

CASE NO. 26-8023

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT

LESLEY KAPLAN,
on behalf of herself and all others similarly situated,
Plaintiff-Respondent,

v.

TRANS UNION LLC,
Defendant-Petitioner.

On Rule 23(f) Petition Challenging the Order Granting Class Certification
by the United States District Court for the Eastern District of Pennsylvania,
Civil Action No. 2:24-cv-2438 (WB)

**BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES
OF AMERICA, WASHINGTON LEGAL FOUNDATION, AND THE
AMERICAN BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT
OF DEFENDANT-PETITIONER'S RULE 23(f) PETITION**

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (“Chamber”), Washington Legal Foundation (WLF), and the American Bankers Association (ABA) each states that it is a nonprofit, tax-exempt organization incorporated in the District of Columbia. Each organization has no parent corporation, and no publicly held company has 10% or greater ownership in it.

/s/ Adam G. Unikowsky

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STATEMENT REGARDING CONSENT

Defendant-Petitioner consents to the filing of this brief; Plaintiff-Respondent does not consent.¹

IDENTITY AND INTEREST OF *AMICI*

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly files *amicus* briefs in cases that raise issues of concern to the Nation’s business community, including cases involving class actions.

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as an *amicus curiae* to oppose improperly certified classes.

The American Bankers Association (ABA) is the voice of the nation’s \$25.3 trillion banking industry, which is composed of small, regional and large

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

banks that together employ over 2 million people, safeguard \$20.1 trillion in deposits and extend \$13.5 trillion in loans. The ABA frequently files *amicus* briefs on matters of interest to their members, including in the class-action context. The ABA has a strong interest in ensuring the proper interpretation and application of Rule 23's requirements, because improperly certified class actions threaten substantial harm to businesses, including the ABA's members.

The District Court's class-certification order is premised on a mistaken interpretation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681c-2, which if left undisturbed would threaten the integrity of the consumer reporting system, to the detriment of businesses and consumers alike. Additionally, the District Court failed to conduct the rigorous analysis required by Rule 23 before certifying a class. The class here consists of all individuals who received a particular letter in the mail, but the District Court failed to consider the need for individualized proceedings to determine whether each individual suffered a concrete injury as a result of the letter—a highly fact-specific inquiry that defeats predominance under Rule 23(b)(3). *Amici* have a strong interest in ensuring that federal district courts comply with Rule 23's standards.

INTRODUCTION

The District Court's certification order is based on its conclusion that the FCRA “mandates a distinct sequence of events for fraud blocks,” under which a

consumer's request requires the reporting agency to automatically "block the relevant information," then determine whether to ultimately "decline to block" the information. SA11-12.

As TransUnion's petition explains, that statutory analysis is incorrect. The FCRA does not require consumer reporting agencies to "first block the relevant information," *id.*, then proceed to determine whether a block is ultimately justified. That interpretation collapses the FCRA's express distinction between *declining* to block the information upfront and *rescinding* any previously imposed block. *See* 15 U.S.C. § 1681c-2(c)(1). This legal error by itself warrants reversal of class certification.

Even if the District Court's statutory analysis were correct, however, class certification violates Rule 23's requirements. The class is defined to include all individuals who received a particular letter declining a requested block, but mere receipt of that letter is not an Article III injury-in-fact. Each class member must still demonstrate concrete harm stemming from TransUnion's alleged failure to immediately block the relevant information—an inherently individualized inquiry that defeats predominance. The District Court failed to engage in this analysis. Instead, it analyzed only the named plaintiff's standing, contrary to this Court's precedent.

This Court’s review is warranted to correct these manifest errors. The District Court’s interpretation of the FCRA—requiring consumer reporting agencies to block information immediately upon request, before any determination of validity—threatens to exacerbate the harmful practice of “credit washing,” whereby bad actors exploit identity-theft protections to fraudulently remove accurate information from credit reports. The business community depends on the accuracy and integrity of the consumer reporting system, which in turn depends on consumer reporting agencies’ ability to make threshold determinations about a request’s legitimacy before blocking information. This Court’s immediate review is warranted to correct the District Court’s erroneous ruling denying consumer reporting agencies that ability.

ARGUMENT

- I. The District Court Erred in Certifying a Class Filled with Uninjured Individuals, Which Defeats Predominance.**
 - A. Rule 23(b)(3)’s Predominance Requirement Is Not Satisfied When Individualized Proceedings Are Needed to Determine Injury, As Is Plainly True of This Class.**

Plaintiffs seeking to certify a Rule 23(b)(3) damages class action “must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including ... the predominance requirement of Rule 23(b)(3).” *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014). This “requirement asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-

defeating, individual issues.” *Ferreras v. Am. Airlines, Inc.*, 946 F.3d 178, 185 (3d Cir. 2019) (internal quotation marks omitted). If all plaintiffs would “need to provide particularized evidence” to prove their claims, “common issues do not predominate over individual ones.” *Id.* at 186.

