No.

IN THE

Supreme Court of the United States

ROCKET MORTGAGE, LLC, ET AL.,

Petitioners,

v.

PHILLIP ALIG, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The plaintiff class here was awarded nearly $10 million in statutory damages without establishing that any unnamed class member was injured. The class members claimed that the defendants committed a procedural error in how they ordered home appraisals. The Fourth Circuit acknowledged that the record was "devoid of evidence" that the supposed error actually affected any of the unnamed class members or the accuracy of their appraisals. By a divided vote, the panel nevertheless affirmed the class certification and the class-wide statutory-damages award, because the class members all faced the same *risk* of harm: the appraisers had been "exposed" to the supposed procedural error, and the class members paid for the appraisals, even though the court "cannot evaluate whether" any harm ever materialized.

The questions presented are as follows:

1. Whether basing Article III standing to seek damages on a mere risk of harm, without evidence that the harm ever materialized, is inconsistent with this Court's holding just a few months later in *TransUnion LLC v. Ramirez.*

2. Whether purchasing a product or service automatically creates a "financial injury" cognizable under Article III, even if the product or service provided precisely the benefit the consumer bargained for.

3. Whether a class can be certified (or remain certified) when many class members suffered no Article III injury.

PARTIES TO THE PROCEEDING

Petitioners, and defendants-appellants below, are Rocket Mortgage, LLC (formerly known as Quicken Loans, LLC and Quicken Loans Inc.)* and Amrock, LLC (formerly known as Amrock, Inc. and Title Source, Inc.).

Respondents, and plaintiffs-appellees below, are Phillip Alig, Sara J. Alig, Roxanne Shea, Daniel V. Shea, and a class of 2,759 "West Virginia citizens who refinanced mortgage loans with Quicken [Loans], and for whom Quicken [Loans] obtained appraisals through an appraisal request form that included an estimate of value of the subject property" between 2004 and 2009.

RULE 29.6 STATEMENT

Rocket Mortgage, LLC is a subsidiary of RKT Holdings, LLC. No publicly held company owns 10% or more of Rocket Mortgage, LLC.

Amrock, LLC is a subsidiary of Amrock Holdings, LLC, which is a subsidiary of RKT Holdings, LLC. No publicly held company owns 10% or more of Amrock, LLC.

* Quicken Loans, LLC changed its name to Rocket Mortgage, LLC on August 1, 2021.

RELATED PROCEEDINGS

This case arises from the following proceedings:

Alig v. Quicken Loans Inc., Nos. 12-cv-114 and 12-cv-115 (N.D. W. Va. Dec. 15, 2018)

Alig v. Quicken Loans Inc., No. 19-1059 (4th Cir. Mar. 10, 2021)

Previous appeals in this case were resolved as follows:

Quicken Loans Inc. v. Alig, Nos. 12-342, 13-1073, 13-1077 (4th Cir. Dec. 19, 2013)

Quicken Loans Inc. v. Alig, No. 16-9312 (4th Cir. July 12, 2016) (denial of Rule 23(f) petition)

The case was removed from state court, where it was filed under the following caption:

Alig v. Quicken Loans Inc., Nos. 11-C-428 and 11-C-430 (W. Va. Cir. Ct. Ohio County)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Rocket Mortgage, LLC and Amrock, LLC respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet.App.1a-75a) is reported at 990 F.3d 782. The district court's decision granting summary judgment and class certification (Pet.App.76a-147a) and its decision denying class decertification and awarding class-wide statutory penalties (Pet.App.148a-232a) are not published in the *Federal Supplement* but are available at 2016 WL 10489897 and 2017 WL 5054287, respectively.

JURISDICTION

The court of appeals entered judgment on March 10, 2021. A petition for rehearing was denied on April 20, 2021 (Pet.App.233a-234a). The time within which to file a petition is extended to September 17, 2021, under this Court's COVID-19-related order of July 19, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reprinted in the Appendix, *infra*, at 237a-240a.

INTRODUCTION

Private individuals cannot recover money damages in federal court if they have suffered no injury. That rule applies with equal force in class actions: a federal court cannot award money damages to *thousands* of private individuals who have suffered no injury. Yet a divided panel of the Fourth Circuit has broken both those rules, affirming a $10 million class judgment even while openly admitting it had no idea whether any class member was actually harmed.

Respondents applied to refinance their home-mortgage loans with Quicken Loans (now called Rocket Mortgage) and, as part of the application, estimated their homes' value. Petitioners arranged to have the homes appraised by independent appraisers. Following then-routine industry practice, petitioners included respondents' estimates on the appraisal-request forms, which helped the appraisal companies to assign the jobs to appraisers with the right expertise and price the jobs based on the complexity of the work involved. As the Fourth Circuit admitted, there was no evidence that sharing this information with appraisal companies actually affected any appraisals conducted for the nearly 3,000 unnamed class members. Indeed, Judge Niemeyer emphasized in dissent that sharing the information harmed respondents "*not one iota.*" Pet.App.52a. But the panel majority nonetheless held that every unnamed class member has standing to recover a $3,500 statutory penalty from petitioners—even if petitioners caused them no harm.

To the panel majority, it was enough if appraisal companies were "exposed" to respondents' estimates, because it *could* have affected some appraisals, which *could* have allowed some homeowners to borrow more than their house was worth, which *could* eventually have harmed the borrowers if, for example, they defaulted. But as this Court made clear soon after the Fourth Circuit's opinion, in a money-damages case an unrealized risk of injury will not do. Standing to seek damages must be based on *actual* injury. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211 (2021). And here respondents, realizing that submitting individualized proof would impede class certification, provided no evidence that the challenged practice actually injured any unnamed class member. At a minimum, therefore, this Court should vacate and remand for reconsideration in light of *TransUnion*. But the Fourth Circuit's errors do not stop there. They have created one circuit conflict and exacerbated another.

First, the Fourth Circuit held that respondents could establish "financial injury" simply because they paid for appraisals—whether or not petitioners' process for ordering appraisals actually affected the accuracy or value of respondents' appraisals in any way. Every other circuit to consider this question has reached the opposite conclusion: buying a product does not confer automatic "pocketbook" standing to sue over actions that do not lessen the value of the product.

