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 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
Brian D. Boone

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

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.

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[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

"[R]isk of future harm . . . cannot, by itself, establish concrete injury to have standing to seek damages . . . ." *Penegar v. Liberty Mut. Ins. Co.*, --- F.4th ---, 2024 WL 3852278, at *5 (4th Cir. Aug. 19, 2024) (cleaned up) (citing *TransUnion LLC v. Ramirez*, 594 U.S. 413, 436 (2021)). Just last month, this Court reemphasized that longstanding limit on federal jurisdiction.

Some medical-monitoring claims—like the one that Lee Ann Sommerville presses—involve only a speculative risk of possible future harm. Applying well-established precedents from this Court and the United States Supreme Court, the District Court below properly dismissed Sommerville's claim for lack of Article III standing.

That decision was no outlier. For more than 200 years, it has been a basic tenet of recovery in tort cases that liability should attach only when an individual has suffered an actual injury. *See* William Prosser, *Handbook on the Law of Torts* § 54, at 330–33 (4th ed. 1971). That bright-line rule exists for several important reasons. First, it prevents claims after an incident or exposure that are either unripe (because the plaintiff has not yet been harmed) or meritless (because the plaintiff will never be

harmed). Second, it provides faster access to courts for those with "reliable and serious" claims. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 444 (1997). And third, it ensures that defendants face liability only for verifiable harms. Medical-monitoring cases that permit recovery based on speculation about a possible future injury create uncertainty for businesses and clog up courts with meritless claims that can get in the way of meritorious ones.

The United States Supreme Court in *Buckley*, most state supreme courts to consider the issue since *Buckley*,[2] and numerous state appellate courts and federal courts interpreting state law have rejected medical-monitoring claims absent a concrete physical injury. Those courts understood that allowing the uninjured to press medical-monitoring claims raises serious public policy concerns, including the potential for "unlimited and unpredictable liability" and the possibility that

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[2] *See Brown v. Saint-Gobain Performance Plastics Corp.*, 300 A.3d 949 (N.H. 2023); *Baker v. Croda Inc.*, 304 A.3d 191 (Del. 2023); *Berry v. City of Chicago*, 181 N.E.3d 679 (Ill. 2020); *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11 (N.Y. 2013); *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181 (Or. 2008); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1 (Miss. 2007); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005); *Wood v. Wyeth-Ayerst Labs. Div. of Am. Home Prods.*, 82 S.W.3d 849 (Ky. 2002); *Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001).

unimpaired claimants will exhaust resources available to compensate claimants who are or will become sick. *Buckley*, 521 U.S. at 433.

But even apart from these policy concerns, medical-monitoring claims, when pursued in federal court based on speculation about possible injuries, pose serious problems under Article III. To have standing in federal court, a plaintiff must prove three elements, which together constitute "the irreducible constitutional minimum of standing." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). *First*, the 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." *Id.* (cleaned up). *Second*, the plaintiff must prove that there is "a causal connection between the injury and the conduct complained of"—that is, "the injury has to be fairly . . . trace[able] to the challenged action of the defendant." *Id.* (cleaned up). And *third*, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (cleaned up).

Medical-monitoring claims like Sommerville's fail those requirements for Article III standing. Like many medical-monitoring

plaintiffs, Sommerville pointed only to a speculative (and negligible at best) exposure to a hazardous material—exposure that *might* (or might not) heighten her *risk* of becoming ill in the future. That is a far cry from the concrete injuries that the Supreme Court and this Court have required. *See TransUnion*, 594 U.S. at 441 (no Article III standing where plaintiffs "did not demonstrate that the risk of future harm [from inaccurate credit alerts] materialized"); *Penegar*, 2024 WL 3852278, at *5; *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); *Beck v. McDonald*, 848 F.3d 262, 267 (4th Cir. 2017) ("[I]ncreased risk of future identity theft and the cost of measures to protect against it" does not constitute an injury in fact under Article III). And with such a speculative articulation of injury, there can be no sufficient showing that the claimed injury—whatever it is—is fairly traceable to any particular party's actions.

