No. 21-428

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

PETITIONERS' REPLY BRIEF

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RULE 29.6 STATEMENT

The disclosure statement included in the petition remains accurate.

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INTRODUCTION

Respondents are right about one thing: the standing question is easy. *TransUnion* makes it especially easy *for petitioners*, and because that decision issued after the denial of rehearing, the Fourth Circuit should have the first opportunity to correct its error.

Respondents' theory was that Quicken Loans sought to "influence" appraisers to provide "inflated" appraisal numbers, which in turn would yield larger refinance loans than borrowers would otherwise qualify for. Opp. 3, 5, 6, 8. And they said this practice was unconscionable because it could "leave buyers 'upside down'—owing more than the property is worth" and therefore "trapped, unable to refinance to obtain better terms or sell [the] home to relocate," sometimes resulting in "foreclosure." Resp. C.A. Br. 7-8 (citations omitted).

But respondents did not want to actually *prove* that unnamed class members had suffered any of those economic injuries—attempting to do so would have created a host of individualized issues and presented substantial barriers to class certification. So they told the district court that Article III did not require it. They said that because the named plaintiffs had standing, and because the state legislature had authorized statutory damages without proof of actual harm, all the unnamed class members could recover statutory damages without any evidence of economic injury. C.A.App.494-500. The district court agreed and entered a $10 million judgment for the class. Pet.App.178a-183a.

Now respondents sing a different tune—one they started composing in the court of appeals. They say this case was "never" about a risk of harm to borrowers; it was always about the payment of money for products that were faulty—appraisals that were "tainted," "worthless," and "unreliable" as a result of appraisers' "exposure" to borrowers' estimates of value. Opp. 2, 12. But, of course, because respondents had taken the position in the district court that no proof of harm was required, the record was "devoid of evidence" (Pet. App. 41a n.22) that any absent class members' appraisals were actually faulty—that their appraisals were *actually* influenced or unreliable, much less worthless. To the contrary, each appraiser certified that the appraisal values were independently derived, and some testified that they never even saw the borrowers' estimates. No matter, respondents say: *even after final judgment*, their "claim" of injury, "for standing purposes, must be taken as true." Opp. 10.

TransUnion itself shows that is wrong. Article III's requirement cannot be circumvented so easily. Respondents, who prevailed at summary judgment, cannot rely on labels like "tainted," "risky," or "worthless" to substitute for evidence of injury that is "actual," "concrete," and "particularized." 141 S. Ct. 2190, 2205 (2021). As *TransUnion* makes clear, potential harm will not do in a damages case: just having paid money for an appraisal that *might* be affected does not free respondents from having to prove that petitioners' conduct *did* affect the appraisals—or that the appraisals somehow harmed respondents. A class of uninjured consumers cannot evade Article III and win money damages by claiming "financial injury" from the purchase price that they would have paid anyway.

If the Court does not remand this case in light of *TransUnion*, it should grant certiorari to decide the other two questions presented, both of which involve fundamental issues under Article III. Courts are divided on both questions, the questions are significant, and this case is an excellent vehicle to decide both of them.

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

Respondents opposed a stay of mandate based on the same arguments they advance here—that the Fourth Circuit's reasons for finding classwide standing were factually distinct from *TransUnion*—but the Fourth Circuit disagreed and granted the stay, without dissent. Pet.App.233a-236a. And as predicted, this Court's decision flatly contradicts the Fourth Circuit's reasoning. At a minimum a GVR is necessary.

A. *TransUnion* makes clear that plaintiffs have standing to recover damages only if they have suffered actual harm, not "exposure to the risk of future harm." 141 S. Ct. at 2211. The court of appeals here held the opposite: simply because the appraisal companies were "exposed" to borrowers' estimates, which could inflate appraisal values, respondents had standing to recover $10 million in damages. Pet.App.14a.[1] In fact, the court repeatedly acknowl-

[1] The court of appeals adopted that position after respondents abandoned the district court's indefensible holding that the unnamed class members did not need standing. *See* pp. 1-2, *supra*; pp. 7-8, *infra*. Remarkably, respondents now suggest that *petitioners* are raising a new argument. That is nonsense. Petitioners challenged class members' injury-in-fact before the district court and the Fourth Circuit. *E.g.*, Pet. App. 178a. At

edged that it did not know whether *any* unnamed class member's appraisal was even affected. Pet. 15. That is ample basis for a GVR in light of *TransUnion*.