Second, the Fourth Circuit affirmed class certification even though thousands of unnamed class members lack standing. As the Court recognized in *TransUnion*, courts are split over whether, and to what extent, a class can be certified if it sweeps in a large number of uninjured plaintiffs. The time has come for this Court to resolve that question, and this case provides an excellent vehicle.

Whether the Court opts for a GVR or plenary review, it should not leave this "fundamentally unjust" decision in place. Pet.App.52a (Niemeyer, J., dissenting).

STATEMENT

Respondents won summary judgment, and nearly $10 million in statutory damages, without establishing any harm to the class members. The court of appeals acknowledged the lack of evidence of harm—but upheld the class certification and statutory-damages award anyway.[1]

A. Mortgage lenders commission appraisals by independent professionals.

When a borrower wishes to refinance her mortgage—*e.g.*, to consolidate debt, obtain a fixed or lower interest rate, or obtain cash for renovations—she generally completes a Uniform Residential Loan Application ("URLA").[2] The form asks for a variety of information, such as the borrower's income, debts, and assets; the requested loan amount; and the borrower's lay estimate of her home's value ("borrower's estimate of value" or "BEV"). C.A.App.205. Lenders use that information to determine eligibility for credit and identify particular loan programs and terms. Pet.App.55a (Niemeyer, J., dissenting). The URLA

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[1] Because respondents prevailed on summary judgment, the record must be read in the light most favorable to petitioners.

[2] For an exemplar of a URLA form, see https://singlefamily.fanniemae.com/media/15171/display.

informs the borrower that the information may also be used by the lender's "agents" and "servicers." *Id.*

Lenders use appraisals to assess the value of the property securing the loan. The lender arranges the appraisal because the appraisal protects the lender: if a borrower takes out a loan that exceeds her home's value, "it is not the borrower but the bank that typically is disadvantaged," because if the borrower defaults, the collateral would not adequately secure the loan. *McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 280 (4th Cir. 2016).

Appraisers generally are not employed by the lender. They are independent, state-licensed professionals obliged to perform their work with "impartiality, objectivity, and independence." C.A.App.256. On every appraisal, the appraiser certifies (subject to federal criminal penalties) that the appraisal was based on the appraiser's "own personal, unbiased, and professional analysis"; not "conditioned on any agreement or understanding" about what value to return; and prepared "in accordance with the requirements of the Uniform Standards of Professional Appraisal Practice" ("USPAP") issued by the Appraisal Standards Board. *E.g.*, C.A.App.211-212. West Virginia law treats USPAP as the applicable professional standards. *See* W. Va. Code § 31-17-8(m)(8).

Before 2009, it was a common, industry-wide practice for lenders to include borrowers' estimates of value from URLAs on appraisal-request forms. Pet.App.4a. Providing this information to appraisal companies helped them to price the appraisal job and match it with an appraiser who had the appropriate licensure and experience. *Id.*; C.A.App.471-474, 933.

USPAP expressly recognized throughout the class period that appraisers could *learn* the borrower's home-value estimate without violating their duty to render impartial, objective, and independent appraisals. Pet.App.4a, 55a; C.A.App.257. Indeed, for a home purchase (as opposed to a refinance), appraisers were *required* to learn the sale price, which likewise reflects a borrower's view of the property's market value. C.A.App.257.

In 2009, the rules changed. Market participants and regulators adopted the Home Valuation Code of Conduct, which for the first time prohibited lenders from providing estimated values to appraisers in connection with refinance loans. C.A.App.378-379. For purchase loans, however, appraisers may still receive the contract price. Pet.App.6a n.4.

Petitioners handled borrowers' estimates as the rest of the industry did. Before the 2009 rule change, Quicken Loans transmitted information from borrowers' URLA forms to an affiliate, Title Source, Inc. ("TSI," now called Amrock). C.A.App.378. TSI automatically generated appraisal-request forms using that information, including BEVs. TSI sent those forms to appraisal companies, which assigned the appraisals to experienced, licensed appraisers in the part of West Virginia where each property was located. C.A.App.378, 471-474, 935-936.

All of the appraisers who provided evidence in this case—including respondents' experts—testified that their appraisals were developed independently, rather than based on borrowers' estimates on appraisal-request forms. C.A.App.344, 347-348, 353-354, 358, 364-365, 373-375. That testimony confirmed what each appraiser had already certified on each appraisal: that it was "unbiased" and not "conditioned on any agreement or understanding." C.A.App.211; p. 5, *supra*. Appraisers know that a borrower's estimate is just that—"what somebody thought the property was worth" and "not necessarily what it was" worth. C.A.App.353-354. Indeed, some appraisers completed their valuations without even *seeing* the BEV that had been sent to their appraisal company. C.A.App.1052, 1059-1060.

After the 2009 rule change, petitioners changed their practice nationwide and omitted borrowers' estimates from appraisal-request forms in accordance with the new rule. This case concerns only the period before the change.

B. Respondents successfully refinance with Quicken Loans.

The named respondents are two couples who successfully refinanced their home-mortgage loans with Quicken Loans to lower their monthly debt payments and interest rates. C.A.App.323. They submitted URLAs that included their estimates of their homes' values. Because they refinanced in 2007 and 2008, before the rule change, their estimates were included on appraisal-request forms TSI sent to local appraisal companies. C.A.App.379. But neither couple has ever said that they would not have refinanced had they known that fact. To the contrary: both couples lowered their payments and expressed complete satisfaction with their experience.

The Aligs had purchased their home in 2003, for \$105,000. Pet.App.57a (Niemeyer, J., dissenting). Their 2007 URLA estimated the home's value as

$129,000. Pet.App.8a. The Sheas had purchased their home in 2006, for $149,350. C.A.App.199. In 2008, their estimated value was $175,000. C.A.App.935.

As part of their loan applications, both couples submitted a deposit and signed an "Interest Rate Disclosure and Deposit Agreement," which provided that the deposit amount would be credited "toward the cost of your appraisal and credit report" at closing. C.A.App.381-382. A separate section cautioned that Quicken Loans "can't be responsible for delays in loan approval or closing due to … untimely receipt of an acceptable appraisal." *Id.*

The appraisers who evaluated the named respondents' homes both testified that they were not influenced by seeing the borrowers' estimates on the order forms. The Aligs' appraiser said he "never let [BEVs] affect [him]" or "impact anything that [he]" did. C.A.App.353-354, 358. Likewise, the Sheas' appraiser testified that borrowers' "assum[ptions]" of what their "house is worth" was "irrelevant" to his appraisals. C.A.App.344. He said "[i]t didn't matter to [him] one inkling" whether his appraisal corresponded with the BEV. C.A.App.347-348.

