No. 19-1059

In the

United States Court of Appeals

For the Fourth Circuit

PHILLIP ALIG, et al.,

Plaintiffs-Appellees,

v.

QUICKEN LOANS INC., et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of West Virginia
Hon. John Preston Bailey, District Judge
Case Nos. 5:12-cv-00114 & 5:12-cv-00115

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS AND REHEARING EN BANC

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March 31, 2021

CORPORATE DISCLOSURE STATEMENT

Amicus curiae The Chamber of Commerce of the United States of America hereby certifies that it is a non-profit membership organization, with no parent company and no publicly traded stock. The Chamber certifies that it is unaware of any publicly held corporation or similarly situated legal entity, other than those listed in Appellants' corporate disclosure statements, that has a direct financial interest in the outcome of this litigation.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

STATEMENT OF IDENTITY AND INTEREST[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the nation's business community.

The Chamber's members have a strong interest in promoting fair and predictable legal standards. They are particularly likely to be defendants in putative class actions. The Chamber's members thus have a strong interest in ensuring that courts comply with the Supreme Court's class action precedents, including undertaking the rigorous analysis required by Federal Rule of Civil Procedure 23. The Chamber

[1] Counsel for Appellants consented to the filing of this brief. Counsel for Appellees did not respond. No party's counsel authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

has filed amicus briefs in several recent class action cases, including *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); and *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

ARGUMENT

I. No plaintiff here suffered Article III injury.

This lawsuit challenges Quicken Loans' practice of sending homeowner value estimates to its appraisers as part of a refinancing process. The claim that *any* instance of this caused concrete Article III injury *to anyone* requires a piling on of dubious inferences. The theory is that the practice "tainted" the appraisals in a subconscious way, even though appraisers testified they were not affected. Thus, says the panel majority, Article III injury arose even if the borrowers got the loan they wanted for the price they agreed up front to pay. If subconscious "taint," untethered from real financial harm, is a "concrete injury" under Article III, then the concept of standing has lost all its teeth.

The missing Article III element here is concrete injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (requiring "injury in fact" that is "concrete and particularized" and "actual or imminent"). "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). That a practice may be unconscionable under a statute, like the West Virginia law here, does not alone satisfy the injury-in-fact requirement. *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (*Spokeo* "abrogated" the view that "violation of a statutory right automatically satisfies the injury-in-fact requirement.").

A concrete injury "must be 'de facto'; that is, it must actually exist," and it must be "real, and not abstract." *Spokeo*, 136 S. Ct. at 1548. Concrete injury thus cannot depend on "speculation about the 'unfettered choices made by independent actors,'" or on an "attenuated chain of inferences." *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 414 n.5 (2013) (quoting *Lujan,* 504 U.S. at 562); *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 346 (4th Cir. 2017) (rejecting "nebulous frustration" as a concrete injury).

The panel majority found Article III standing easily satisfied here because every class member paid for an appraisal. Op. 14 n.9. Because the appraisals they got were supposedly "tainted," they all suffered "financial harm" in the majority's view. Op. 13.

The panel majority is wrong for two reasons.

1. The appraisals were not "tainted."

The theory that the appraisals were "tainted" is a triumph of imagination over evidence. As Judge Niemeyer observed, the plaintiffs were harmed "*not one iota*." Diss. 47.

Everything in these transactions happened "as planned." Diss. 46. The borrowers benefited financially from refinancing to lower interest rates. *Id.*

Even looking at each appraisal individually, evidence of "taint" proves elusive. Appraisers certified that their appraisal numbers "represented [their] impartial, objective, and independent judgment based on comparable sales." Diss. 63. They testified that the homeowners' estimates "did not influence" their appraisals "in any way." Diss. 52-53 (adding that the estimates were "irrelevant" to "determining market value using 'comparables.'"). In sum, "there is no evidence that the appraisers on these loans were influenced by the borrowers' estimates." Diss. 48.

2. Regardless, "taint" is not a concrete harm.

Even if the appraisals *were* "tainted," they do not represent "financial harm" to the borrowers. The panel majority chose to view the appraisals in a vacuum, as if each appraisal were an independent product sold to the borrower. Thus, it relied on inapt case law to find that although the refinance loans benefitted the borrowers, the appraisals alone mattered for standing purposes.