This type of medical-monitoring claim also raises serious ripeness concerns. The possibility that plaintiffs like Sommerville—and the class

she purports to represent—might eventually become ill is too remote to give rise to a justiciable controversy. On the record here, that risk is "wholly speculative" and entirely "dependent on future uncertainties." *Wild Virginia v. Council on Envt'l Quality*, 56 F.4th 281, 294 (4th Cir. 2022) (cleaned up). The ripeness doctrine precludes exactly these types of claims.

With the benefit of a full record after the close of discovery, the District Court below properly rejected—on both standing and ripeness grounds—Sommerville's medical-monitoring claim. That decision is grounded in well-established constitutional principles. This Court should affirm, ensuring that the courthouse doors remain open to plaintiffs who suffer actual, actionable injuries while precluding claims by plaintiffs whose injuries are non-existent or speculative.

ARGUMENT

I. ARTICLE III STANDING IS A THRESHOLD REQUIREMENT FOR ALL CLAIMS IN FEDERAL COURT.

Article III's threshold standing requirements apply to all plaintiffs and all claims in federal court. It does not matter whether the cause of action arises under federal or state law. Article III always applies. *See Md. Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 218 (4th Cir. 2020)

(plaintiffs lacked standing to assert state-law claim in federal court "based on their failure to satisfy the standing requirement of Article III").

Sommerville chose to press her claim for medical monitoring—a state-law claim under West Virginia law—in federal court on behalf of a proposed class of individuals.[3] JA0035. Having made that choice, she was required to establish Article III standing. *See, e.g.*, *Lujan*, 504 U.S. at 561 ("The party invoking federal jurisdiction bears the burden of establishing" Article III standing); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) ("Standing to sue in any Article III court is, of course, a federal question which does not depend on the party's prior standing in state court."); *Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 662–63 (2019); *Shavitz v. Guilford Cnty. Bd. of Educ.*, 100 F. App'x 146, 150 n.1 (4th Cir. 2004). Anything less would violate constitutional limitations on federal-court jurisdiction.

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[3] Sommerville also initially pressed other state-law claims for negligence, ultrahazardous activity/strict liability, and willful and wanton conduct. Compl. p. 14–18; First Am. Compl. p. 14–18. But she abandoned those claims in her second amended complaint after the District Court dismissed them from her first amended complaint. *See* JA0035–JA0059; *Sommerville v. Union Carbide Corp.*, No. 2:19-cv-00878, 2020 WL 2499536, at *2–4 (S.D. W. Va. May 14, 2020) (ECF No. 47).

A. Standing is central to Article III's "case" and "controversy" requirement.

"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*, 594 U.S. at 417. Article III's standing requirement exists to preserve the separation of powers between the branches of government. *See id.* at 422; *Raines v. Byrd*, 521 U.S. 811, 820 (1997). "Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies,'" and away from more abstract questions that are better left to resolution by the political branches. *TransUnion*, 594 U.S. at 423.

Over the years, the Supreme Court has distilled Article III's standing requirements to three elements—"the irreducible constitutional minimum of standing." *Lujan*, 504 U.S. at 560. 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). These requirements—especially injury in fact—"ensure[] that federal courts decide only 'the rights of individuals"

because "federal courts do not adjudicate hypothetical or abstract disputes." *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 170 (1803)).

Injury in fact is critical to standing because not just any possible or perceived injury will suffice. If the injury has not yet occurred, then the inquiry is heightened: An "imminent" or "threatened" injury must be "*certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). "'Allegations of *possible* future injury' are not sufficient." *Id.* (cleaned up) (quoting *Whitmore*, 495 U.S. at 158).

Clapper and *TransUnion* both underscore that a justiciable injury in fact cannot be based on speculation about potential future harm. In *Clapper*, the Supreme Court held that, even for prospective injunctive relief, the plaintiffs lacked standing when they alleged a possibility that the government would illegally intercept their communications. The Supreme Court rejected the Second Circuit's standard that there need only be an "objectively reasonable likelihood" of injury, emphasizing that the injury "must be certainly impending." 568 U.S. at 410. The Court also explained that "highly speculative fear" premised "on a highly attenuated

chain of possibilities" could not satisfy Article III's standing requirement. *Id.*

