No. 21-336

# In The Supreme Court of the United States

SHIYANG HUANG, PETITIONER

*v.*

BRIAN SPECTOR, JAMES MCGONNIGAL, RANDOLPH JEFFERSON CARY III, ROBIN D. PORTER, WILLIAM R. PORTER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The court of appeals below held that "a vast number" of Plaintiffs can obtain hundreds of millions of dollars in monetary damages, by solely alleging a "risk of future harm" for Article III standing, with no need to provide evidence beyond the pleadings.

Three weeks later, this Court held that "in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm." *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2210-11 (2021). This Court emphasized that its precedents "did not hold that the mere risk of future harm, without more, suffices to demonstrate Article III standing in a suit for damages." *Ibid.*

The question presented is:

Whether class-action plaintiffs can still rely on mere "risk of future harm" allegations alone to establish Article III standing, achieve class certification under Federal Rules of Civil Procedure 23, and obtain hundreds of millions of dollars in money damages, in light of this Court's recent decision in *TransUnion LLC* v. *Ramirez,* 141 S. Ct. 2190 (2021).

## RELATED PROCEEDINGS

United States District Court (N.D. Ga.):

*In re Equifax Inc. Customer Security Data Breach Litigation,* No. 1:17-md-02800-TWT (Mar. 17, 2020) (amended judgment)

United States Court of Appeals (11th Cir.):

*Brian Spector, et al* v. *Shiyang Huang, et al,* No. 20-10249 (11th Cir.)

*Brian Spector, et al* v. *Theodore H. Frank, et al,* No. 20-10609 (11th Cir.)

*Brian Spector, et al* v. *Mikell West, et al,* No. 20-10610 (11th Cir.)

*Brian Spector, et al* v. *Christopher Andrews, et al,* No. 20-10611 (11th Cir.)

*Brian Spector, et al* v. *George Cochran, et al,* No. 20-10612 (11th Cir.)

*Brian Spector, et al* v. *Alice-Marie Flowers, et al,* No. 20-10613 (11th Cir.)

*Brian Spector, et al* v. *John W. Davis, et al,* No. 20-11470 (11th Cir.)

*Brian Spector, et al* v. *Harald Schmidt, et al,* No. 20-14095 (11th Cir.)

## PARTIES TO THE PROCEEDING

Petitioner Shiyang Huang was an objector in the district court proceedings and an appellant in the court of appeals proceedings.

Respondents Brian Spector, James McGonnigal, Randolph Jefferson Cary III, Robin D. Porter, William R. Porter were named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings. Respondents Equifax Inc., Does 1 through 50, inclusive, Equifax Information Services LLC, Equifax Information Solutions, LLC, Does 1 through 10, et al., were defendants in the district court proceedings and appellees in the court of appeals proceedings.

Respondents Theodore H. Frank, David R. Watkins, John W. Davis, Mikell West, and George Cochran were objectors in the district court proceedings and appellants in the court of appeals proceedings.[1]

Because petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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[1] Christopher Andrews, Alice-Marie Flowers and Harald Schmidt were objectors in the district court proceedings. Their appeals were dismissed by the court of appeals. *See* App., *infra*, 9a n.6.

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

## PETITION FOR A WRIT OF CERTIORARI

Shiyang Huang respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-60a) is reported at 999 F.3d 1247. The order of the district court (App., *infra*, 61a-178a) is not published in the Federal Supplement but is available at 2020 WL 256132.

### JURISDICTION

The judgment of the court of appeals was entered on June 3, 2021. Three petitions for rehearing were denied on July 28, 2021 (App., *infra*, 179a-180a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., art. III, §§ 1-2 is reprinted in the appendix to this petition. App., *infra*, 185a-186a.

## STATEMENT

1. a. Class-action plaintiffs must meet "threshold requirements" of Fed. R. Civ. Proc. 23. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997). They must show numerosity, commonality, typicality, and adequacy of representation under Rule 23(a). *Ibid.* Plaintiffs "must also satisfy [Rule 23(b)] through evidentiary proof[.]" *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 33 (2013). As relevant here, "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)[.]" *Ibid.* (citing *Amchem*, 521 U.S. at 615, 623-24). Fed. R. Civ. Proc. 23(b)(3) also requires "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

Because class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only[,]" a party seeking class certification "must affirmatively demonstrate his compliance" under Rule 23. *Comcast*, 569 U.S. at 33 (citations omitted). This Court "emphasized that it may be necessary for the court to probe behind the pleadings" for courts to "a rigorous analysis," because class certification is proper only if "the prerequisites of Rule 23(a) have been satisfied." *Ibid.* (internal quotation marks omitted).

b. "Like all American litigation, class action lawsuits are likely to settle." Brief for the United States, *Frank* v. *Gaos*, No. 17-961, 2018 WL 3456069, at **3-4 (U.S. Jul.