That is wrong because the appraisals had no point other than as a cog in the refinance machine. No borrower bought an appraisal except as part of a single larger transaction—a loan refinance.

Thus, this case is far different from *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015). *Contra* Op. 14. In that case, Texas showed that providing drivers' licenses to noncitizens would cost the state millions of dollars. 809 F.3d at 155. The United States argued that the "costs would be offset by other benefits," including vehicle registration revenue, fewer uninsured motorists, and higher employment. *Id.* The Fifth Circuit found that Texas had standing because none of the projected benefits were "sufficiently connected to the costs to qualify as an offset." *Id.* at 156 (noting that vehicle registration revenues "are not a direct result of the issuance of licenses"). That court specifically envisioned that if the alleged costs and benefits had a "tighter nexus," then standing could have been absent. *Id.* at 156. Indeed, in an earlier case, the same court held that there was no taxpayer standing to sue over specialty license plates because those who bought the license plates paid money that "covered the associated expenses." *Id.* (citing *Henderson v. Stalder*, 287 F.3d 374, 379-81 (5th Cir. 2002)).

Here, the borrowers bought refinance loans. Those refinance loans came on terms all agreed to and they improved the borrowers' financial circumstances. Diss. 48.

As one step in the refinancing process, the borrowers paid for appraisals—that is, for an appraiser's view of their property value—which they got. Even on the (doubtful) assumption that the borrowers' estimates *did* affect the appraisals, the sole effect would be a *possibility* that the exact loans the borrowers applied for were unjustified by their home values. Under those circumstances, the borrowers got what they wanted and left the bank under-collateralized. *McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 280 (4th Cir. 2016) ("[I]t is not the borrower but the bank that typically is disadvantaged by an under-collateralized loan.").

This is an extremely "tight[] nexus" between the alleged harm and the benefit borrowers received. *Texas*, 809 F.3d at 156. In the panel majority's own words, "the appraisal process is closely related to loan formation for loans secured by the collateral of real property." Op. 41. Thus, given the benefit the borrowers received, no concrete injury exists at all.

The panel majority's failure to recognize and enforce these traditional limits on Article III standing is serious. It puts this Court outside its constitutional bounds, it is inconsistent with Circuit precedent, *see* Reh'g Pet. 8-9, and it requires businesses to defend against burdensome litigation from consumers who actually *benefitted* from their interaction. This Court should correct that approach, reinforcing that litigation—even class-action litigation—is meant to redress concrete harm, not amorphous "taint."

II. Lack of uniform, classwide Article III injury should bar class certification.

1. Federal courts lack authority to adjudicate claims by uninjured class members.

First, Article III standing is a threshold matter in federal court. Standing is "indispensable" and must be present at each stage of the case. *Lujan*, 504 U.S. at 561 (holding that standing must be "supported . . . at the successive stages of litigation"). "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods*, 136 S. Ct. at 1053 (Roberts, C.J., concurring). As this Court recently recognized, "the strictures of Article III standing are no less important in the context of class actions." *Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244, 252 (4th Cir. 2020).

No federal court should thus be taking on an "exercise of judicial power" for any litigant who cannot "show injury in fact resulting from the action which they seek to have the court adjudicate." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982). And class certification is exactly that—an exercise of judicial power that brings unnamed class members under the power of the court. "Class certification is the thing that gives an Article III court the power to render dispositive judgments affecting unnamed class members." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 770 (5th Cir. 2020) (Oldham, J., concurring).

2. Even on the panel majority's view, no one knows how many class members suffered an injury.

The panel majority found standing by holding that every class member paid for an appraisal but received a "tainted" one. That analysis was flawed on its face. Even if the taint did alter some appraisals, *which ones* remains unclear. The panel majority admits that it has no idea how many appraisals were actually inflated. Nor does the panel majority envision any classwide way to sort them. Instead, the panel majority reasoned that "anchoring"—subconsciously basing future estimates on earlier-given numbers—is a phenomenon that could have influenced appraisers without them knowing it. Op. 37-38 (also finding it suspicious that the average separation between estimated values and appraised values was within five percent).