Indeed, both appraisal values came in below the borrowers' estimates. The Sheas' property appraised at $158,000—$17,000 below the BEV on the appraisal-request form. Pet.App.58a (Niemeyer, J., dissenting); C.A.App.935. The Aligs' appraiser initially valued their property at $122,500. Pet.App.8a. TSI asked the appraiser to "revisit [the] appraisal" in light of recent "comps," which included nearby sales of homes for $124,000 and $132,000. Pet.App.58a (Niemeyer, J., dissenting); C.A.App.671. Based on the additional data, the appraiser raised his appraisal value $3,000, to $125,500—still below the Aligs' estimate. C.A.App.671. Requests like that were relatively rare. *Id.*

The Aligs obtained a refinance loan for $112,950 at a fixed interest rate of 6.25%. They used the proceeds to pay off two consumer loans with higher interest rates, thereby lowering their monthly debt payments by $480. C.A.App.200-201. The Aligs gave Quicken Loans a 5-out-of-5 rating in their post-closing survey, indicating that their experience was "excellent" and that they were "likely to recommend [Quicken Loans] to a friend." C.A.App.273. Four years later, the Aligs again refinanced with Quicken Loans, further lowering their interest rate to 4.5%. C.A.App.274.

The Sheas obtained a refinance loan for $155,548 at a fixed interest rate of 6.625%, which consolidated one mortgage loan with a balloon-interest provision and a second mortgage loan with a 12.4% interest rate. C.A.App.199, 272. Like the Aligs, the Sheas gave Quicken Loans "excellent" (5-out-of-5) ratings. C.A.App.272. Seven years later, the Sheas sold their home for $165,000. C.A.App.272.

C. Respondents file a class action over the practice of sending borrowers' estimates to appraisal companies.

After the rules changed in 2009, respondents sued Quicken Loans and TSI. They claimed that providing borrowers' estimates to an appraiser (without specifically disclosing the practice) had been "unconscionable" *even before the rule change*, during the period when it was expressly allowed under USPAP.

1. Primarily relevant here, respondents asserted that Quicken Loans' sharing of BEVs "unconscionably induced" them to enter into loan agreements, in violation of a provision of the West Virginia Consumer Credit and Protection Act ("WVCCPA"). They sought class-wide statutory penalties for each appraisal-order form that included a borrower's estimate. Pet.App.10a.[3] Among other claims, they also asserted that Quicken Loans breached a duty to provide a "fair and unbiased appraisal" that they claimed arose from their interest disclosure. Pet.App.9a, 60a.

Respondents sought to certify a class of 2,769 West Virginians "who refinanced mortgage loans with Quicken [Loans]" before the 2009 rule change "and for whom Quicken [Loans] obtained appraisals through an appraisal request form that included an estimate of value of the subject property." Pet.App.135a.[4] The class was not limited to borrowers whose appraisers saw or were influenced by BEVs; whose appraisals were actually inflated; who took out loans greater than the value of their homes; who sold their homes at a loss or experienced foreclosure; whose refinances resulted in higher interest rates or monthly payments; or who were negatively impacted by the refinance in any way. In other words, the class was not limited to those *who were harmed by* the challenged practice; it included borrowers who received accurate appraisals, saved mon-

[3] Respondents also asserted that TSI was derivatively liable. Pet.App.50a.

[4] Respondents proffered only the Aligs as class representatives; the Sheas are class members.

ey by refinancing, and declared themselves wholly satisfied.

2. The district court granted respondents summary judgment on liability and certified the plaintiff class. Pet.App.76a-147a.

Liability.—The court first held that providing BEVs to appraisers—an industry-wide practice that USPAP allowed at the relevant time—without disclosing that practice to borrowers constituted "unconscionable inducement" in violation of the WVCCPA. Pet.App.99a-100a, 136a. The court held that respondents were entitled to summary judgment even though they had offered no evidence that the practice affected each borrower's appraisal, influenced borrowers' decisions to refinance, or caused any harm to borrowers at all. The court reasoned that WVCPPA claims provide statutory damages even where actual harm is "not present." Pet.App.102a.

The court then held that the same conduct was a breach of contract. Pet.App.102a-105a, 136a. The court interpreted language in the disclosure provided to respondents—stating that Quicken Loans could not be responsible "for delays in loan approval or closing due to …. the untimely receipt of an acceptable appraisal"—as creating a contractual duty to provide borrowers with "an acceptable appraisal." Pet.App.103a-104a. The court thought that providing the BEV to an appraiser rendered the subsequent appraisal *per se* un-"acceptable," beyond factual dispute. *Id.*

Class certification.—The court concluded that the case could be resolved on a class basis because "[i]f

Quicken [Loans] violated the law"—and the court had already determined that sharing borrowers' estimates with appraisers was a *per se* violation of the WVCCPA and breach of contract, even when it harmed no one—all that remained was "to award statutory damages and set an amount." Pet.App.122a.

At about the same time as the district court's decision, this Court decided *Spokeo, Inc. v. Robins*, holding that "even in the context of a statutory violation," plaintiffs must have "a concrete injury," which "must affect [them] in a personal and individual way." 136 S. Ct. 1540, 1548, 1549 (2016) (citation omitted). Although the district court refused to allow targeted discovery about whether borrowers' appraisals were actually inflated or class members were actually harmed, C.A.App.452, 460, petitioners had developed evidence demonstrating that many class members had not suffered any concrete injury-in-fact.

Petitioners showed that unharmed class members were the norm, not the exception. Respondents' theory was that Quicken Loans shared borrowers' estimates to inflate appraisal values (contrary to the appraisers' unanimous testimony, pp. 6-7, 8, *supra*) and produce larger loans. But the record refuted that theory. Nearly half the appraisals on class loans (1,360) came in *below* the BEV, sometimes (as with the Sheas') significantly below. C.A.App.964, 969. And in numerous cases, Quicken Loans *reduced* loan amounts to accommodate unexpectedly low appraisals that did not support the requested amount—and denied borrowers' requests for re-appraisals in hopes of getting higher values. *See, e.g.*, C.A.App.989, 1016, 1026, 1028, 1037, 1040.

