recommended that Sommerville undergo any diagnostic testing due to her alleged exposure (*id.*; JA2546–47; JA2672–74), and (3) Sommerville's proffered expert opined that her risk of developing of a future medical condition increased at most by less than one tenth of one percent (JA1879–80).

[3] The panel majority did not suggest that exposure alone would qualify as an injury in fact under Article III—and rightly so. *See* Op. at 30 n.1 (Diaz, C.J., dissenting).

"'exposure *itself*' to 'environmental toxins'" and "'the concomitant need [to submit to and pay] for medical testing' *today* to mitigate an increased risk of illness." *Id.* But that claimed injury *does* rest on an "attenuated chain of possibilities." *Clapper*, 568 U.S. at 410. Take "the concomitant need [to submit to and pay] for medical testing." Op. at 17. That alleged need exists only based on Sommerville's claim that she *might* develop an illness in the future. Even if a perceived need for medical testing is present, that perception, standing alone, cannot form the basis for Article III standing. It is based on speculation.

Ultimately, whether the claimed injury is exposure paired with a present need for testing (as the panel majority suggested) or is the costs of testing (as Chief Judge Diaz suggested in dissent), the injury stems from nothing more than a guess about what might happen one day. That guess cannot give rise to a justiciable injury-in-fact under Article III.

III. THE PANEL MAJORITY INCORRECTLY RELIED ON STATE LAW IN FINDING SOMMERVILLE'S CLAIMED INJURY SUFFICIENTLY CONCRETE.

In characterizing the claimed injury as "wrongful[] expos[ure]" requiring Sommerville to "pay for and undergo periodic diagnostic medical examinations *now*," and in finding that injury sufficiently

concrete, the panel majority noted that "West Virginia law permits Sommerville to seek recovery for this harm, which is grounded in the 'traditional common-law principle[]' of 'avoiding physical injury.'" Op. at 13. The panel majority cited to the Supreme Court of Appeals of West Virginia's *Bower* factors establishing the elements of a state-law claim for medical monitoring. Op. at 14. But "[i]njury in fact is a constitutional requirement." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Raines*, 521 U.S. at 820). The panel majority improperly substituted state law for the federal Article III standard. "States cannot alter [the judiciary's role under Article III] simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse." *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013).

Whether a plaintiff can bring a medical-monitoring claim in state court has no bearing on whether that claim is cognizable in federal court under Article III. And even though the *Bower* factors set "an extremely high bar for a plaintiff to overcome before there can be any recovery for medical monitoring," *In re Tobacco Litig.*, 600 S.E.2d 188, 194 (W. Va. 2004), that says nothing about whether that bar for *recovery* is coextensive with Article III's standing requirements for *bringing suit* in

federal court. Inasmuch as the panel majority looked to state law to interpret the limits of Article III, that reliance was misplaced.

CONCLUSION

Speculative, unproven risk of possible future harm—like the harm claimed here—does not give rise to a justiciable injury under Article III. The district court applied sound, long-standing principles of standing under the Supreme Court's and this Court's precedents in granting summary judgment in Union Carbide and Covestro's favor. The panel majority's decision conflicts with both this Court's own precedent and that of the Supreme Court. This Court should grant rehearing en banc and ultimately affirm the District Court's decision.

Dated: September 9, 2025

Respectfully submitted,

/s/ Brian D. Boone

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 29(b)(4), 29(a)(4)(G) and 32(g)(1), I certify that this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(b)(4) and 32(a)(7) because it contains 2,438 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the word count of Microsoft Word for Microsoft 365. This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in Century Schoolbook 14-point font, a proportionally spaced typeface.

Dated: September 9, 2025

/s/ Brian D. Boone
Brian D. Boone

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit through the appellate CM/ECF system on September 9, 2025, which will serve a notice of electronic filing to all registered counsel of record.

Dated: September 9, 2025

/s/ Brian D. Boone
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