That principle applies in the same way when the individual issue is Article III standing. “Every class member must have Article III standing in order to recover individual damages. Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) (internal quotation marks omitted). When a putative class contains uninjured members, and fails to prove that common issues predominate over individual standing disputes, a class cannot be certified. *See Huber v. Simon’s Agency, Inc.*, 84 F.4th 132, 156 (3d Cir. 2023) (“[P]redominance concerns can arise when unnamed class members must submit individualized evidence to satisfy standing and recover damages.”); *see also Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 368 (3d Cir. 2015) (“[A] properly formulated Rule 23 class should not raise standing issues.”).² To carry the burden to prove predominance, plaintiffs “should submit evidence enabling the District Court to estimate how many class

² *Amici’s* position is that courts should never certify a class known to contain uninjured members, but this Court has rejected that view. *Neale*, 794 F.3d at 366. The Court has emphasized, however, that the presence of uninjured individuals within a class may defeat predominance. *Id.* at 368.

members (or what proportion of them) have standing,” because if “few class members will be able to show” standing then the “proposed class is not sufficiently cohesive.” *Huber*, 84 F.4th at 157 (internal quotation marks omitted).

Here, regardless whether the District Court’s interpretation of the FCRA is correct, Article III injury is an individual issue that defeats predominance. Even if TransUnion were required to immediately block information (as the District Court erroneously held), each class member would still need to establish some concrete harm stemming from TransUnion’s failure to implement the block. *See TransUnion*, 594 U.S. at 442 (“No concrete harm, no standing.”); *Huber*, 84 F.4th at 152–54. And that concrete harm would need to be specifically attributable to the failure to *immediately* block the information, not any subsequent determination to decline or rescind the block. *Cf.* SA13 (finding commonality satisfied based on the question whether TransUnion “violates the FCRA by skipping the *initial* block” (emphasis added)).

There is no way for common proof to establish whether each individual class member was concretely injured by TransUnion’s failure to immediately block the class member’s requested information. The class’s sole defining feature—receipt of a letter that purportedly violated the statute—does not on its own establish injury, as both the Supreme Court and this Court have previously held. *See TransUnion*, 594 U.S. at 441-42 (holding that receipt of a letter, allegedly in the wrong format, did not

constitute Article III injury); *Huber*, 84 F.4th at 152 (rejecting the view that “because SAI’s letter violated the FDCPA, any and all recipients of the letter automatically have standing to bring suit”). Thus, to determine whether each class member has standing, the District Court would need to conduct a series of individualized mini-trials as to whether they suffered a concrete injury stemming from the alleged failure to immediately block the information. This need for extensive individualized proceedings defeats predominance. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 172 (3d Cir. 2001) (“If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.”).

Of course, the same is also true if the District Court’s statutory analysis is incorrect, as TransUnion rightly contends. If TransUnion is not required to immediately block the information, each plaintiff would need to demonstrate both that TransUnion was ultimately incorrect in its denial of the requested block *and* that TransUnion’s refusal to block caused the plaintiff a concrete injury. Regardless of the merits of the District Court’s statutory analysis, then, individualized issues predominate and class certification is inappropriate.

B. The District Court’s Standing Analysis Is Fundamentally Flawed.

The District Court did not grapple with these individualized standing disputes, contrary to this Court’s precedent. *See Huber*, 84 F.4th at 157. Instead, the District

Court analyzed only the putative class representative's standing. SA15-16. But that analysis is no substitute, and in any event is fundamentally flawed on its own terms.

The District Court concluded that Kaplan suffered concrete harm based on “wasted time and resources,” “emotional distress,” and TransUnion’s publication to Barclays of “a copy of Kaplan’s credit report containing the inaccurate ... debt.” *Id.* For the first two injuries, however, the District Court relied on authorities addressing whether those harms are compensable in damages, which is distinct from whether they suffice as Article III injury. *See In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 194 (3d Cir. 2020) (“We have consistently distinguished injury from damages.”). And it is doubtful that the claimed injuries of “wasted time and resources” and “emotional distress” do suffice in the absence of some other tangible harm or risk of harm. *See, e.g., Reilly v. Ceridian Corp.*, 664 F.3d 38, 44-46 (3d Cir. 2011) (rejecting such harms as sufficient, reasoning that they should be compensated only after a tangible injury occurs). Indeed, if those harms were adequate, the Supreme Court would not have specified the separate requirement of “downstream consequences” or “adverse consequences” from alleged informational injuries. *TransUnion*, 594 U.S. at 442 (quotation marks omitted); *Kelly v. RealPage Inc.*, 47 F.4th 202, 212-14 (3d Cir. 2022). Still, even if these injuries could theoretically

suffice, the District Court did not identify any evidence demonstrating that they actually occurred on a classwide basis.