Petitioners also showed that whether the *appraisals* were high, low, or just right, the loans themselves did not harm class members. Rather, class members overwhelmingly benefitted from reducing their overall indebtedness, monthly payments, and/or interest rates—such as the Sheas' elimination of the 12.4% second mortgage and the adjustable interest rate on their first mortgage. C.A.App.1044, 1046. Indeed, after judgment on the statutory-damages claim, class members had the right under the WVCCPA to seek actual damages. Only two besides the Aligs did so (out of nearly 3,000).[5] One class member not only declined to pursue actual damages, he opted out of the class *after* summary judgment and declined statutory damages, explaining that "[t]he new loan terms saved [him] a significant amount of money," and it would not be "fair to punish Quicken Loans" after it "had been a pleasure to work with" and "saved [him] so much money." C.A.App.487-489.

Arguing that all class members must have standing, petitioners moved to decertify the class. The district court denied that motion, holding that "if a class representative has standing, the case is justiciable and the proponent of the class suit need not demonstrate that each class member has standing." Pet.App.178a (citation omitted). Alternatively, the court held that class members need not have been injured because the state legislature had made their claims "legally cognizable." Pet.App.180a-183a.

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[5] Those claims for actual damages were resolved and dismissed by stipulation. C.A.App.604, 610, 616.

3. The district court awarded respondents $3,500 per loan in statutory damages.[6] It also awarded a refund of the entire appraisal fee as "restitution" on respondents' contract claim. The judgment totaled more than $10 million. Pet.App.207a, 232a.

4. A divided panel of the Fourth Circuit largely affirmed. Pet.App.1a-75a.

The court acknowledged the lack of any evidence of class-wide harm caused by the challenged BEV-sharing practice. For example, the court noted testimony from appraisers that BEVs did not influence them. Pet.App.4a, 41a. It also noted that even if BEVs *had* influenced appraisers "some of the time" (Pet.App.43a), there may have been no damages if, "for example," "a borrower's estimate of value was accurate," (Pet.App.18a-19a, 24a). And, as the court noted, the record was "devoid of evidence" about "whether the appraisals for most class members were inflated." Pet.App.41a n.22. The court further acknowledged that refinancing may have benefited class members, not harmed them. Pet.App.15a. But it held that the lack of harm created no barrier to recovery under the WVCCPA, which permits statutory damages without any showing of harm. Pet.App.17a-18a, 45a.

The court also acknowledged the lack of harm to many class members in remanding the contract claim. The court found a contractual duty to "obtain a fair, valid and reasonable appraisal of the proper-

[6] At the time, the statute specified a civil penalty of $100 to $1000, but the range was indexed for inflation. W. Va. Code §§ 46A-5-101(1), -106 (1996).

ty,"[7] but held that respondents needed to show damages as well as breach of that duty. Pet.App.28a (citation omitted). It recognized that class members might have suffered no damages if their "appraisals would have been the same whether or not the appraisers were aware of the borrowers' estimates of value." Pet.App.24a.

Even as it recognized the absence of evidence that unnamed class members suffered any harm, the panel majority affirmed class certification and rejected petitioners' argument that many class members lacked standing. Pet.App.13a-16a. The court held that all class members had Article III standing simply because they paid money to obtain appraisals. Pet.App.14a, 15a n.9. Although all class members received the appraisals they paid for, and those appraisals served their purpose by enabling class members to refinance their mortgage loans, the majority opined that those appraisals were somehow "tainted when [petitioners] exposed the appraisers to the borrowers' estimates of value." Pet.App.14a. Thus, even though the borrowers' estimates concededly may not have affected the appraisers or the appraisals at all, p. 14, *supra*, the court held that the appraisers' mere "expos[ure]" to those estimates was enough to establish "financial harm," and therefore standing, for every class member. Pet.App.14a.

5. Judge Niemeyer dissented. He would have ordered summary judgment for petitioners. Pet.App.70a, 73a.

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[7] The court did not adopt respondents' theory or the district court's theory of a breached duty to obtain an "acceptable appraisal," but formulated a new contract theory on its own.

Judge Niemeyer emphasized that there was "no evidence that the appraisers on these loans were influenced by the borrowers' estimates or that any kind of fraud was committed." Pet.App.53a. Likewise, "there [wa]s simply no evidence that if [borrowers] had been made aware of [the inclusion of BEVs on appraisal-request forms], they would not have proceeded with the transactions on the same terms." Pet.App.53a. To the contrary, respondents "received exactly what they had bargained for and … were highly satisfied with the transactions." Pet.App.52a. He characterized the majority's "startling" decision to punish Quicken Loans for conduct that was commonplace, lawful, and harmless as "fundamentally" and "palpably unjust." Pet.App.52a, 75a.

6. The court of appeals denied rehearing but stayed the mandate pending the disposition of this petition. Pet.App.233a-236a.

REASONS FOR GRANTING THE WRIT

To establish standing to seek damages, plaintiffs must demonstrate that the defendants' conduct *actually injured them* in a concrete and particularized way. As this Court most recently put it: "No concrete harm, no standing." *TransUnion*, 141 S. Ct. at 2200. And a risk of future harm that does not materialize and causes no injury is not enough to support a claim for damages. *Id.* at 2211.

The decision below cannot be reconciled with *TransUnion*, which clarified standing's injury-in-fact requirement shortly after the Fourth Circuit denied rehearing. The court of appeals held that respondents were injured because appraisers were "exposed … to the borrowers' estimates." Pet.App.14a. But as

TransUnion has since made clear, the mere risk that such an "exposure" *could have resulted* in an inaccurate appraisal does not establish standing to seek damages. And as the Fourth Circuit admitted, besides that "exposure," "[t]he record is devoid of evidence" of any class-wide effect on appraisers. Pet.App.41a n.22. Likewise, the record did not establish that any class member was harmed by an inaccurate appraisal. Where there is no evidence of *actual* harm, evidence of *potential* harm will not do.