16, 2018). "Unlike a typical settlement, however, a class-action settlement inherently involves a potential conflict of interest, because it 'compromises the claims of absent class members, litigants not themselves part of the settlement negotiations.'" *Ibid.* (citation omitted) "Worse, the class representatives and class counsel litigating on behalf of those absent class members may have incentives to settle which conflict with the class's interests." *Ibid.* To protect the rights of absent class members against these potential conflicts, Fed. R. Civ. Proc. 23(e) requires that the "claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."

A court, however, "is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing." *Frank* v. *Gaos,* 139 S. Ct. 1041, 1046 (2019). Article III standing must exist "at the time the class action is certified [under] Rule 23." *Sosna* v. *Iowa,* 419 U.S. 393, 402 (1975). "Rule 23's requirements must be interpreted in keeping with Article III constraints[.]" *Amchem,* 521 U.S. at 613; *Ortiz* v. *Fibreboard Corp.,* 527 U.S. 815, 831 (1999) (same). "That a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class `must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.'" *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 337 n.6 (2016) (citation omitted).

2. a. This case arises from a consolidated class action filed against respondent Equifax, et al.

> In 2017, Equifax, a consumer reporting agency, announced it had been subject to a data privacy breach affecting the personal information of almost 150 million Americans. The breach involved some of the most sensitive personal information possible: all nine digits of Americans' Social Security numbers, coupled with their names, dates of birth, and addresses, among other things.

App., *infra*, 3a-4a. Consumer-track Plaintiffs ("Plaintiffs") pleaded common law claims, and statutory claims under state and federal law. *Ibid.* All Plaintiffs alleged to "remain[] at a substantial and imminent risk of future harm." Objectors C.A. App. I:129-II:214. Equifax moved to dismiss the entire complaint in forty-five days, halting discovery under local rules. *Id.* at VII:190. Equifax did not discuss standing, *Id.* at IV:63. So did the district court: "Article III standing analysis is best left to after the class-certification stage." *Id.* at IV:101. Equifax's motion to dismiss was granted in part. The negligence and negligence per se claims under Georgia law survived, but many state-law claims, most other common law claims, all federal claims under Fair Credit Reporting Act were dismissed. App., *infra*, 62a-63a. Plaintiffs did not appeal.

b. Instead, Plaintiffs had been trying to settle with Equifax since 2017, as they doubted their ability to prove Article III standing.[2] After a "confirmatory discovery[,]"

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[2] *See* Objectors C.A. App. VII:178 ("How about the proving that the data breach led to injury to the class? * * * That would be something

App., *infra*, 86a, they rapidly settled with Equifax. As relevant here, Plaintiffs agreed to settle as a nationwide Rule 23(b)(3) class.[3] The settlement will "release Equifax from claims that were or could have been asserted in this case[,]" *id.* at 71a, for various forms of monetary relief from a $380.5 million settlement fund, plus a commitment for business practice changes. *Id.* at 65a-68a. The district court then approved a nationwide class notice for the settlement. Plaintiffs' counsel later sought $77.5 million in attorney's fee, excluding expenses. *Id.* at 178a.

The settlement enjoyed national criticism from all walks of life, provoking a quarter-million signatures in protest.[4] A prominent plaintiff's class-action attorney disparaged this settlement for "erod[ing] confidence that class actions protect consumers."[5] *Also see* Edelson C.A. Br. 10 ("inadequate compensation, misleading notice, and an ad hoc and confusing claims process.") Over one thousand objections piled up in the district court. *Id.* at 96a.

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that ... the lawyers would have to take into consideration as whether to settle this case, correct?") *Ibid.* ("How about the proving that the data breach led to injury to the class?") *Id.* at VII:177. ("[H]ow would you prove [injury] for 145 and-a-half [m]illion people?") *Also see generally* Huang C.A. Br. 10.

[3] Equifax preserved all rights "in any contested proceeding relating to certification of any proposed class." Objectors C.A. App. V:183.

[4] *Petition: Don't let EQUIFAX escape liability!* Change.org (2019). http://bit.ly/3aLB8VN; *Equifax Breach Settlement Sparks Criticism.* U.S. Senate. (Jul. 22, 2019). https://bit.ly/2UvbwXf. David Dayen. *Another Equifax Settlement Bait and Switch.* The American Prospect (Sep. 9, 2019). https://bit.ly/3sOj47v.