And in *TransUnion*, the Court explained that a "concrete" harm for standing purposes must have "a close historical or common-law analogue for the[] asserted injury," such as a "physical or monetary injury" or certain intangible harms, like reputational harms or disclosure of private information. 594 U.S. at 424–25 (citing *Spokeo, Inc. v. Robins*, 578 U.S. 300, 341 (2016)). But the Court explained that such a test was not "not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts." *Id.*

This Court has applied those same principles. Consistent with *Lujan*, *Spokeo*, *Clapper*, and *TransUnion*, the Court consistently requires concrete, particularized, and actual or imminent injuries while rejecting standing premised on speculative or hypothetical harms. *See, e.g.*, *O'Leary*, 60 F.4th at 245 (rejecting allegations of "an increased risk of identity theft" because it involved "the kind of daisy chain of speculation that can't pass muster under Article III"); *Beck*, 848 F.3d at 267, 273–277 (holding that the "increased risk of future identity theft and the cost of

measures to protect against it" was insufficient to establish standing); *South Carolina*, 912 F.3d at 728–29 (rejecting South Carolina's theory of standing premised on "environmental, health, and safety risks" from potentially becoming a permanent repository for hazardous materials because it "rest[ed] on a similarly 'highly attenuated chain of possibilities'" and was "too speculative to give rise to a sufficiently concrete injury-in-fact" (quoting *Clapper*, 568 U.S. at 410)).

B. Neither Congress nor the States can create standing when plaintiffs otherwise lack Article III standing.

"Injury in fact is a constitutional requirement," so "'[C]ongress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" *Spokeo*, 578 U.S. at 339 (quoting *Raines*, 521 U.S. at 820); *see also Md. Shall Issue*, 971 F.3d at 218 ("[F]ederal courts must first determine whether [plaintiffs] have Article III standing because the existence of a 'case or controversy' is '*the* threshold question in every federal case.'" (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975))). Nor can the States. *See, e.g.*, *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013) (states cannot give private parties who otherwise lack standing "a ticket to the federal courthouse").

Take *Raines*. There, the Supreme Court held that individual members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act even though the Act expressly created a cause of action for individual members of Congress to bring constitutional challenges to the statute. 521 U.S. at 815–16, 829–30. Similarly, in *Summers v. Earth Island Institute*, the Supreme Court concluded that plaintiffs lacked Article III standing to challenge certain Forest Service regulations because they had not suffered any "injury in fact" in the constitutional sense—even though they had suffered a "procedural injury" in being denied the ability to file comments on certain Forest Service actions. 555 U.S. 488, 496–97 (2009). This Court has adhered to the same principle. *See, e.g.*, *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 340 (4th Cir. 2017) ("[W]here an individual fails to allege a concrete injury stemming from allegedly incomplete or incorrect information listed on a credit report, he or she cannot satisfy the threshold requirements of constitutional standing.").

The same is true for claims arising under state law. *Hollingsworth*, for example, held that several intervenors lacked standing to appeal a decision declaring California Proposition 8 unconstitutional. 570 U.S. at

705–06. Those citizens' only interest in the appeal was "to vindicate the constitutional validity of a generally applicable California law." *Id.* at 706. Yet "a 'generalized grievance,' no matter how sincere, is insufficient to confer standing." *Id.* Even though the California state court below had recognized the intervenors' right to argue in defense of Proposition 8 (*id.* at 712–13), that was not enough to maintain standing in a federal court under Article III. "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." *Id.* at 715.

The bottom line: If a plaintiff pursues a claim in an Article III court, they must satisfy Article III's standing requirements. There are no exceptions. Thus, regardless of the Supreme Court of Appeals of West Virginia's decision to authorize medical-monitoring claims under West Virginia law, this Court must determine whether the "injury" alleged for a medical-monitoring claim like Sommerville's—the risk of future harm—is sufficient to confer Article III standing.

It is not.

II. MEDICAL-MONITORING CLAIMS LIKE SOMMERVILLE'S THAT ARE BASED ON NOTHING MORE THAN SPECULATION AND THE MERE POSSIBILITY OF FUTURE INJURY DO NOT COMPORT WITH ARTICLE III.

Applying Article III standing requirements to medical-monitoring claims like Sommerville's that are unsupported by allegations or evidence of a present injury, the result is clear. An *unsubstantiated* allegation of increased exposure to a hazardous material that *might* lead to an increased *risk* of illness is not an injury under Article III. Nor can such a speculative "injury" ever be fairly traceable to another's conduct.