The clear conflict with *TransUnion* warrants vacatur and remand, at a minimum. But this case merits plenary review, because it presents two substantial questions over which the circuits are split.

First, the Fourth Circuit evaded Article III's injury-in-fact requirement by recasting the class members' unrealized risk of harm as a "financial" injury. It reasoned that class members must have been denied the full benefit of the appraisals they paid for because of petitioners' practice of sharing BEVs with appraisal companies. Pet.App.13a-16a & n.9. Other circuits have rejected indistinguishable claims that anyone who pays money has standing. Those circuits require plaintiffs to *establish*, and not just speculate or suppose, that the defendants' conduct actually rendered the purchased product worthless, or less valuable. Where the plaintiff gets what she paid for, the defendant has caused her no injury, financial or otherwise, and there is no standing. The Fourth Circuit's expansive view of "financial" harm, which sweeps in all consumers who purchased a product or service simply because they made that purchase, creates a clear circuit split.

Second, because the certified class demonstrably includes an overwhelming proportion of uninjured class members, this case offers the Court the opportunity to finally resolve the question it left open most recently in *TransUnion*: whether a significant number of class members who lack standing precludes class treatment.

These issues have broad significance. Class actions seeking statutory damages are common. Reasoning like the Fourth Circuit's allows Rule 23 to circumvent Article III—awarding millions in penalties to thousands of plaintiffs who could not sue on their own because they suffered no injury traceable to the defendant. Under the Fourth Circuit's reasoning, individualized evidence of standing is never required; anyone who bought something—it does not even have to be from the defendant—is welcome to join the class. That contravenes Article III, the Rules Enabling Act, and the common-sense principle that federal courts award damages only to plaintiffs whom the defendant injured.

This Court should grant certiorari.

I. The Court should grant, vacate, and remand in light of *TransUnion*.

The decision below is irreconcilable with this Court's subsequent decision in *TransUnion*. Because of the undisputed evidence that borrowers' estimates *did not* affect appraisers or appraisals, the only way the Fourth Circuit could affirm both class certification and summary judgment for respondents was to hold that appraisers' mere *potential exposure* to borrowers' estimates created a common class-wide injury. That is exactly what *TransUnion* forbade: standing to sue for damages must be based on past injury, not a past *risk* of injury. This Court should therefore GVR in light of *TransUnion*.

A. In *TransUnion*, only a minority of the class was actually injured as a result of the defendants' conduct; a majority claimed only that they *could* have been injured at any moment. The first group had standing to recover statutory damages; the second did not.

The plaintiff class sued under the Fair Credit Reporting Act, alleging that TransUnion "failed to use reasonable procedures to ensure the accuracy of their credit files." 141 S. Ct. at 2200. All 8,185 class members had information in their TransUnion credit files wrongly suggesting that they might be on a watch list of individuals who threaten national security. But for 6,332 of the class members, TransUnion apparently did not send the misleading credit reports to any potential creditors during the class period. *Id.* at 2200-2202, 2209-2210.

This Court held that those 6,332 class members lacked standing to recover statutory damages for TransUnion's violation of the statute's procedural requirements. The plaintiffs contended that these class members had standing because they were "exposed … to a material risk that the information would be disseminated … and [would] thereby cause them harm"; indeed, they claimed "that TransUnion could have divulged their misleading credit information to a third party at any moment." *Id.* at 2210, 2212. This Court rejected that argument, holding that standing to seek *damages*—as opposed to an injunction—cannot be based on a past risk of harm that never materialized. *Id.* at 2210-2211. The

Court noted that sometimes exposure to risk will itself cause injury, such as emotional distress. *Id.* at 2211. But a plaintiff cannot claim injury from the never-realized risk "when the plaintiff did not even know that there was a risk of future harm." *Id.* at 2212.

As the Court explained, someone who drives home near a recklessly swerving motorist faces a *risk* of harm. But if she arrives safely at home without incident—the risk of harm having never materialized—she has no standing to sue the dangerous driver for damages. *Id.* at 2211. The Court held that the 6,332 class members were like the woman who arrived at home safely: they were not injured and had no standing. *Id.*

B. Respondents' claims are strikingly similar to the claims of the uninjured plaintiffs in *TransUnion*. Respondents assert that, by "expos[ing]" appraisers to borrowers' estimates without specifically disclosing the practice to borrowers, Quicken Loans "tainted the appraisal process" and created a risk that the appraisers' home valuations would be inflated. Pet.App.14a, 30a. Respondents contend that an inflated appraisal, in turn, could lead to harm to borrowers: if they borrow more than the property is worth, they may be left "upside down," unable to refinance or sell the home. Resp. C.A. Br. 7-8. The same could have been said in *TransUnion*: the credit file was "tainted" and *could* lead to harm.

But like the uninjured plaintiffs in *TransUnion*, respondents provided *no* evidence that any of these risks actually materialized for any unnamed class members, much less all of them. Every appraiser denied being influenced by borrowers' estimates. *See* pp. 6-7, 8, *supra*. Some did not even *see* the borrower's estimate before appraising the property. C.A.App.1052, 1059-1060. And nearly half of the appraisals came in below the borrower's estimate—sometimes *well* below. C.A.App.964, 969. The Fourth Circuit *presumed*—baselessly—that at least "some of the time" appraisers could have been "subconsciously" influenced "without [their] realization" if they were exposed to borrowers' estimates. Pet.App.42a, 43a, 48a.[8] But the court acknowledged that the record was "devoid of evidence" about the actual home values for absent class members, and that even if *some* appraisers treated BEVs as targets, the appraisals might well have been unaffected where the borrower's estimate was accurate. Pet.App.24a, 41a n.22. Respondents could have tried to fill that hole in their case by re-doing each class member's appraisal retrospectively, as they did for the Aligs' appraisal, Pet.App.8a. But they did not—presumably because relying on such individualized evidence would impede class certification.

Moreover, even if the court's speculation about potential harm to the *appraisal process* were correct, the Fourth Circuit identified no harm that *actually* materialized for any *borrower* as a result of an inaccurate appraisal. For example, respondents identified no class member who was unable to sell or refinance because she was "upside down" on her mortgage. The Aligs soon refinanced with Quicken Loans

[8] Standing cannot be "presume[d]," especially at summary judgment. *Swanson Group Mfg. LLC v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015) (citation omitted). Similarly, "courts must certify class actions based on proof, not presumptions." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020).

again and the Sheas sold their home for a value above the 2008 appraisal. C.A.App.272, 274. As Judge Niemeyer explained, petitioners' conduct "harmed the Aligs and Sheas *not one iota*." Pet.App.52a.

