No. 21-428

In the Supreme Court of the United States

ROCKET MORTGAGE, LLC, ET AL.,
Petitioners,

v.

PHILIP ALIG, ET AL.,
Respondents.

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

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December 8, 2021

QUESTION PRESENTED

Did the Fourth Circuit correctly hold that the plaintiffs' payment of hundreds of dollars each for independent appraisals that they never received was a concrete "financial harm" supporting Article III standing?

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INTRODUCTION

This is an easy case for Article III standing. The Fourth Circuit concluded that the plaintiffs suffered injury-in-fact because they each paid Rocket Mortgage hundreds of dollars for independent appraisals that they "never received." App. 13–14a. "Of course," the panel explained, this sort of "financial harm is a classic and paradigmatic form of injury in fact." *Id.* at 14a. Even the dissent never questioned that the plaintiffs' out-of-pocket injury gave them Article III standing. And when Rocket moved for rehearing en banc on that issue, not a single Fourth Circuit judge supported rehearing. Doc. 114.

The real question in this case was one of West Virginia law. The district court and the Fourth Circuit had to predict whether Rocket's practice of using biased appraisals to inflate mortgages—a practice that has since been universally prohibited—amounted to "unconscionable inducement" under West Virginia's Consumer Credit and Protection Act (WVCCPA). Rocket does not ask this Court to reconsider the Fourth Circuit's conclusion that it unconscionably induced the plaintiffs' mortgages. And for good reason: Even if this Court were inclined to address that factbound, backward-looking question of state law, West Virginia's courts have already concluded that Rocket's practice violates the WVCCPA.

Instead, Rocket seeks to capitalize on this Court's recent decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), to transform this narrow state-law issue into a federal constitutional controversy over the bounds of Article III standing. Rocket now argues for the first time in its petition for certiorari that the plaintiffs' injury is based on the same sort of "mere risk of future harm" that this Court found inadequate for standing in *TransUnion*.

On that basis, it asks this Court to grant, vacate, and remand.

But this case is nothing like *TransUnion*. Notwithstanding Rocket's eleventh-hour attempt to recharacterize the plaintiffs' claims, the plaintiffs' standing here is not based on a risk of future injury. The plaintiffs never made such an argument, and the decision below did not suggest otherwise. To the contrary, as the Fourth Circuit recognized, the plaintiffs had *already* suffered out-of-pocket losses of approximately $350 each by paying Rocket for appraisals they never received. The plaintiffs' claims have always been based on that concrete pocketbook injury—not on the uncertain future risks that followed. *TransUnion*—a case in which the plaintiffs never paid the defendant anything—does nothing to undermine that settled basis for Article III standing.

Rocket's backup request for plenary review is just as uncertworthy. Although it claims a circuit split, it cannot identify any decision (from any circuit) that rejects standing when the plaintiffs' complaint is that they paid money for something they never received. Rocket's petition would have this Court become the first to hold that the federal courts lack jurisdiction over the claims of plaintiffs who have suffered hundreds of dollars in out-of-pocket damages. This Court should decline the invitation.

STATEMENT

A. Rocket Mortgage's business model

When a homeowner sells a home, there is a natural check on any estimate of its value: "[A]dversarial parties," each represented by a "competing real estate agent[]," typically engage in arms-length negotiations and carefully bargain over the ultimate price. App. 47a. In a refinancing

transaction, however, there is no seller to negotiate with. So lenders and borrowers alike have historically turned to "only" one "trained professional" to "objectively evaluate the value of the home": an independent, impartial appraiser. *Id.*

When homeowners applied for a refinance from Rocket Mortgage (then Quicken Loans) in the mid-2000s, this, in theory, was what they got. As part of these applications, Rocket explained that it would obtain an appraisal on each borrower's behalf, and explained that it would charge about $350 for that appraisal. App. 3a, 8a. And it told them they could "rely on" that appraisal report. JA915; JA918.