Similarly, even if some class members may have theoretically suffered Article III injury based on dissemination of their allegedly inaccurate information, *see TransUnion*, 594 U.S. at 433–34, the District Court did not examine the proportion of class members who actually had their information disseminated. That failure precludes a finding of predominance. *See Huber*, 84 F.4th at 152 (noting inability to find “specific ‘financial consequences’ as a result of SAI’s letter” on classwide basis, as named plaintiff “offered no such evidence”).

In short, the District Court’s analysis did not establish standing for Kaplan herself, much less for the rest of the class. The class-certification order should be reversed for failure to comply with Rule 23(b)(3).

II. Review Is Warranted to Correct the District Court’s Errors and Protect the Integrity of Consumer Reporting Agencies’ Information.

Under Rule 23(f), this Court “exercises [its] ‘very broad discretion’ using a . . . liberal standard.” *Laudato v. EQT Corp.*, 23 F.4th 256, 260 (3d Cir. 2022). This case warrants immediate review for at least three reasons.

First, “the district court’s class certification determination was erroneous” and an appeal would “facilitate development of the law on class certification.” *Id.* (quotation marks omitted). That is especially valuable here given the frequency of class actions arising under the FCRA.

Second, immediate review would prevent the District Court’s analysis from spreading and encouraging a rash of erroneously certified class actions containing uninjured individuals and seeking classwide statutory damages. As this Court has recognized, “the certification decision is typically a game-changer, often the whole ballgame.” *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012). “Certification of a large class may so increase the defendant’s potential damages liability and litigation costs” that even a defendant with a meritorious defense “may find it economically prudent to settle and to abandon” that defense. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); accord *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (“Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”). This Court’s immediate review is the only meaningful check on those pressures.

Third, the District Court’s statutory holding poses a serious threat to the integrity of the consumer reporting system—a system on which businesses and consumers alike depend. If left undisturbed, the District Court’s ruling would require consumer reporting agencies to immediately block information upon request, before assessing whether the request is valid. But that would only exacerbate “credit washing” by bad actors—*i.e.*, fraudulently invoking identity-theft protections to remove accurate, legitimate information from credit reports. The Federal Trade

Commission has repeatedly warned about and taken enforcement action against this practice.³

The District Court’s interpretation risks exacerbating these abuses by allowing bad actors to trigger mandatory blocks regardless of the legitimacy of their requests. This approach will lead to more inaccuracies and misrepresentations in credit reports, thereby obstructing financial institutions’ capacity to make informed assessments of individuals’ credit risk, ultimately harming both businesses and consumers. *Cf. Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1158 (11th Cir. 1991) (“[T]he very economic purpose for credit reporting companies would be significantly vitiated if they shaded every credit history in their files in the best possible light for the consumer.”).

The integrity of the credit reporting system hinges on the accuracy of reporting, which serves as a critical tool for financial institutions in assessing

³ FTC Consumer Alert, *Influencers Are Pushing This Illegal Trick To “Fix” Your Credit Report* (Jan. 5, 2026), <https://consumer.ftc.gov/consumer-alerts/2026/01/influencers-are-pushing-illegal-trick-fix-your-credit-report>; Press Release, FTC, *FTC Acts to Shut Down ‘The Credit Game’ for Running a Bogus Credit Repair Scheme that Fleeced Consumers* (May 6, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-acts-shut-down-credit-game-running-bogus-credit-repair-scheme-fleeced-consumers>; Press Release, FTC, *FTC Halts Deceptive Credit Repair Operation that Filed Fake Identity Theft Complaints* (Mar. 21, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-halts-deceptive-credit-repair-operation-filed-fake-identity-theft-complaints>.

consumers' creditworthiness and enabling those consumers to obtain credit on appropriate terms. If credit reports become less reliable because accurate information is subject to mandatory blocks, there would be significant repercussions for consumer reporting agencies and the wide variety of lenders and other businesses that rely on them—and ultimately for consumers. The District Court's interpretation threatens to undermine this system, which further underscores the need for immediate review of the erroneous class-certification order.

CONCLUSION

The petition for leave to appeal should be granted.

Dated: May 20, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29 and 32(g), and Local Rules 31.1(c) and 28.3(d), the undersigned counsel certifies as follows:

1. I am a member of the bar of this Court.
2. This brief complies with the type-volume limitation of Rule 29(b)(4) because the brief contains 2,511 words, excluding the parts of the brief exempted by Rule 32(f).
3. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because the brief was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.
4. The text of the electronic brief is identical to the text in the paper copies.
5. A virus detection program, CrowdStrike, has been run on the file and no virus was detected.

Dated: May 20, 2026

Respectfully Submitted,

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2026, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. Ten hard copies of the foregoing brief were sent to the Clerk's Office via overnight delivery. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: May 20, 2026

/s/ Adam G. Unikowsky