In the absence of any evidence that appraisals were inflated or inaccurate, or that an inaccurate appraisal caused any borrower any harm, at most the Fourth Circuit identified a *risk* of harm from including borrowers' estimates on the appraisal-request form—a risk that never became a reality. And *TransUnion* confirmed that a past risk of harm is not enough for standing to seek damages. Here, nobody was hit by the equivalent of *TransUnion*'s swerving motorist. 141 S. Ct. at 2211.[9]

TransUnion makes clear that at least a substantial portion of the class has suffered no injury-in-fact. And because there is no evidence of actual harm for *any* unnamed class member, the Fourth Circuit's reliance on this incorrect theory requires a GVR at a minimum. Indeed, because the Fourth Circuit's error is so clear in light of *TransUnion*, this case is a particularly well-suited vehicle for addressing the standing and class-certification questions on which the circuits are split, as discussed below.

[9] Respondents never attempted to argue that they were emotionally or psychologically distressed by being *exposed* to a risk of harm—the one exception *TransUnion* contemplated. 141 S. Ct. at 2211 n.7. And *TransUnion* separately refutes the alternative "disclosure" or "informational injury" on which the district court relied. *See* Pet.App.181a-182a. There are no "downstream consequences" of the sort this Court insisted on. *TransUnion*, 141 S. Ct. at 2214 (citation omitted).

II. The decision below creates a circuit split about what constitutes "financial injury" cognizable under Article III.

The decision below creates a circuit split about whether the purchase of a product or service, standing alone, automatically confers "financial" standing to sue over procedural failures, even when the purchaser got exactly what she expected and experienced no harm. The panel majority held that simply because respondents "actually paid for the appraisal[s]," they experienced "financial injury" and could claim statutory damages for purported violations of appraisal *procedure* that supposedly "tainted" the appraisals. Pet.App.14a-15a & n.9. That holding impermissibly recasts procedural injuries as pocketbook injuries, and every other court to have considered this automatic standing-by-purchase rule has rejected it, for good reason: it runs headlong into Article III's concrete-injury requirement. Combining "a conclusory assertion of money lost with a request that a defendant pay up … doesn't suffice." *Thorne v. Pep Boys Manny Moe & Jack Inc.*, 980 F.3d 879, 886 (3d Cir. 2020) (citation omitted). This clear circuit conflict warrants this Court's review.

A. Plaintiffs seeking statutory damages have frequently attempted to recast an unrealized risk of harm as present-day "financial" or "economic" injury, contending that spending money to buy a product or service *is itself* economic injury, irrespective of whether that product or service was actually defective or caused any harm. But all federal appellate courts—until this case—have rejected such a transparent attempt to circumvent Article III's concreteness requirement.

The Third Circuit has addressed (and rejected) this standing theory repeatedly, most recently in *Thorne*. There, the defendant tire dealer allegedly failed to help register customers' new tires with the manufacturer, as required by federal law. *Id.* at 883. But that procedural failure caused Thorne no injury, so she tried to "characterize[] her tire purchase as an economic injury" to satisfy Article III. The Third Circuit rejected that argument. In substance, Thorne was alleging potential harm based on "uncertain future events": *if* there were a manufacturing defect, and *if* the manufacturer contacted registered customers, then the manufacturer's inability to contact her *could* lead to her continuing to drive on recalled tires, which *could* lead to a crash. *Id.* at 886-887, 893. But those "uncertain future events do not make her Pep Boys tires worth less at the time of purchase than equivalent registered tires." *Id.* at 887. Just because Thorne paid for the tires does not mean that the dealer's *procedural* failure to follow the registration requirement was an economic injury. It was Thorne's burden to show some impact on the price other than "pure conjecture." *Id.* (citation omitted).

The court reached the same conclusion in *In re Johnson & Johnson Talcum Powder Products Marketing Sales Practices & Liability Litigation*, 903 F.3d 278 (3d Cir. 2018). A consumer had purchased baby powder that allegedly could lead to an increased risk of cancer, but it caused her no harm and functioned precisely as labeled. *Id.* at 282. As in *Thorne*, the court rejected the plaintiff's efforts to recast what was really an unrealized risk of harm as "economic injury." Noting that she had not alleged "that the economic benefit she received from that powder was *anything* less than the price she paid," the court said that "in order to seek monetary damages," she would have to "do more than simply characterize her purchases as economic injuries." *Id.* at 290, 291.

The Ninth Circuit has likewise rejected the argument that the mere fact of purchasing a product or service that operates as intended creates "financial," or "economic," injury. In *McGee v. S-L Snacks Nat'l*, 982 F.3d 700 (9th Cir. 2020), a consumer claimed that the use of trans fats in Pop Secret popcorn placed her at risk of heart disease and other illnesses. *Id.* at 704. She did not allege that she *had* suffered any related illness; instead, she alleged that she "suffered an economic injury" from the fact of buying popcorn tainted by trans fats. The court rejected her effort to recast an unrealized risk of injury as a present-day economic one, because there was no allegation that the popcorn was worth objectively less than she paid for it. *Id.* at 706-707; *see also Birdsong v. Apple, Inc.*, 590 F.3d 955, 961 (9th Cir. 2009) (rejecting claim of standing based on "economic harm" where the plaintiffs did not identify any particular "agreed-upon benefit" they were deprived of).

Even in cases where plaintiffs seek to establish economic harm based on an "overpayment" theory, courts reject standing arguments premised on speculation and supposition—they require *actual proof* (or, at the pleading stage, specific allegations) that the plaintiff *would have paid less* or *would not have made the expenditure at all* absent the defendants' unlawful conduct. *Compare Cahen v. Toyota Motor Corp.*, 717 F. App'x 720, 723-724 (9th Cir. 2017) (plaintiffs who offered only "conclusory allegations that their cars are worth less" than they paid for them did not establish "economic injury" to complain that vehicles' security systems made owners more vulnerable to being hacked), *with Maya v. Centex Corp.*, 658 F.3d 1060, 1064-1065 (9th Cir. 2011) (home owners had standing to challenge builder's misrepresentations that allegedly caused high-risk buyers to purchase homes at inflated prices, ultimately resulting in foreclosures and a loss in the value of the plaintiffs' neighboring homes).