The panel's analysis simply does not apply to all of the class members, or any particular one of them for that matter. *Every* appraisal did not fall within five percent of the homeowner's estimate—some were lower or higher. And even an appraisal within five percent could simply mean that the owner knew roughly what her home was worth. (It does not seem strange that an owner of a $300,000 house might know its value within $15,000). On top of that, no psychological phenomenon can show that "anchoring" changed the final outcomes for any specific appraiser or appraisal.

The panel majority opinion acknowledges this problem. It asserts that "even if they did so only subconsciously," appraisers "*at least sometimes* adjusted their appraisals in response." Op. 42 (emphasis added). The court even admitted that the "record is devoid of evidence regarding the actual home values of other class members [all except one couple]," such that it "[could] not evaluate whether the appraisals for most class members were inflated." Op. 37 n.22. Plaintiffs bear the burden of proof, *Lujan*, 504 U.S. at 561, and cannot do so by speculation that the panel majority admits may not even apply to "most class members." Op. 37 n.22. Yet the panel majority ignored the conclusion that flows from this problem: it lacked jurisdiction to certify the class.

3. Unknown, uncounted, uninjured class members destroy Rule 23 predominance.

Even applying Rule 23 by itself, the evidence of concrete injury in a case like this one leaves predominance lacking. "Common questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact. . . . When a case turns on individualized proof of injury, separate trials are in order." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013).

The Eleventh Circuit recently addressed this in a case much like this one. *See Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1264 (11th Cir. 2019). In *Cordoba*, the plaintiffs alleged that a company violated the Telephone Consumer Protection Act by failing to maintain internal records of which consumers had asked not to receive any more calls (and as a result the company continued to call those people). The problem was that it remained unclear at class certification *who* among the class had *asked* not to be called. The Eleventh Circuit vacated class certification. It concluded that, if someone never asked not to be called, the company's failure to keep records of such asks did not cause that person any injury. Nor was there any obvious classwide way to sort class members by who had asked the company not to call them. The "fact that many, perhaps most, members of the class may lack standing is extremely important to the class certification decision." *Cordoba*, 942 F.3d at 1264. Noting the "in terrorem character of a class action," *id.* at 1276, the court held that "[t]he district court must consider under Rule 23(b)(3) before certification whether the individualized issue of standing will predominate." *Id.* at 1277.

The panel majority should have applied the same reasoning as the Eleventh Circuit. Here, plaintiffs have not even established that they suffered harm from the challenged business practice, let alone that the practice injured *all* of the absent class members. Figuring out who suffered concrete injury from the challenged practice poses a significant individualized question. Thus, for the same reason that certification was not proper in *Cordoba*, it was not proper here. The panel majority's view that appraisals were "sometimes" influenced, "subconsciously," and its forthrightness in admitting it has no idea which ones or any clear path to sorting them, should have been the end of class certification.

This laissez-faire approach bears no similarity to the "rigorous" class certification analysis that the Supreme Court has required, and on which the plaintiff must bear the burden of proof. *Wal-Mart Stores,* 564 U.S. at 351, 345.

4. Failure to enforce class certification requirements in statutory damages cases can have devastating consequences for businesses.

Class-action lawsuits like this one, involving claims for statutory damages arising out of thousands of transactions, pose serious risks to businesses. As Judge Wilkinson recognized in another context, "the exponential expansion of statutory damages through the aggressive use of the class action device is a real jobs killer" because it threatens "bankrupting entire businesses over somewhat technical violations" even "where no plaintiff has suffered any actual harm." *Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) (concurring).

Common sense dictates that, if Quicken Loans violated West Virginia's consumer protection act, it did so unintentionally. It had little to gain from leaving itself under-collateralized on loans and much to lose if confronted with a lawyer-driven class-action lawsuit seeking millions of dollars in statutory damages.

For some companies, the prospect of class-action statutory damages will be "annihilative." *Id.* at 278. And "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). "When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting). While this is one of the rare circumstances in which a business has not settled a class claim, the potentially ruinous consequences for businesses of flimsy class certifications in statutory damages cases only underscores the need for this Court's en banc review.

CONCLUSION

This Court should grant rehearing en banc and reverse this class certification.

Dated: March 31, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the type-volume limitations of Fed. R. App. P. 29(a)(5). The brief is proportionally spaced, has a typeface of 14-point Century Schoolbook font, and contains 2,595 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2021, the foregoing was filed with the Clerk of the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. The system will serve counsel of record.

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