But, unbeknownst to its borrowers, Rocket was not interested in obtaining an impartial appraisal. Like many subprime lenders in the run-up to the financial crisis, it did not make money by collecting interest on its loans. *See* Kurt Eggert, *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 Conn. L. Rev. 1257, 1259, 1283 (2009). Instead, it resold those loans to investment banks, where they could be batched and securitized. *See id.* Because someone else bore the risk of default, what mattered to Rocket wasn't whether a home was accurately valued—it was how large the loan was. *See id.* at 1292–93, 1310–11.

So Rocket employed a simple method to try to influence appraisers to yield higher estimates: It asked borrowers to provide their own, uninformed estimates of home value and then, without telling them it was doing so, relayed those estimates to appraisers. App. 4a.

This scheme could achieve Rocket's goal in two different ways. First, providing borrowers' estimates had an inevitable "anchoring effect," subconsciously

influencing appraisers' estimates by suggesting a default value. App. 42a. And second, Rocket treated the estimates as a "requested" value. App. 40a. If an appraiser's estimate came in below that target, they would usually be contacted by a "team" whose job was to "push back" on the value and ask the appraiser to provide a "value bump[]" of the "max increase available." JA711, JA395.

It is impossible to know whether Rocket's strategy *actually* raised the ultimate value of each and every appraisal it commissioned—or each and every loan it originated. (Although it appears it often did: The average difference between an appraisal value and a borrower's uninformed estimated value was within five percent. App. 42a.) But, for that very reason—precisely because it is impossible to know how successful Rocket's attempt was—its tactics rendered each appraisal "worthless." JA540, 542. To obtain a truly impartial appraisal, the plaintiffs would have had only one option: Get a new one.

B. West Virginia courts condemn Rocket Mortgage's appraisal practices

As West Virginia borrowers learned what Rocket Mortgage had done, they began to sue the lender. Among other things, they argued that its inflated appraisals tactic amounted to "unconscionable inducement" in violation of § 46A-2-121 of the West Virginia Consumer Credit and Protection Act. That provision (at all times relevant here) allowed courts to refuse enforcement of certain consumer credit agreements or transactions if it found, "as a matter of law," that the "agreement or transaction" was "induced by unconscionable conduct." W. Va. Code § 46A-2-121 (1996); *see also* W. Va. Code § 46A-5-101(1) (1996) (creating a cause of action for actual damages and statutory penalties for violating this section).

West Virginia courts agreed. In *Brown v. Quicken Loans Inc.*, a West Virginia circuit court explained that "[n]o legitimate purpose" was served by Rocket (then Quicken) providing appraisers with estimated values; indeed, the *only* purpose of doing so "could be to inflate the true value of the property." 2010 WL 9597654, at *5 (W. Va. Cir. Ct. Mar. 2, 2010). Based in part on the company's failure to address these and other "obvious flaws," the court found that the resulting mortgage had been unconscionably induced. *Id.* *6, 8. The West Virginia Supreme Court of Appeals affirmed that conclusion. *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640, 657 (W. Va. 2012).

C. Factual and procedural background

1. Philip and Sara Alig refinanced their home mortgage with Rocket Mortgage in 2007. App. 8a. As part of the refinancing, Rocket Mortgage required them to pay hundreds of dollars for an appraisal. App. 51a. But, unbeknownst to the Aligs, that appraisal wasn't independent. As with all its appraisals, Rocket required the Aligs, without telling them why, to tell it what they believed the value of their home was. App. 8a. It then secretly passed that value onto their appraiser. *Id.* When the appraiser came in $6,500 under the Aligs' estimate, Rocket pressured him to increase his appraisal until it fell only a few thousand dollars below the estimate—which was more than $30,000 above the home's actual fair-market value. *Id.*

The Aligs sued Rocket in West Virginia circuit court individually and on behalf of a class of West Virginia citizens who obtained mortgage loans through Rocket. Their theory was that Rocket had sought to influence appraisers by providing them with estimated values on

appraisal request forms, thereby rendering its appraisals unreliable and worthless. Employing and concealing this practice, the plaintiffs asserted, amounted to unconscionable inducement under section 46A-2-121 of the WVCCPA.