Under West Virginia law, "[a] claim for medical monitoring seeks to recover the anticipated costs of long-term diagnostic testing necessary to detect latent diseases that may develop as a result of tortious exposure to toxic substances." *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 429 (W. Va. 1999). To recover on the claim, a plaintiff must prove that

> (1) he or she has been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease relative to the general population; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of

> the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible.

Id. at 432–33.

In recognizing medical monitoring as a cognizable state-law claim, the Supreme Court of Appeals of West Virginia reasoned that the claim did not have to "rest upon the existence of present physical harm" but that "the exposure itself and the concomitant need for medical testing constitute the injury" for purposes of tort law. *Id.* at 430 (quotation omitted). But for that injury to satisfy Article III's requirements, it must be sufficiently grounded in the *present*. When medical-monitoring plaintiffs, like Sommerville here, fail to allege or substantiate a present exposure that warrants medical testing, the only "injury" they have to stand on is a speculative risk of developing an illness in the future. That is far too tenuous for Article III standing.

A. An unsubstantiated claim of exposure to a hazardous substance that might increase the risk of developing an illness later is not an "injury in fact."

According to Sommerville, she and the proposed class suffered an injury because they live in a geographic area where Union Carbide and Covestro allegedly emitted ethylene oxide (EtO) into the air, they might have been exposed to increased levels of EtO by breathing the air, and

thus they might be at an increased risk of future illness. That is the type of "daisy chain of speculation" that this Court has rejected. *O'Leary*, 60 F.4th at 245.

To start, Sommerville's suit hangs on an allegation of exposure that *might* lead to an increased *risk* of developing a medical condition in the future. But that purported "injury" is not concrete, actual, or imminent. Without more, alleging exposure to a hazardous substance is not—and cannot be—sufficient to establish injury in fact unless that allegation is supported by allegations and evidence indicating that the exposure creates a present harm.[4] This case does not involve an *existing* medical

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[4] Sommerville cites *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), for the proposition that "exposure to a known toxin, without onset of symptoms consequent to that exposure, confers standing under Article III to an exposed plaintiff." Appellant's Br. at 13. But *Duke* was decided before *TransUnion* and must be understood through the lens of that later decision. Sommerville also points to the Sixth Circuit's decision in *Sutton v. St. Jude Medical S.C., Inc.*, 419 F.3d 568 (6th Cir. 2005), as further support for the idea that "medical monitoring costs resulting from toxic exposure constitute a present injury-in-fact under Article III." Appellant's Br. at 14–15. But that case—also decided before *TransUnion*—involved allegations that surgeons had *already* implanted defective medical devices into members of the proposed class, which had *already* "led to severe and disabling conditions," including death, in "numerous patients." *Sutton*, 419 F.3d at 569. That is dramatically different from Sommerville's unsubstantiated allegations of exposure and risk of future harm here.

condition that developed from the alleged EtO emissions. Nor does it involve substantiated allegations of an increased risk of developing a disease—Sommerville failed to substantiate or prove any meaningful increase in levels of EtO exposure in the first instance. JA4405–JA4406. Rather, Sommerville's standing is premised entirely on speculation about a possible risk of future harm. But as the District Court explained at the motion-to-dismiss stage, "non-injurious conduct—no matter how tortious—is not justiciable." *Sommerville*, 2020 WL 2499536, at *2.

This Court's prior cases expose the flaws in Sommerville's theory of standing. As this Court explained in *Beck*, the mere potential of future identity theft is insufficient for standing; there must be more that "push[es] the threatened injury of future identity theft beyond the speculative to the sufficiently imminent." 848 F.3d at 274. Otherwise, the "contention of an enhanced risk of future identity theft [is] too speculative." *Id.*; *see also Penegar*, 2024 WL 3852278, at *5 ("Although [the letter] threatened future, concrete harm, Penegar has yet to suffer such harm and therefore did not sustain an injury in fact from the letter."); *O'Leary*, 60 F.4th at 245 ("an increased risk of identity theft" was insufficient for standing purposes absent "a nonspeculative

connection between the alleged statutory violation and identity theft"). Here, all that Sommerville—or any putative plaintiff in the proposed class—can point to is a speculative fear about what *might* happen in the future because of possible, unsubstantiated exposure.