Respondents try to distinguish *TransUnion* by arguing that this case involved *actual* injury, not just a risk of injury. But respondents' "actual injury" theory is question-begging: it is premised on the assumption that because a procedural error *could* result in an inaccurate appraisal, it necessarily *did*. Opp. 8 ("[B]ecause Rocket tried to influence the result, what [respondents] got could not be trusted as an impartial measure of home value"). That assumption is spurious. The Fourth Circuit acknowledged that many appraisals may have been entirely accurate—if borrowers' estimates were accurate or did not influence appraisers. Pet. 14-15. And some appraisers concededly *did not even see* the estimates that were transmitted to their appraisal companies. C.A.App.1052, 1059-1060.[2] Yet, the Fourth Circuit based its "taint" theory entirely on the respondents' question-begging assumption. *See* Pet.14-15.

Put differently, respondents treat "tainted" as a magic word that automatically creates a constitu-

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each stage, petitioners addressed whatever standing theory that respondents were then espousing. Petitioners' challenge to the theory the Fourth Circuit ultimately adopted is properly before this Court.

[2] Respondents claim that the influence on appraisers is "inevitable," relying on a theoretical "anchoring effect," Opp. 3—though, like the court of appeals, they cite no record evidence, because there is none. *See* Pet.App.42a (citing law review articles and a case about Sentencing Guidelines). But estimates *that no appraisers saw* could not possibly have acted as an anchor.

tionally cognizable injury. But Article III requires "actual" and "particularized" injury, not speculative or abstract harm. Thus, the relevant constitutional question is *how* the appraisals were "tainted" and whether the "taint" caused the class members any concrete harm. After all, in *TransUnion*, the plaintiffs' credit files were "tainted" as well in the sense that they were inaccurate. *See* Pet. 20. But that did not confer an Article III injury because credit files that were not disseminated had no real-world impact: while there was a *risk* of harm, that risk never materialized. So too here. There may have been a *risk* that passing borrower's estimates would influence appraisers, but the record was "devoid of evidence" that that risk ever materialized to harm any absent class members. Pet. App. 41a n.22.

In response, respondents argue that their latest actual-injury theory (that potential exposure to borrowers' estimates makes appraisals "worthless") "must be taken as true." Opp. 10. That is doubly wrong. First, the case they cite held *at the pleading stage* that, even assuming the truth of the plaintiff's factual allegations *about the merits*, those allegations did not establish *standing*. *Warth v. Seldin*, 422 U.S. 490, 502 (1975). This case was resolved at summary judgment, and "[a] plaintiff must demonstrate standing with the manner and degree of evidence required at the successive stages of the litigation." *TransUnion*, 141 S. Ct. at 2208 (citation omitted). A claim of standing cannot just be "taken as true." Second, respondents' merits theory did not require them to prove that the appraisals were worthless—on the lower courts' view of state law, it required them to prove that Quicken Loans' conduct contributed to respondents' decision to enter into their loans.

Pet.App.36a-40a. So even indulging respondents' view of their statutory claim would not change the fact that the statute awards damages to individuals without standing.

B. Respondents also say this case is different from *TransUnion* because here, the plaintiffs spent money, while the *TransUnion* plaintiffs did not. Opp. 8. That distinction is irrelevant too. *TransUnion*'s central holding is that to seek damages, the plaintiff must prove actual past harm. Potential harm that never materializes will not do; harm cannot be presumed from the statutory violation itself. That is exactly what respondents are doing—claiming that a procedural violation must have impacted their purchase given the risk of harm, but without showing that any harm actually materialized.