[5] *See* Alison Frankel, *Plaintiffs' lawyer Jay Edelson slams $380 million Equifax deal in amicus brief at 11th Circuit.* Reuters.com (Sep. 14, 2020). https://reut.rs/3lW4QQq.

After receiving notice, Petitioner timely objected. Petitioner argued that the court may only invoke Article III jurisdiction to provide "relief to claimants ... who have suffered, or will imminently suffer, actual harm." Objectors C.A. App. V:226 (quoting *Lewis* v. *Casey*, 518 U.S. 343, 349 (1996)). In the final approval hearing, another objector also "challenge[d] standing [of] the named Plaintiffs[,]" and claimed "[no]thing in the record" demonstrated Plaintiffs' standing. *Id.* at VIII:160. Yet the district court disregarded all objections: "[m]y job is to determine whether the settlement is fair, reasonable and adequate." *Id.* at VIII:202. It approved the settlement straight from the bench, without mentioning Article III standing or class certification. *Id.* at VIII:199-209 ("Tr."). The district court then asked settling parties to summarize its "adoption basically of the arguments that have been made by the Plaintiffs and by Equifax in the hearing[.]" *Id.* at VIII:207.

It follows that "class counsel emailed the proposed orders to the court" behind the scenes. Plaintiffs C.A. Br. 14. The court of appeals "assume[d] the District Court adopted the proposed order verbatim." App., *infra*, 25a-26a. Plaintiffs drafted the order (App., *infra*, 61a-178a), certifying an almost 150-million-person settlement class, and awarding attorney's fee ($77.5 million) to themselves. All objections were overruled, including petitioner's. But the district court also abandoned its pledge to analyze Article III standing "after the class certification stage[.]" Objectors C.A. App. IV:101. That order conceded that a vast majority of class members "do not claim out-of-pocket losses[.]" App., *infra*, 94a. But Plaintiffs insisted "a common claim for damages" for "plead[ing] a material risk of identity theft." App., *infra*, 182a, 184a.

3. The court of appeals affirmed in relevant part. App., *infra*, 11a-17a. It reviewed Plaintiffs' standing at the pleading stage and held that "all Plaintiffs have adequately alleged a sufficient risk of identity theft" for money damages. App., *infra*, 15a n.10. The court of appeals held that "allegations of *some* Plaintiffs that they have suffered injuries resulting from actual identity theft support the sufficiency of *all* Plaintiffs' allegations that they face a risk of identity theft." *Id.* at 15a (emphasis added). *But compare* Plaintiffs C.A. Br. 28 (conceding that all class members' claims are "no better than *possible* or even speculative damages" (emphasis original)).

The court of appeals also held that for "a vast number of Plaintiffs *who have not yet suffered identity theft*," their "*risk of harm here is a sufficient injury*[.]" App., *infra*, 16a (emphasis added). To that end, it held that "actual identity theft is by no means required when there is a *sufficient risk of identity theft*." *Ibid.* (emphasis added).

The court of appeals further found plaintiffs' "risk of harm" redressable, because "[t]he Plaintiffs who have not suffered identity theft did not sue Equifax in order to stop third parties from committing identity theft." *Id.* at 16a-17a. Plaintiffs could seek millions of dollars in damages to solely redress their "risk of identity theft." *Ibid.*

Plaintiffs insisted that "pleadings alone can be sufficient to establish standing." Plaintiffs C.A. Br. 25.[6] The court of appeals agreed that they have "easily shown an injury in fact" with pleadings alone. App., *infra*, at 16a.

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[6] Plaintiffs claimed below that no court requires them to "provide evidence of standing beyond that in the pleadings," or "prove their standing allegations with evidence." App., *infra*, 182a, 184a.

## REASONS FOR GRANTING THE PETITION

The Court should grant this petition for a writ of certiorari, vacate the court of appeals' judgment, and remand for further consideration (GVR) in light of this Court's intervening decision in *TransUnion LLC* v. *Ramirez,* 141 S. Ct. 2190 (2021). Because *TransUnion* decided a circuit split and "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," *Lawrence* v. *Chater,* 516 U.S. 163, 167 (1996) (per curiam), a GVR is warranted.

Additionally, the court of appeals failed to apply this Court's precedents. It set *zero* evidentiary requirements for plaintiffs, ignoring this Court's evidentiary proof requirements for Article III standing and Rule 23 class certification. Its approach conflicts with several decisions of this Court and of every other court of appeals. The correction of its error could warrant summary reversal.

The court of appeals also erred under *Spokeo* and *Clapper* v. *Amnesty Int'l, USA,* 568 U.S. 398 (2013). This Court did not authorize per se Article III standing for alleging *possible* risk of future harm, or what Plaintiffs conceded below to be "no better than *possible* or even speculative damages[.]" Plaintiffs C.A. Br. 28.