This case is like *Beck* and *O'Leary*, where the plaintiffs could not allege anything to substantiate their claimed risk of identity theft. *See Beck*, 848 F.3d at 274 ("[E]ven after extensive discovery, the *Beck* plaintiffs have uncovered no evidence that the information contained on the stolen laptop has been accessed or misused or that they have suffered identity theft, nor, for that matter, that the thief stole the laptop with the intent to steal their private information."); *O'Leary*, 60 F.4th at 244–45 ("O'Leary hasn't alleged—even in a speculative or conclusory fashion—that entering six digits of his SSN on TrustedID's website has somehow raised his risk of identity theft. . . . [Even] crediting his allegation 'on information and belief' that TrustedID shared his six SSN digits with Equifax, there would have to be another Equifax data breach, that breach would have to compromise O'Leary's partial SSN, and an identity thief would then have to misappropriate that information to harm O'Leary (presumably by first figuring out the rest of his SSN)." (citation omitted)).

Medical-monitoring claims like Sommerville's do not provide the sort of "nonspeculative connection" needed to bridge the gap. *O'Leary*, 60 F.4th at 245. All those types of medical-monitoring claims offer are the "daisy chain[s] of speculation" and "'highly attenuated chain[s] of possibilities'" that this Court—and the Supreme Court—have soundly and regularly rejected. *Id.*; *South Carolina*, 912 F.3d at 728 (citation omitted); *see also Beck*, 848 F.3d at 274; *Penegar*, 2024 WL 3852278, at *5; *Holland v. Consol Energy, Inc.*, 781 F. App'x 209, 212–13 (4th Cir. 2019) ("At most, [Plaintiffs] have alleged that the 1992 Plan will someday have to enroll beneficiaries . . . But "'[a]llegations of possible future" injury are not sufficient' to satisfy Article III standing . . . and we agree with the district court that the allegations in this case are too speculative to give rise to Article III standing.").

Recognizing an injury in fact on these or similar facts would also raise concerns about justiciability. On a standing theory like Sommerville's, there is no way to quantify the probability of developing an injury in the future. Indeed, Sommerville—or anyone else in the

proposed class—may never even develop an injury.[5] As Justice Breyer observed in *Buckley*, "contacts, even extensive contacts, with serious carcinogens are common." 521 U.S. at 434. "Indeed, 'tens of millions of individuals may have suffered exposure to substances' that may never result in any harm." *Baker*, 304 A.3d at 196 (quoting *Buckley*, 521 U.S. at 432). There is also no way to presently quantify the severity of the injury that a plaintiff *might* develop in the future or the resulting damages that a plaintiff *might* incur.

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[5] This also raises separate concerns about the ripeness of the claim. "A claim should be dismissed as unripe if the plaintiff has not yet suffered injury and any future impact remains wholly speculative." *Wild Virginia*, 56 F.4th at 294 (citation and quotation marks omitted). Thus, although "ripeness can rest on anticipated future injury" (*id.* at 295), "just as a plaintiff cannot assert standing based on an alleged injury that lies at the end of a 'highly attenuated chain of possibilities,' a plaintiff's claim is not ripe for judicial review 'if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *South Carolina*, 912 F.3d at 730 (citations omitted). The "future uncertainties" surrounding medical-monitoring claims like Sommerville's underscore that the claim is "not ripe for review at this time." *Id.* at 731; *see also A/S J. Ludwig Mowinckles Rederi v. Tidewater Constr. Corp.*, 559 F.2d 928, 932 (4th Cir. 1977) ("An important factor in considering ripeness is whether resolution of the tendered issue is based upon events or determinations which may not occur as anticipated.").

B. Other courts have recognized the speculative nature of the type of injury on which Sommerville and many other medical monitoring plaintiffs base their claims.

The District Court below is not the first court to express concerns over whether medical-monitoring claims implicate a cognizable injury when they are not supported by allegations or evidence of a present harm. Other courts have shared in that skepticism.