2. After Rocket Mortgage removed the case to federal court, the district court granted class certification and summary judgment to the plaintiffs. Relying on West Virginia authority, the court concluded that Rocket's practice of secretly providing borrower estimates to appraisers amounted to unconscionable inducement under West Virginia law. App. 78a–99a.

Rocket appealed, arguing that the district court's liability and class-certification decisions were premised on a misunderstanding of West Virginia law. Intertwined with these issues, it also argued that the district court's decisions overlooked a lack of Article III standing on the part of both the class representatives and individual class members. Rocket Opening Br. 24. The plaintiffs, it argued, had failed to show that they suffered any "concrete injury" apart from a "statutory violation." *Id.* (quotation omitted).

3. The Fourth Circuit affirmed. To the panel majority, recent West Virginia caselaw supported a clear *Erie* prediction: Rocket's practices in this case met the state-law standard for unconscionable inducement. Given the significance of the independent appraisal to a home refinancing, it was unconscionable for Rocket to conceal from its borrowers the fact that it had sought to influence appraisers' estimates of home value. App. 40a–43a, 45a–48a. What is more, there was "no genuine dispute" that its appraisals—"and, more importantly, their guise of impartiality—contributed to" the borrowers' decisions to

refinance. App. 48a. The panel emphasized the "circumscribed" nature of this state-law holding, which, it wrote, was driven by the fact that Rocket's practices were "of a particularly questionable character and pertained to" a "particularly essential" aspect of the loan process. *Id.*

In the course of reaching that conclusion, the Fourth Circuit also rejected Rocket's challenge to the plaintiffs' standing. The plaintiffs, the majority opinion explained, had suffered a "classic and paradigmatic form of injury in fact": They "paid an average of $350 for independent appraisals" that they had "never received." App. 14a. Instead, the appraisals they did get were "tainted": Rocket had "exposed the appraisers to the borrowers' estimates of value and pressured them to reach those values," compromising the appraisals' independence. *Id.*

The dissent did not disagree on that point: Although it would have held that Rocket's conduct did not constitute unconscionable inducement as a matter of West Virginia law, it took no issue with the majority's standing analysis.

The Fourth Circuit denied Rocket's petition for rehearing en banc, with no judge requesting a poll. Doc. 114.

REASONS TO DENY THE PETITION

I. *TransUnion* has nothing to do with this case.

A. Rocket Mortgage's lead argument is that this Court should grant, vacate, and remand in light of its decision last term in *TransUnion*, 141 S. Ct. at 2190. *TransUnion*, however, has nothing to say about the classic financial injury on which the plaintiffs' standing is based.

In *TransUnion*, the plaintiffs claimed that their credit files erroneously flagged them as potential terrorists,

drug traffickers, or serious criminals. *Id.* at 2201–02. For most of the class, there was no evidence that their erroneous files had ever been disseminated to any potential creditors. *Id.* But those class members nevertheless asserted that they suffered an Article III injury-in-fact because there was a "material risk" that their files would be disseminated in the future and would "thereby cause them harm." *Id.* at 2210. This Court disagreed. The plaintiffs' "exposure to the risk of future harm," it held, was insufficiently "concrete" to support Article III standing in their damages action, at least when unaccompanied by some "*separate* concrete harm." *Id.* at 2211.