In light of the national prominence of this case, the sprawling 150-million-person class size, and the reputational hazards it already brought to consumer class actions, the decision below ultimately could warrant this Court's plenary review. But before this Court resorts to that step, this Court should grant certiorari, vacate the court of appeals' judgment, and remand for reconsideration in light of this Court's intervening decision in *TransUnion.*

### A. The court of appeals erred

#### *1. TransUnion rejected risk of future harm allegations alone for seeking money damages*

The court of appeals erred in a decision three weeks before *TransUnion*, and a GVR is warranted.

This Court decided *TransUnion* on June 25, 2021, three weeks after petitioner filed a rehearing petition in the court of appeals. *See* Huang C.A. Pet. for Reh'g (Jun. 7, 2021). *TransUnion* is an "intervening" precedent after the court of appeals already issued its decision. *Chater*, 516 U.S. at 166-167. As a result, there is at least "a reasonable probability" that the court of appeals will reach a different result if this Court issues a GVR in light of *TransUnion*. *Ibid.* *See Ward* v. *Nat'l Patient Account Servs. Sols., Inc.*, —F.4th—, 2021 WL 3616067, at *5 (6th Cir. Aug. 16, 2021) (acknowledging that *TransUnion* has "abrogated" binding precedents in another circuit).

Before *TransUnion*, circuits were split on whether plaintiffs can establish injury-in-fact based on alleged risk of identity theft. *See* Bradford C. Mank, *Data Breaches, Identity Theft, and Article III Standing: Will the Supreme Court Resolve the Split in the Circuits?* 92 Notre Dame L. Rev. 1323, 1324 (2017); *Beck* v. *McDonald*, 848 F.3d 262, 273-74 (4th Cir.), cert. denied, 137 S. Ct. 2307 (2017); *Tsao* v. *Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1340 (11th Cir. 2021). But further developments since the court of appeals' decision significantly affected the proper analysis of the question presented in the petition. This Court's *TransUnion* ended that circuit split. It rejected mere "risk of future harm" allegations as insufficient in a suit for money damages. It held that such "risk of harm" only allows injunctive relief.

In *TransUnion*, class representatives for over 8,000 plaintiffs first alleged *actual* harms and offered a "separate argument based on an asserted *risk of future harm*[.]" *TransUnion*, 141 S. Ct. at 2210 (emphasis added). Even though some *TransUnion* class members suffered actual harms, this Court rejected the claim that *Spokeo* provided standing for all, if every class member was swallowed by some "future risk of harm" allegations.

> *Clapper* involved a suit for injunctive relief. As this Court has recognized, a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial.
>
> But a plaintiff must "demonstrate standing separately for each form of relief sought." Therefore, a plaintiff's standing to seek injunctive relief does not necessarily mean that the plaintiff has standing to seek retrospective damages.

141 S. Ct. at 2210 (citation omitted). In other words, "the mere risk of future harm, standing alone, cannot qualify as a concrete harm[.]" *Id.* at 2210-11.

*TransUnion* plaintiffs' failed "risk of future harm" claims are precisely Plaintiffs' allegations in this case. Just as in *TransUnion*, "a vast number of Plaintiffs have not yet suffered identity theft[.]" App., *infra*, 15a. *Also see id.* at 94a (they "do not claim out-of-pocket losses[.]") The court of appeals held "all Plaintiffs have adequately alleged a sufficient risk of identity theft[,]" *id.* at 14a n.10, giving standing to pursue hundreds of millions of dollars

in damages. The court of appeals entirely relied on *Spokeo*, "where the Court said that 'the risk of real harm' (or as the Court otherwise stated, a 'material risk of harm') can sometimes 'satisfy the requirement of concreteness.'" *TransUnion*, 141 S. Ct. at 2210.

But *TransUnion* emphasized that "*Spokeo* did not hold that the *mere risk of future harm*, without more, suffices to demonstrate Article III standing *in a suit for damages*." *Id.* at 2210-11 (emphasis added). "[I]n a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm." *Ibid.* The Article III defect for the "vast number of Plaintiffs" (App., *infra*, 15a) thus becomes particularly apparent, because *Spokeo* still requires a "'concrete' injury[,]" which "must be '*de facto*'; that is, it must actually exist." 578 U.S. at 338. But they "do not claim out-of-pocket losses[.]" *id.* at 94a. That "vast majority" relied on "mere risk of future harm" as the exclusive basis for Article III standing. After *TransUnion* rejected mere "risk of future harm" as a "concrete harm[.]" 141 S. Ct. at 2210-11, that "vast number of Plaintiffs" are now left with "[n]o concrete harm" and "no standing." *Id.* at 2200.