Consider *Buckley*. There, the Supreme Court held that medical monitoring is not a cognizable tort under the Federal Employers' Liability Act (FELA). 521 U.S. at 438–44. In doing so, the Court focused on the absence of an actual injury. The Court expressed concerns that, absent actual symptoms (*i.e.*, an actual, present injury), the costs of medical monitoring for a potential future condition were too untethered from traditional tort principles to qualify as damages. *Id.* at 438–41. The Court also stressed the risks associated with "the systemic harms that can accompany 'unlimited and unpredictable liability" when "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring." *Id.* at 442.

Although *Buckley* involved only the question whether medical monitoring—absent actual symptoms—was a viable tort claim under FELA, the reasons for the Supreme Court's rejection of the claim bear on the standing inquiry too. Just as the risk of developing symptoms in the future is too speculative for a viable tort claim under federal law, so too is such risk, on its own, too speculative to give rise to standing under Article III. *See also Brown*, 300 A.3d at 952 (rejecting medical-monitoring claim because "an increased risk of future development of disease is not sufficient . . . to constitute a legal injury"); *Baker*, 304 A.3d at 192, 194 (rejecting medical-monitoring claim because "an increased risk of illness without present manifestation of a physical harm is not a cognizable injury"); *Berry*, 191 N.E.3d at 689 (same); *Caronia*, 5 N.E.3d at 14, 18 (same); *Lowe*, 183 P.3d at 184–85 (same); *Paz*, 949 So. 3d at 5 (same); *Henry*, 701 N.W.2d at 689 (same); *Wood*, 82 S.W.3d at 855 (same); *Hinton*, 813 So. 2d at 829 (same).

* * *

An undefined, untethered potential for future harm has never satisfied Article III's requirements. This Court should not be the first to allow it. "Though its requirements are often pesky, standing ensures that

[courts] do not exceed the authority to decide cases and controversies conferred on [them] by the Constitution. Proceeding to the merits here would transgress the bounds of that authority." *Penegar*, 2024 WL 3852278, at *7.[6]

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[6] Of course, a plaintiff's standing in state court has no bearing on Article III standing in federal court. *See, e.g.*, *Nicklaw v. CitiMortgage, Inc.* 839 F.3d 998, 1003 (11th Cir. 2016) ("That Nicklaw does not allege a sufficient injury in fact under Article III does not mean that New York law does not create a right that, when violated, could form the basis of a cause of action in a court of New York. But Nicklaw chose to sue CitiMortgage in federal court, and the requirement of concreteness under Article III is not satisfied every time a statute creates a legal obligation and grants a private right of action for its violation."); *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 934 (8th Cir. 2012) (affirming dismissal of claim for violation of Minnesota Consumer Fraud Act because the complaint did "not measure up to Article III's requirements" and "'[s]tate courts may afford litigants standing to appear where federal courts would not, but whether they do so has no bearing on the parties' Article III standing in federal court'" (citation omitted)); *Hagy v. Demers & Adams*, 882 F.3d 616, 624 (6th Cir. 2018) ("For the same reason that the Hagys lack standing to bring the federal claim, they lack standing to bring the state-law claims, which rely on incorporating the federal law wholesale."); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 495 (6th Cir. 1999) (rejecting plaintiffs' theory of standing premised on Ohio common law because "[c]itation to Ohio cases is unpersuasive, as 'standing to sue in any Article III court is . . . a federal question which does not depend on the party's prior standing in state court'" (citation omitted)).

CONCLUSION

The District Court correctly determined that Sommerville lacked Article III standing to press a medical-monitoring claim for herself or a proposed class. As that court understood, this case is not about whether medical-monitoring claims are viable as a tort under state law. The question here is one of federal Article III standing. And this Court doesn't need to look beyond its own precedents on Article III to affirm the District Court.

Medical-monitoring claims like Sommerville's are inconsistent with Article III's standing requirements. Speculative, unproven risk of possible future harm does not give rise to a justiciable injury. The District Court applied sound, longstanding principles of standing under the Supreme Court's and this Court's precedents. This Court should affirm the District Court's judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 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(a)(5) and 32(a)(7) because it contains 5,110 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 30, 2024

/s/ Brian D. Boone
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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 30, 2024, which will serve a notice of electronic filing to all registered counsel of record.

Dated: September 30, 2024

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