The plaintiffs here, by contrast, have never argued that their injury-in-fact was based on a "risk of future harm." Rather, they argued that they suffered "an injury in the form of lost money." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 47 (1st Cir. 2018). They each paid a fee to Rocket Mortgage so that the company could obtain an appraisal on their behalf. But because Rocket tried to influence the result, what they got could not be trusted as an impartial measure of home value. As the Fourth Circuit put it: They "paid an average of $350 for independent appraisals" that "they never received." App. 14a. This immediate and concrete "financial harm," the court recognized, "is a classic and paradigmatic form of injury in fact." *Id.*

That holding does not implicate *TransUnion* at all. The plaintiffs in *TransUnion* did not pay for a product that wasn't what it seemed. Indeed, they did not pay any money at all. That is precisely why they were forced to rely, unlike the plaintiffs here, on an alleged risk of future harm.

B. In an attempt to bring this case within *TransUnion*'s orbit, Rocket Mortgage claims that the Fourth Circuit did not find standing based on the plaintiffs' straightforward financial harm. Instead, according to the Rocket, the court based its decision on the "risk" that the tainted appraisals would *further* harm the class members—for example, by causing a class member to borrow more than her home was worth. Pet. 20–22. Whether those harms had materialized for each borrower was uncertain. *See id.* In finding standing anyway, Rocket concludes, the Fourth Circuit "relie[d]" on the "incorrect theory" that a past risk of harm could amount to an Article III injury-in-fact. Pet. 22; *see also* Pet. 2–3.

But the Fourth Circuit did no such thing. It said what it meant: The plaintiffs' injury-in-fact was "financial harm"—on its own "a classic and paradigmatic form of injury in fact." App. 14a (quoting *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 760 (4th Cir. 2018)). "[P]aying more than [a product] is worth" is unquestionably an "economic injury sufficient to establish Article III standing." *George v. Omega Flex, Inc.*, 874 F.3d 1031, 1032 (8th Cir. 2017); *see also, e.g.*, *Cottrell v. Alcon Labs.*, 874 F.3d 154, 163 (3d Cir. 2017); *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011).

Rocket's attempt to recharacterize the Fourth Circuit's express holding relies on carefully selected language taken out of context from unrelated parts of the decision. When the Fourth Circuit wrote that injury arose because appraisers were "exposed" to borrowers' estimates, its point was not that exposure created a risk of follow-on effects that "*could* have" harmed the plaintiffs. Pet. at 2–3. It was that the exposure *itself* tainted the appraisals such that the plaintiffs did not get what they

had paid for. App. 14a, 15a n.9. And when the court explained that the record was "devoid" of evidence regarding the actual home value of each class member, it was not questioning the fact of the plaintiffs' injury. *See* App. 41a n.22. It was not even talking about standing. Rather, it was explaining its view of West Virginia law: Unconscionable inducement could be shown without proving that there was anything "*substantive[ly]* unconscionable" about the plaintiffs' ultimate loan terms. *Id.* The dissent's remark that the named plaintiffs suffered "not one iota" went to a similar point: whether, for purposes of state law, the plaintiffs' loan terms had actually worsened as a result of Rocket's conduct. *See* App. 52a, 57a–60a, 71a. But the dissent never questioned the plaintiffs' Article III standing based on their out-of-pocket injury.

To be sure, the Fourth Circuit noted that the ultimate effects of Rocket's attempt to inflate its appraisals were unknown. *See, e.g.*, App. 43a (noting that Rocket's attempts worked "at least some of the time"); App. 48a (similar). But far from defeating standing, that just reinforced the plaintiffs'—and the Fourth Circuit's—point: It was *because* it was impossible to know whether Rocket's efforts to inflate its appraisals were successful that those appraisals were worthless as an impartial estimate of home value, and thereby gave rise to the class's financial injury-in-fact.

That conclusion, for standing purposes, must be taken as true. It is a basic maxim of standing law that courts must take the plaintiff's legal theory as a given, assuming that it will succeed on the merits. *See Warth v. Seldin*, 422 U.S. 490, 502 (1975); *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007). Applied here, that rule

required assuming that the plaintiffs were right that charging $350 for an appraisal that can't be trusted as a measure of home value, and then concealing that fact, amounted to unconscionable inducement under West Virginia law. The only question here is whether the plaintiffs' payment of that $350 charge was enough for Article III standing. And that question—which is an easy one—has nothing to do with *TransUnion*.