The court of appeals compounded its errors under *TransUnion* when it discussed Plaintiffs' redressability. Under *TransUnion*, "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief *to prevent the harm from occurring*[.]" 141 S. Ct. at 2210 (emphasis added). But the court of appeals admitted that "Plaintiffs who have not suffered identity theft did not sue Equifax in order to stop third parties from committing identity theft." App., *infra*, 16a-17a. If "a vast number of Plaintiffs" (App., *infra*, 15a) are not in court to "prevent the harm from occurring" under *TransUnion*,

they lack standing for monetary relief. 141 S. Ct. at 2210. Even Plaintiffs themselves doubted "[individuals] should be entitled to compensation ... if [they] were never the victim of any kind of identity fraud or theft[.]" Objectors C.A. App. VII:142. *TransUnion* decided their question: "No concrete harm, no standing." 141 S. Ct. at 2200.

In sum, *TransUnion* rejected "risk of future harm" in suits for damages, and the court of appeals erred. Since the court of appeals did not have *TransUnion*'s hindsight on a circuit-splitting jurisdictional issue, this petition should be granted, judgment below vacated and remanded for further considerations under *TransUnion.*

### 2. *Plaintiffs' lack of evidence for "risk of future harm" means they lack Article III standing and cannot certify a class*

The court of appeals erred further in not requiring *any* evidentiary proof from Plaintiffs, when their "risk of future harm" allegation was the fundamental basis for sweeping class-wide Article III standing. *See* Plaintiffs C.A. Br. 25 (claiming "pleadings alone can be sufficient to establish standing" for class certification purposes.)

This Court's class-certification precedents often emphasized that Rule 23 "does not set forth a mere pleading standard." *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 350-51 (2011). Instead, Plaintiffs "*must* also satisfy" Rule 23(b) "through *evidentiary proof*[.]" *Comcast,* 569 U.S. at 33 (emphasis added). "[P]laintiffs wishing to proceed through a class action *must actually prove—not simply plead*—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)." *Halliburton Co.* v. *Erica P. John Fund,* 573 U.S. 258, 274 (2014) (emphasis

added). Under Rule 23(b)(3), evidence is "a means to establish or defend against liability." *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U.S. 442, 454 (2016). As relevant here, Rule 23 requirements "demand undiluted, even heightened, attention[.]" *Ortiz*, 527 U.S. at 849.

Evidence is also required to "allege *and show*" standing. *Spokeo*, 578 U.S. at 337 n.6. They "are not mere pleading requirements[.]" *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Article III jurisdiction is required for a class-action settlement. *Frank*, 139 S. Ct. at 1046. It "disposes of the claims against all parties, not just the claims against the settling parties, so it is a final decision on the merits." *Birchmeier* v. *Caribbean Cruise Lines, Inc.*, 896 F.3d 792, 795 (7th Cir. 2018) (Easterbrook, J.); *accord Reyn's Pasta Bella, LLC* v. *Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006) (same). Such a final judgment requires *evidence*. *Muransky* v. *Godiva Chocolatiers, Inc.*, 979 F.3d 917, 925 n.1 (11th Cir. 2020) (noting tensions); *Sierra Club* v. *EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (holding that parties seeking "final judgment on the merits ... must either identify ... record evidence sufficient to support its standing" or "submit additional evidence[.]")

Class actions "add[] nothing to the question of standing." *Spokeo, supra.* When "an opposing party [challenges] standing, the party invoking the court's jurisdiction cannot simply allege a nonobvious harm, without more." *Wittman* v. *Personhuballah*, 136 S. Ct. 1732, 1737 (2016) (citing *Lujan*, 504 U.S. at 561). When "his allegations of jurisdictional facts are challenged by his adversary ... he must support them by competent proof." *McNutt* v. *GMAC*, 298 U.S. 178, 189 (1936).

Lack of evidence is also a telltale sign in *TransUnion*.

> Here, the 6,332 plaintiffs did not demonstrate that the risk of future harm materialized ... Nor did those plaintiffs present evidence that the class members were independently harmed by their exposure to the risk itself ... Therefore, the 6,332 plaintiffs' argument for standing for their damages claims based on an asserted risk of future harm is unavailing.

141. S. Ct. at 2211. "Because no evidence in the record establishes a serious likelihood of [harm], we cannot simply presume a material risk of concrete harm." *Id.* at 2212 (citation omitted).