Respondents' attempted distinction is likewise inconsistent with the Second Circuit's decision in *Maddox v. Bank of New York Mellon Trust Co.*, 19 F.4th 58, 2021 WL 5347004 (2021). That case, like this one, involved statutory-damages claims for a procedural violation under state law—there, lenders' failure to record satisfactions of mortgage within thirty days after full loan repayment. *Id.* at *2. Before *TransUnion*, the Second Circuit had held that the statutory violation was sufficient to create injury-in-fact to obtain statutory damages. 997 F.3d 436, 453 (2d Cir. 2021). But after *TransUnion*, the court reconsidered its decision and reached the opposite conclusion. 2021 WL 5347004, at *4-*7. It did not matter that the *Maddox* plaintiffs had paid money—$50,000 to satisfy their loan—while the *TransUnion* plaintiffs did not. What mattered was that this

Court clarified Article III's injury-in-fact requirement, and the Second Circuit took that clarification seriously on reconsideration. Because there was no indication that the "purported risk" of a delayed recording—*e.g.*, creating a cloud on title or making the borrowers appear less creditworthy to potential lenders—had ever materialized, the plaintiffs did not establish concrete harm under Article III. *Id.* at *6. The Fourth Circuit should have the same opportunity to reconsider its erroneous decision here.

C. Respondents even go so far as to say that this case was "never" about the risk of harm that could result from providing appraisal companies with borrowers' estimates of value. That is revisionist history at its worst. Respondents' theory of unconscionability has *always* been about the "influence" that sharing BEVs could have on appraisal values. Opp. 1 ("[t]he real question" in this case is about using appraisals "to inflate mortgages"); Opp. 3 (asserting that Quicken Loans' goal was "to try to influence appraisers to yield higher estimates"); Opp. 5 ("providing appraisers with estimated values" could "inflate the true value of the property" (citation omitted); *id.* ("The Aligs['] … theory was that [Quicken Loans] had sought to influence appraisers …."). Indeed, their brief below devoted pages to the negative consequences consumers could face *if* appraisal values were inaccurate, invoking concerns about borrowers being unable refinance, unable to sell—even foreclosure. Resp. C.A. Br. 6-10; pp. 1-2 & n.1, *supra*. If this had merely been a dispute about "pay[ing] for a product that wasn't what it seemed," Opp. 8, then this would have been solely a simple breach-of-contract case—and even then, respondents would have had to show "resulting damages." Pet.App.24a.

To be sure, respondents did not argue in the district court that a risk of harm was enough—but only because they argued that *no showing of harm was necessary*. C.A.App.494-500. That is why they developed no *evidence* of harm—their position was that they did not need it. The district court agreed. Pet.App.178a-183a. Indeed, the district court took the view that a claim could be actionable even if it "may not have resulted in tangible *economic* or physical harm." Pet.App.181a (emphasis added; citation omitted). Only on appeal did respondents discard that position and start arguing that "taint" itself constitutes financial harm, even without proof that the "taint" affected any appraisal or borrower.

D. Respondents also argue that if they had no proof, that's because it was unobtainable: they claim "it was impossible to know whether [Quicken Loans'] efforts to inflate its appraisals were successful." Opp. 10. If true, that would be an argument *against* standing, not for it: both in class certification and, especially, at summary judgment, speculation is no substitute for evidence. The abstract fear that an appraisal *might* be inaccurate—even though they provided no evidence that it was and borrowers successfully refinanced, suffered no other consequences, and never even sought new appraisals—is no basis for standing. *Clapper v. Amnesty Int'l USA*, 586 U.S. 398, 416 (2013) (even an expenditure based on a nonparanoid fear of speculative future harm is not cognizable injury).

In any event, the argument is just plain wrong. There *are* ways to show whether including borrowers' estimates on appraisal-request forms—a widespread practice permitted at the time—negatively impacted borrowers. Respondents could have offered testimony that appraisers *actually saw* the estimates that were transmitted to their appraisal companies and *were actually influenced* by them. They could have conducted retrospective appraisals—*as they did for the Aligs*, Pet.App.8a—and attempted to prove that class members' appraisal values were inaccurate. They could have provided evidence that the evils their brief below focused on—foreclosure, inflated loans, an inability to refinance, etc.—had actually occurred. And, if appraisals really were as disconnected from the refinancing transactions as respondents now claim, they could have shown that class members paid for new appraisals. They chose to offer none of this. Indeed, they did not even try, because doing so would have demonstrated that this case was unsuitable for class treatment. But the desire to use Rule 23 does not trump the obligation to comply with Article III. Pet. 27-28.