B. In no other circuit would the purchase of a product, standing alone, be enough to confer standing when the product caused no harm and operated as intended. In no other circuit can a plaintiff simply assert that the product was "tainted" or "worthless" and thereby give herself standing to sue for damages. Yet in the Fourth Circuit, plaintiffs need only claim that they "actually paid for the [product], and thus were injured." Pet.App.15a n.9.

Heightening the contrast, respondents here did not even offer *evidence* of the injury that other circuits require plaintiffs to *prove*. They offered no evidence that sharing BEVs *actually rendered* the appraisal worthless or less valuable; that the appraisals did not function as intended; or that they would have spent less for the appraisal or would have decided not to refinance had they known that petitioners followed industry practice in sharing borrowers' estimates with appraisal companies. To the contrary, the appraisals accomplished exactly what they were needed for—they enabled the refinance that each class member *sought and received*.

As the Third Circuit framed the issue in *Johnson & Johnson*, "Has a plaintiff—who has entirely consumed a product that has functioned for her as expected—suffered an economic injury solely because she now sincerely wishes that she had not purchased that product?" The answer was a resounding no—"buyer's remorse, without more, is not a cognizable injury under Article III." 903 F.3d at 280-281. Here, respondents offer even less. The class members "entirely consumed" the appraisals they purchased, along with the benefits that those appraisals afforded them (a loan refinance). Not one plaintiff—not even the Aligs or Sheas—testified or even alleged that they would have forgone refinancing had they known of petitioners' BEV-sharing practice.

The mere fact that plaintiffs paid money for appraisals does not supply the concrete injury-in-fact that Article III requires. The Fourth Circuit's contrary conclusion is not only wrong under Article III, it creates a clear circuit split that warrants this Court's review.

III. The Court should finally resolve the circuit split about whether a class may be certified where absent class members lack standing.

As established above, the district court awarded money—a lot of it—to class members who suffered no harm at all. But [e]very class member must have Article III standing in order to recover individual damages." *TransUnion*, 141 S. Ct. at 2208; *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross."). That much is clear from the Rules Enabling Act, which "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S.

338, 367 (2011) (quoting 28 U.S.C. § 2072(b)). Thus, "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring).

Because respondents here litigated to judgment without demonstrating injury to any unnamed class member, this case offers an excellent vehicle (and developed record) to address the issue left open in *TransUnion*: whether a widespread lack of standing among class members precludes class treatment. 141 S. Ct. at 2208 n.4. The circuits are intractably split on this question, and this Court's guidance is sorely needed.

A. The circuits have taken "divergen[t]" approaches to evaluating issues of standing with respect to absent class members. *In re Asacol Antitrust Litig.*, 907 F.3d 42, 56 (1st Cir. 2018); *see, e.g.*, *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 368 (3d Cir. 2015) (noting the split); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 524 (6th Cir. 2015) (same); *In re Deepwater Horizon*, 739 F.3d 790, 801 (5th Cir. 2014) (same).

1. Four circuits have held that a class action may proceed where some (or even many) absent class members lack standing.

The Third Circuit, for example, permits actions to proceed as a class "so long as at least one named plaintiff has standing," even if "unnamed, putative class members" do not. *Neale*, 794 F.3d at 362, 364. The court reasoned that requiring absent class members to have standing would fail to treat the certified class "as a legally distinct entity" and "eviscerate the representative nature of the class action." *Id.* at 364. Although the Third Circuit considers standing-related distinctions among class members to be relevant to commonality and predominance under Rule 23, *id.* at 368, absent class members who lack standing are not a deal-breaker. *See id.* at 371 (the existence of individual questions "does not *per se* rule out a finding of predominance" (citation omitted)).

The Seventh Circuit adopted a similar rule in *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009), considering it "almost inevitable" that a class would "include persons who have not been injured by the defendant's conduct," but deeming that no barrier to class certification. *Id.* at 677. The court has said that *Kohen*'s holding is not limitless— "a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (citation omitted). But it has expressly declined to define the boundaries of this vague standard, noting instead that "[t]here is no precise measure for 'a great many'" and that "[s]uch determinations are a matter of degree." *Id.*

The First and Eleventh Circuits agree, but they add an additional requirement—only class members who can show injury are permitted to actually *obtain* a monetary award. *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 19-21, 32 (1st Cir. 2015) (requiring some "mechanism for distinguishing the injured from the uninjured class members" at some point prior to judgment); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1274 (11th Cir. 2019) ("the district court will have to determine whether each of the absent class members has standing before they could be granted any relief").

2. Two circuits take the opposite approach: the Second and Eighth Circuits have unequivocally held that "no class may be certified that contains members lacking Article III standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *accord Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013).

3. Finally, two circuits have tried to have it both ways. The Fifth Circuit initially seemed to adopt the no-standing-no-problem approach, stating that "[c]lass certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct." *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009) (citing *Kohen*). But the court also said that there was "no serious question that the plaintiffs ha[d] standing" in that case. *Id.* at 302. A few years later, the court issued an opinion embracing the contrary position and citing *Denney*. *In re Deepwater Horizon*, 732 F.3d 326, 342 (5th Cir. 2013). But, as a later panel noted, that opinion ultimately represented the views of only a single judge—one panel member did not join that part of the opinion and another dissented. *See In re Deepwater Horizon*, 739 F.3d at 802. More recently, the court characterized its position as still undecided but noted the significance of the rule followed by the Second and Eighth Circuits. *See Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020). Although the court left the issue open, Judge Oldham, concurring, would have followed those holdings and held that class members' lack of standing precludes certification. *See id.* at 770-771.