In the court of appeals' view, however, a settlement-class certification resolves the case at the pleading stage. App., *infra*, 13a-15a & n.10. The court of appeals, for its part, turned a blind eye to this Court's class-certification decisions in *Wal-Mart*, *Comcast*, and *Halliburton*, citing none of them. Plaintiffs doubled down on that rhetoric. *See* Plaintiffs C.A. Br. 25 ("pleadings alone can be sufficient to establish standing.") *Also see* App., *infra*, 182a ("Because existing law does not impose an evidentiary requirement, Plaintiffs had no need to offer evidence.")

But they "flatly contradict[] [this Court's] cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim." *Comcast*, 569 U.S. at 35 (citing *Wal-Mart*, 564 U.S. at 350-51 & n.6). *Halliburton*, 573 U.S. at 274 (same). Plaintiffs unquestionably sought *class certification*. *See* App., *infra*, 39a-46a, 88a-95a. Thus, this Court's "evidentiary proof" requirement for class certification is a "must[.]" *Comcast*, 569 U.S. at 33; *Halliburton*, 573 U.S. at 274.

Perhaps Plaintiffs had no evidence. Equifax suspended Plaintiffs' discovery by moving to dismiss under local rules. Plaintiffs' "confirmatory discovery[,]" App., *infra*, 86a, "mean[s] the only materials they had accessed had been provided to them by [Equifax], which they 'did the difficult job of reading.'"[7] But they "are not entitled to ignore controlling, adverse precedent." *Jackson* v. *City of Peoria*, 825 F.3d 328, 331 (7th Cir. 2016). They "must" show "evidentiary proof" for class certification. *Comcast*, 569 U.S. at 33; *Halliburton*, 573 U.S. at 274. Plaintiffs "cannot simply allege a nonobvious harm, without more." *Wittman*, 136 S. Ct. at 1732. *Spokeo*, 578 U.S. at 337 n.6.

> Here, despite the issue of constitutional standing having been brought to the attention of the District Court by various parties on numerous occasions throughout the litigation * * * we do not have the benefit of the District Judge's views as to whether the Plaintiffs have demonstrated the requisite injury-in-fact for supporting a finding of constitutional standing. The District Judge repeatedly failed to rule on whether any of the Plaintiffs had Article III standing to bring the class action and to enter into the Settlement Agreement.[8]

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[7] NYU Law School, *Judge Alex Kozinski weighs the pros and cons of class action lawsuits at the Center on Civil Justice's fall conference.* (Nov. 14, 2014). https://bit.ly/2UCICaV. ("Kozinski").

[8] *Cent. States Se. & Sw. Areas Health & Welfare Fund* v. *Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 200 (2d Cir. 2005).

Plaintiffs' refusal to add evidence also doomed their allegations of "imminent risk of identity theft[.]" App., *infra*, 182a-183a. Without evidence, "we cannot simply presume a material risk of concrete harm." *TransUnion*, 141. S. Ct. at 2212 (citation omitted). Standing must be "demonstrated," not merely *alleged*. *Id.* at 2203. *Also see Spokeo*, 578 U.S. at 337 n.6. (plaintiffs must "allege *and show*" standing.) (emphasis added). When standing is challenged by adversaries, Plaintiffs' purported risk of future harm must be backed up by evidence. *Wittman*, 136 S. Ct. at 1737. Even weak evidence cannot get by.[9] But here, Plaintiffs offered *none*. App., *infra*, 182a, 184a.

In sum, Plaintiffs needed to show evidence for three reasons. They first must "show" injury-in-fact. *Spokeo*, 578 U.S. at 337 n.6. They also must prove alleged "non-obvious harm." *Wittman*, 136 S. Ct. at 1737. Plaintiffs also "must" provide "evidentiary support" for class certification. *Comcast*, 569 U.S. at 33; *Halliburton*, 573 U.S. at 274. Since Plaintiffs repeatedly balked at their obligations to provide evidence, there is no "evidentiary proof" for any proper class certification, and "federal courts lack jurisdiction if no named plaintiff has standing." *Frank*, 139 S. Ct. at 1046.

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[9] *See Johannessohn* v. *Polaris Indus. Inc.*, —F.4th—, 2021 WL 3700153, at *4 (8th Cir. Aug. 20, 2021) (observing "evidence at the class certification stage shows" some class members suffered no injury); *Comcast*, 569 U.S. at 35-37 (reversing class certification because plaintiffs' evidence is divorced from their liability theory); *TransUnion*, 141 S. Ct. at 2212 ("The production of weak evidence [means] that the strong [evidence] would have been adverse.")