II. If it does not GVR, the Court should grant certiorari to resolve the remaining two questions, which are important and implicate circuit splits.

Because the Fourth Circuit should have an opportunity to correct its erroneous ruling in light of this Court's guidance in *TransUnion*, a GVR is appropriate. In the alternative, the Court should grant plenary review, because the Fourth Circuit's decision splits with other circuits on two fundamental issues of standing: first, whether the mere purchase of a product or service confers standing to sue, absent any evidence that the defendant's conduct rendered the product or service less valuable; and, second, whether a widespread lack of standing among class members precludes class treatment. Contrary to respondents' arguments (at 11-13), both questions are presented here.

1. Respondents acknowledge that both the Third and Ninth Circuits have held that mere payment for a product is insufficient to confer standing. *See* Pet. 23-24; Opp. 11-12. But they insist that this case is distinguishable because here, they have "claimed" that their products were "worthless." Opp. 12.

That is no distinction at all. The whole point of these cases is that merely *labeling* a product "worthless" is not enough to establish financial injury. Article III requires evidence—or, at the pleading stage, plausible *factual* allegations—not "pure conjecture." *Thorne v. Pep Boys Manny Moe & Jack Inc.*, 980 F.3d 879, 887 (3d Cir. 2020); *Johnson & Johnson Talcum Powder Products Mktg. Sales Practices & Liability Litig.*, 903 F.3d 278, 291 (3d Cir. 2018) ("in order to seek monetary damages," the plaintiff would have to "do more than simply characterize her purchases as economic injuries"); *see also* Pet. 25-26. These courts recognize that a contrary rule—like the one adopted by the Fourth Circuit—would make it all too easy to circumvent Article III's limitations on the jurisdiction of federal courts by "[re]characteriz[ing]" a potential future harm as a present-day financial one. *Thorne*, 980 F.3d at 886.

Until this case, spending money has never been enough to sue for damages in federal court over a product that caused no harm. But now, in the Fourth Circuit alone, it is sufficient to "claim" that a product is "worthless"—there is no need to prove that the product actually *is* worthless. In fact, in the Fourth Circuit a conclusory "claim" of decreased value is sufficient not only to get into court, but to get all the way to judgment. And respondents got their $10 million judgment *without trial*—even though substantial evidence squarely contradicted their decreased-value "claim." Petitioners showed that borrowers' estimates did not influence appraisers, and the resulting appraisals served their fundamental purpose of securing a loan and (in thousands of instances) saving borrowers money. Pet. 8-9. In the Fourth Circuit, none of that matters.

The Fourth Circuit's holding directly conflicts with *Thorne*, *In re Johnson*, and *McGee v. S-L Snacks Nat'l*, 982 F.3d 700 (9th Cir. 2020), and this Court should grant certiorari to resolve the split.

2. Respondents do not dispute that courts of appeals have taken conflicting approaches to evaluating the third question presented, which *Spokeo* and *TransUnion* left open: whether a class may be certified where a large number of unnamed class members lack standing. *See* Pet. 28-33. Nor do they dispute that this question is significant in light of the increased use of the class-action device for statutory claims and the immense pressure on a defendant to settle even the weakest cases once a class has been certified. *See* Pet. 34. Indeed, they do not even dispute that the district court was on the wrong side of the split when it held that only a named plaintiff need have standing for the class to recover millions in damages. Pet.App.195a-196a.

Respondents' sole argument against review is that this question is "not presented here" because, under Quicken Loans' theory of injury, either all plaintiffs (including the named plaintiffs) have standing or none do. Opp. 13. That is simply incorrect: the

Aligs themselves plausibly established standing by obtaining a retrospective appraisal of their home's value in 2007 that was lower than the value the appraiser gave at the time. Pet. 21. They also asserted actual damages. Pet. 13 n.5. But respondents never submitted such evidence for *any* absent class member—they argued that such proof was unnecessary and they could obtain a $10 million judgment anyway. That is wrong, as this Court should finally make clear.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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