II. Rocket Mortgage's other questions are not presented here.

Rocket Mortgage's fallback arguments for plenary review likewise mischaracterize the Fourth Circuit's decision. Properly read to mean what it says, the decision below does not implicate any of the issues on which Rocket now seeks review.

A. Rocket Mortgage claims that the Fourth Circuit's decision created a circuit split about whether purchasing a product or service "automatically creates a 'financial injury'" even if "the product or service provided precisely the benefit the consumer bargained for." Pet. i. But that question is not presented here because the Fourth Circuit never accepted that incorrect premise. As explained above, the Fourth Circuit did not hold that "the purchase of a product, standing alone," can confer standing "when the product caused no harm and operated as intended." Pet. 26. Instead, it held that Rocket's appraisals did *not* operate as intended or offer the plaintiffs what they paid for. Rather than the independent, impartial appraisals for which each borrower paid an average of $350, the appraisals they got were tainted by Rocket's disclosure of the borrower's estimated value.

Nor is there a circuit split on the issue. The cases on which Rocket relies hold only that plaintiffs lack Article

III standing when they plead an "economic injury from the purchase of a product" but do not allege that the product "failed to work for its intended purpose" or was "worth objectively less than what one could reasonably expect." *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278, 290 & n.15 (3d Cir. 2018) (quotation omitted); *McGee v. S-L Snacks Nat'l*, 982 F.3d 700, 707 (9th Cir. 2020) (plaintiff had failed to allege that she was injured by paying for a product that either contained a hidden defect or was worth objectively less than what she paid for it); *see also Maya*, 658 F.3d at 1069 (plaintiffs' paying "more for their homes than the homes were worth at the time of sale" was an "actual and concrete" economic injury). Here, the plaintiffs claimed that the tainted appraisals were unreliable and worthless.

To argue otherwise, Rocket insists that the borrowers' appraisals "accomplished exactly what they were needed for": enabling a refinance. Pet. 26. But appraisals are not merely instruments to secure a loan—otherwise, why would they be conducted by independent third parties, and why would borrowers pay a separate fee for them? They are also supposed to be independent assessments of a home's value. And in any event, because the plaintiffs' legal theory was that appraisals served that purpose, Rocket is not at liberty to reject that theory in its standing challenge. *Se Warth*, 422 U.S. at 502.

To be sure, a plaintiff cannot reframe the *risk* of future injury stemming from a product as an economic injury just because they bought the product. *See Thorne v. Pep Boys Manny Moe & Jack Inc.*, 980 F.3d 879, 886 (3d Cir. 2020); *Johnson & Johnson*, 903 F.3d at 291. But as we explained above, this case was never about a risk of

injury that might later befall the plaintiff. It is about what actually happened to each of the borrowers: They paid $350 for a worthless, tainted appraisal. To get the independent estimation of home value they paid for, they would have to pay for a new, untainted one. That is an ordinary financial injury—not a speculative risk of future harm.

B. Rocket Mortgage's final issue is likewise not presented here. Rocket claims that the Fourth Circuit erred by allowing class certification when many absent class members are uninjured. But under Rocket's theory of standing, the *entire class* would have suffered no injury. *See, e.g.*, Pet. 21 ("no harm" "actually materialized" for "any borrower" (emphasis omitted)); *id.* at 11 (plaintiffs "offered no evidence" that Rocket's practices had "caused any harm to borrowers at all"). So the borrowers' standing—including the standing of the named plaintiffs—rose or fell together. Whether or not Rocket is correct—and as explained above, it is not—this case has nothing to do with the question whether a court may certify a class in which some absent class members are uninjured.

CONCLUSION

The petition for certiorari should be denied.

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December 8, 2021