The court of appeals' decision below is out of step with the decisions of this Court and every other circuit.[10] It erred to rewrite Rule 23 as a mere pleading standard, which "amounts to a delegation of judicial power to the plaintiffs." *West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (Easterbrook, J.) Summary reversal is also appropriate under this Court's decisions in *Comcast, Halliburton, Wal-Mart, Wittman*, and *Spokeo.*

### *3. This Court's precedents never permitted "possible" future injury for standing*

It is "fundamental to the judiciary's proper role" to exercise judicial powers "in the last resort, and as a necessity[.]'" *Raines* v. *Byrd*, 521 U.S. 811, 818-19 (1997); *Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., concurring). Even before *TransUnion*, the court of appeals erred to adjudicate *possible* future harms. Article III standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, 568 U.S. at 408. As a result, injury-in-fact must be "actual or imminent," *id.* at 409, and "not conjectural or hypo-

[10] All other courts of appeals adopted *Wal-Mart*'s teachings that Rule 23 "does not set forth a mere pleading standard." *Wal-Mart*, 564 U.S. at 350. *See Kolbe* v. *BAC Home Loans Servicing, LP*, 738 F.3d 432, 468 (1st Cir. 2013); *Johnson* v. *Nextel Comm'n*, 780 F.3d 128, 142 n.16 (2d Cir. 2015); *Ferreras* v. *Am. Airlines*, 946 F.3d 178, 183 (3d Cir. 2019); *EQT Prod. Co.* v. *Adair*, 764 F.3d 347, 357 (4th Cir. 2014); *Chavez* v. *Plan Benefit Servs.*, 957 F.3d 542, 545 (5th Cir. 2020); *Young* v. *Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537 (6th Cir. 2012); *Orr* v. *Shicker*, 953 F.3d 490, 500 (7th Cir. 2020); *Postawko* v. *Mo. Dept. of Corr.*, 910 F.3d 1030, 1037 (8th Cir. 2018); *Parsons* v. *Ryan*, 754 F.3d 657, 674 (9th Cir. 2014); *Soseeah* v. *Sentry Ins.*, 808 F.3d 800, 809 (10th Cir. 2015); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 249 (D.C. Cir. 2013).

thetical." *Spokeo*, 570 U.S. at 338 (quoting *Lujan*, 504 U.S. at 560). Never has this Court watered down Article III's *imminence* requirement to *possible* future harms. "Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose," to a "breaking point when ... the plaintiff alleges only an injury at some indefinite future time[.]" *Lujan*, 504 U.S. at 564 n.2. *Clapper*, 568 U.S. at 409 ("'[a]llegations of possible future injury' are not sufficient.") (citation omitted). Even *Spokeo* required at least a "material" risk of harm. *Muransky*, 979 F.3d at 927 ("Whatever 'material' may mean, conceivable and trifling are not on the list.")

The court of appeals cited them, App., *infra*, 12a-14a, but then immediately erred to provide standing for what Plaintiffs inadvertently admitted as "no better than *possible* or even speculative damages[.]" Plaintiffs C.A. Br. 28. The reality reveals that "risk" is so speculative that a "vast number" of Plaintiffs (App., *infra*, 15a) have still suffered no harm, with no out-of-pocket losses to claim (*id.* at 94a), *four years after* Equifax's data breach. "The definition of the class was so amorphous and diverse" that it was not "reasonably clear that the proposed class members have all suffered [an injury.]" *Adashunas* v. *Negley*, 626 F.2d 600, 604 (7th Cir. 1980). Such "risk of future harm" claims are "dependent on entirely speculative, future actions of an unknown third-party." *Reilly* v. *Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011).

One might ask—when will the "vast number of Plaintiffs" (*Id.* at 15a) suffer any allegedly "imminent" injury? The truth is, many might be *never* harmed. "Of course, it is hypothetically possible that a member of the zero-loss subclass will suffer some future injury[.]" *In re Target Corp., Customer Data Sec. Breach Litig.*, 892 F.3d 968,

976 (8th Cir. 2018). But such "risk of future harm is ... entirely speculative, which is perhaps best illustrated by [Plaintiffs'] inability" to submit any evidence. *Ibid.* Plaintiffs' speculative harms "at some indefinite future time" cannot invoke Article III's limited jurisdiction under this Court's decisions in *Spokeo, Clapper,* and *Lujan.* The decision below breached the "actual or imminent" standard for injury-in-fact, *Spokeo*, 576 U.S. at 339. The court of appeals' decision below erred to exceed Article III's "constitutional limitation of federal-court jurisdiction[.]" *Clapper,* 568 U.S. at 408.