In the Ninth Circuit, it has been a roller-coaster ride. Sitting en banc, the court initially said that so long as a single class member "has standing …, the entire federal class has standing." *Bates v. UPS*, 511 F.3d 974, 988 (9th Cir. 2007) (*en banc*). But *Bates* was primarily about injunctive relief, and the Ninth Circuit has not relied upon it in damages cases. Just five years later the court articulated the *Denney* rule, stating: "no class may be certified that contains members lacking Article III standing." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (citation omitted). But four years after *Mazza*, the court held that a class with some uninjured members "does not necessarily defeat certification of the entire class, particularly as the district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition"—essentially the approach of the First and Eleventh Circuits. *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016); *accord Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1023 (9th Cir. 2020) (each class member must establish standing "at the final judgment stage … to recover monetary damages"), *rev'd on other grounds,* 141 S. Ct. 2190 (2021). And earlier this year, the court embraced the Seventh Circuit's equivocal rule—stating that *not every* class member must have standing but that uninjured class members "must be *de minimis*" for the action to proceed as a class. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 792 (9th Cir. 2021). The Ninth Circuit has since vacated that opinion and *sua sponte* decided to rehear the case *en banc*. 5 F.4th 950 (9th Cir. 2021).

B. In short, the circuits are in disarray about the interaction between Article III and Rule 23. And trial courts, in turn, are adrift attempting to apply the various approaches in individual cases, as demonstrated by the district court's decision below. The district court here took the worst of all approaches—it believed that unnamed class members do not need standing, but that a federal court can *award thousands of dollars* to each uninjured class member without running afoul of Article III. Pet.App.178a-179a. That cannot be right.

As Judge Oldham noted in his *Flecha* concurrence, if Article III imposes limitations on a court's ability to adjudicate a plaintiff's claims, there is no reason "why these venerable principles would not apply with equal force at the class-certification stage." 946 F.3d at 770. After all, both the Federal Rules of Civil Procedure and the Rules Enabling Act make clear that Rule 23 "do[es] not extend … the jurisdiction of the district courts," Fed. R. Civ. P. 82, nor "enlarge or modify any substantive right," 28 U.S.C. § 2072. An absent class member invokes federal-court jurisdiction and seeks relief from that court (the only difference is that the absent class member is permitted by procedural rule to have her claim aggregated with others and decided without her participation), and therefore must show standing. She cannot use Rule 23 to circumvent that requirement. *Cf. Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976); ("That a suit may be a class action … adds nothing to the question of standing …."); *Allee v. Medrano*, 416 U.S. 802, 829 (1974) ("Standing cannot be acquired through the back door of a class action."). If anything, given the "transformative nature of the class-certification decision"—and the massive amount of settlement pressure created by the certification of a vast class—it is all the more important to "be particularly rigorous" about standing at the class-certification stage. *Flecha*, 946 F.3d at 770 (Oldham, J., concurring).

This Court has come close to settling the conflict on several occasions, but case-specific circumstances dissuaded it. In *Tyson Foods*, confronted with a certified class found to contain uninjured members, the Court decided that it "need not, and does not, address [this question]" because Tyson abandoned it at the merits stage. 577 U.S. at 460. And in *TransUnion*, the record already made clear which class members were injured and which were not; accordingly, once this Court held that an unrealized risk of harm did not constitute injury-in-fact, circuit precedent would preclude those uninjured plaintiffs from any financial recovery. *See* p. 31, *supra*.

But that posture is unusual. Most cases where the standing issue arises are more like this one, where the class is defined broadly enough to encompass uninjured members but the record does not show which members are uninjured. Because defendants are typically precluded from obtaining discovery from absent class members—as petitioners were here, C.A.App.452, 460—there is no workable "mechanism" for excluding uninjured class members from a financial recovery. *Nexium*, 777 F.3d at 19. Thus, the case-dispositive question is whether it was permissible to certify (or decline to decertify) a class broad enough to include the uninjured. This case provides the perfect opportunity to finally resolve this unsettled question.

IV. The questions presented are recurring and important.

The questions presented are significant and warrant this Court's review. Statutes like the one here—making available statutory damages without any showing of harm—regularly generate class actions in federal court.[10] But Article III requires that, before seeking to use the class-action device to generate big paydays for virtually any procedural violation, the plaintiffs must have standing. In light of the "exponential expansion of statutory damages through the aggressive use of the class action device," *Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring), clarity on these issues is particularly important.

The decision below takes this "exponential expansion" even further—no federal or state statute even made disclosing BEVs to appraisers a procedural violation. Instead, the courts below read that supposed rule into a state statute generally prohibiting "unconscionable" conduct. And they did so retrospectively, in essence penalizing petitioners for not anticipating the 2009 rule change before it happened.

The inclusion of uninjured class members only exacerbates problems with the class mechanism. Once an artificially large class is certified, the *in terrorem* effect is inescapable and the pressure to settle is enormous—even in a weak case. Fed. R. Civ. P. 23 advisory committee note (1988).

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[10] *See, e.g.*, *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007) (noting the proliferation of FDCPA litigation by consumers who suffered no harm).

That pressure is only magnified in cases where defendants must try the case against the "perfect plaintiff" who (like Mr. Ramirez in *TransUnion*) suffers injury—or worse yet, a composite plaintiff representing the worst experiences of individuals in the class—but then pay damages to thousands of class members who suffered no such injury. The United States considered this an important-enough concern that it filed an *amicus* brief in *TransUnion* urging the Court to recognize that "[i]f a plaintiff who suffered atypical injuries is permitted to represent a class, a jury might over- or under-value the impact that a defendant's conduct had on other class members, and accordingly set statutory damages at too high or low an amount." U.S. Br. at 31, *TransUnion*, No. 20-297. That is effectively what happened here. The Aligs came before the court alleging that an inflated appraisal left them with $13,000 more in mortgage debt than their property was worth. They (successfully) made the case for civil penalties at the "higher" end of the allowable range by making claims about the consequences that can flow from an overleveraged mortgage loan, such as "jeopardiz[ing] the American dream of homeownership." Pet.App.231a. But respondents never showed that these consequences had materialized for a single class member—not even the Aligs.

This case is an ideal vehicle to vet these issues, because the court of appeals' own explication of the factual record makes clear that—under any proper interpretation of Article III—a large share of the class lacks standing. As explained above, the Fourth Circuit sought to impose punishment on a practice that it deemed impermissible—to the tune of $10 million—while acknowledging the complete lack of evidence that this practice *actually* affected a single appraisal or *actually* induced a single person to enter into a loan. That unjust result—and the resulting doctrinal disarray—should not be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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