The court of appeals erred further by conflating "mitigation injury" with imminence of alleged risk-of-harm. Self-inflicted injuries are repeatedly rejected by this Court. *Clapper*, 568 U.S. at 416; *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976) ("Plaintiffs cannot "complain about damage inflicted by [their] own hand.")

But in the court of appeals' view, those "who have not yet suffered identity theft" injured themselves by "mitigating the risk of identity theft." App., *infra,* 15a-16a. Plaintiffs C.A. Br. 27 ("Plaintiffs alleged ... purchasing credit monitoring and credit freezes to mitigate harm[.]")

> Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.

*Clapper*, 568 U.S. at 416. The court of appeals' holding here also broke ranks with its own precedents. *Tsao*, 986 F.3d at 1335 ("were [] efforts to mitigate the risk of future identity theft a present, concrete injury sufficient to confer standing? ... [W]e conclude the answer is no[.]")

In conclusion, "the concrete-harm requirement is essential to the Constitution's separation of powers." *TransUnion*, 141 S. Ct. at 2207. No precedent in this Court asked to adjudicate "possible" future injuries. "The claim that they incurred expenses in anticipation of future harm, therefore, is not sufficient to confer standing." *Reilly*, 664 F.3d at 46. The court of appeals erred to provide standing for speculative future harm beyond Article III's constitutionally limited jurisdiction. The court of appeals erred under *Spokeo*, *Clapper*, and *Lujan*.

**B. The decision below warrants this court's review**

The decision itself also warrants review. First, "[t]his case involved an issue that affected nearly every (if not every) adult American. The whole country was watching." Edelson C.A. Br. 10. The public's trust in courts is, at times, more than its trust in the President and Congress combined.[11] But as a prominent plaintiff's class-action lawyer realized, this settlement "will undermine public confidence in class actions generally[.]" Frankel, *supra* note 5. The district court rejected all objections from the public and two state attorneys general. App., *infra*, 96a, 175a-177a. It certified a sprawling class, while letting "Class Counsel author[] the district court's opinion."

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[11] Kalvis Golde, *Recent polls show confidence in Supreme Court, with caveats*, SCOTUSblog (Oct. 22, 2019). https://bit.ly/3s8sWZn.

Edelson C.A. Br. for Reh'g 5 n.3. This Court's review is urgently needed, because those "serious missteps will have consequences for the credibility of the Class Action bar." *Id.* at 10. Cf. Kozinski, *supra* note 7 (noting class actions "seem to wind up generating a lot of money for the lawyers, and a lot of *gornisht* for the consumers ... Plenty of nothing.")[12]

Second, this Court's review will remind lower courts that unresolved Article III standing questions in class-action settlements are unacceptable.[13] Class-action settlements must not be approved without resolving prerequisite Article III jurisdiction first. All federal courts must *independently* determine whether subject-matter jurisdiction exists, even if no one challenges it. *E.g.*, *Frank*, 139 S. Ct. at 1046.[14]

Here, however, the district court first said it would examine standing after class certification. Objectors C.A. App. IV:101. That Article III inquiry is required. *Frank*, 139 S. Ct. at 1046; *TransUnion*, 141 S. Ct. at 2208 n.4.

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[12] *See* Brief for the United States, 2018 WL 3456069, at **3-4; *Eubank* v. *Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (Posner, J.) ("[W]e and other courts have often remarked the incentive of class counsel ... to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers[.]")

[13] *See Amchem*, 521 U.S. at 612; *Ortiz*, 527 U.S. at 831; *Frank*, 139 S. Ct. at 1046; *Muransky*, 979 F.3d at 921; *In re Google Cookie Placement Cons. Priv. Litig.*, 934 F.3d 316, 324-25 (3d Cir. 2019).

[14] See *Muransky*, 979 F.3d at 922 (Article III standing doubts "factored heavily into the settlement negotiations" and let to a settlement for "$6.3 million instead of the $342 million initially sought.") Cf. *supra* note 2 (Plaintiffs' expected burdens of "proving that the data breach led to injury to the class" infected negotiations.)

But when parties jointly sought approval of this sprawling nationwide class action, the district court accepted Plaintiffs' proposed orders "verbatim" (App., *infra,* 26a), with no jurisdictional review. Plaintiffs' urge to avoid Article III problems "does not relieve courts of their responsibility to *independently* decide whether a plaintiff has suffered a concrete harm under Article III[.]" *TransUnion,* 141 S. Ct. at 2205 (emphasis added); *Frank,* 139 S. Ct. at 1046 (same). Instead, Rule 23 "must be interpreted in keeping with Article III constraints[.]" *Ortiz,* 527 U.S. at 849 (quoting *Amchem*, 521 U.S. at 613).

## CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190 (2021).

Respectfully Submitted.

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