No. 17-2208

In the

United States Court of Appeals

for the

Fourth Circuit

CAROLYN CLARK,

Plaintiff-Appellee,

v.

TRANS UNION LLC,

Defendant-Appellant.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT TRANS UNION LLC

On Appeal from the U.S. District Court
for the Eastern District of Virginia, No. 3:15-cv-00391-MHL
Hon. M. Hannah Lauck

Steven P. Lehotsky
Warren Postman
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Andrew J. Pincus
Archis A. Parasharami
Daniel E. Jones
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Attorneys for Amicus Curiae
The Chamber of Commerce of the United States of America

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (the "Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules and Regulations

Other Authorities

INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 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.

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 curiae* briefs in cases that raise issues of concern to the nation's business community. The Chamber participated as an *amicus* before the Supreme Court at both the petition and merits stages in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

The Chamber has a significant interest in the Article III standing and class certification issues presented by this case because its members frequently face putative class action lawsuits based on

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5). All parties have consented to the filing of this brief.

allegations of bare statutory violations—without any assertion that the plaintiff has suffered actual harm. In *Spokeo*, the Supreme Court underscored that the Constitution requires plaintiffs to allege concrete, *i.e.*, "real," harm—rejecting the contention that alleging a bare statutory violation automatically satisfies Article III's injury-in-fact requirement. And this Court, faced with the same statutory provision at issue here, confirmed that Article III requires a plaintiff to allege more than "a statutory violation divorced from any real world effect." *Dreher v. Experian Info. Solutions, Inc.*, 856 F.3d 337 (4th Cir. 2017). As we discuss below, both the named plaintiff and the vast majority of putative class members cannot satisfy this standard, meaning that the district court erred both in refusing to dismiss the plaintiff's own claim and in certifying a class under Rule 23.

If, despite *Spokeo* and *Dreher*, plaintiffs are permitted to pursue cases like this one, the federal courts will be forced to hear, and businesses (including the Chamber's members) will be mired in, lawsuits over alleged technical statutory violations that have not caused any actual harm. And the reality is that these cases are designed to force costly class settlements rather than redress actual,

real-world injuries. The Chamber therefore has a strong interest in reversal of the order below.

INTRODUCTION AND SUMMARY OF ARGUMENT

The claim at issue here is a prime example of the type of no-injury claim that the Supreme Court held in *Spokeo* cannot proceed in federal court. Plaintiff Carolyn Clark alleges that TransUnion violated a section of the Fair Credit Reporting Act (FCRA) requiring consumer reporting agencies to disclose on request from a consumer "[t]he sources of the information" in that consumer's credit report. 15 U.S.C. § 1681g(a)(2). In particular, Clark asserts that TransUnion did not identify LexisNexis or other third-party vendors as sources of the public record information in consumer reports—instead reporting the underlying source of the public data (such as a courthouse).

Clark did not identify any adverse real-world impact to her from this alleged violation—she did not, for example, state that she was denied credit as a result of the fact that TransUnion pointed to the underlying source of information (public records) rather than third-party vendors. Instead she justifies her assertion of standing solely on the claimed "informational injury" of not receiving information that the

statute required TransUnion to disclose. TransUnion Br. 16. The district court endorsed this relaxed approach to injury in fact, concluding that "a consumer need not necessarily prove any more harm than that suffered as a result of deprivation of FCRA information to which he or she is entitled." (JA Vol. II 276.) As we discuss below, that approach cannot be squared with *Spokeo* or *Dreher*, and accordingly the district court erred in refusing to dismiss Clark's lawsuit for lack of Article III standing.

To make matters worse, the district court relied on that broad view of standing in granting class certification. Although TransUnion introduced extensive expert evidence demonstrating that the vast majority of the putative class members would suffer no adverse effect from a lack of disclosure that TransUnion used a third-party public records collector (*see* TransUnion Br. 11), the district court brushed aside that showing. The court below held that each class member suffered the same informational injury from the bare violation of Section 1681g(a), and was not required "to prove individualized injury in fact based on harm suffered beyond the violation of § 1681g(a)(2) itself." (JA Vol. II 427, 438 n.21.)

Yet a putative class may not be certified when, as here, it contains large numbers of individuals who lack Article III standing. Due process and Rule 23 require that each member of a class suffer an injury in fact, and that defendants be afforded the right to challenge each class members' assertion of Article III standing.

The reason is simple: A Rule 23 class action is the sum of the individual class members' claims within it—nothing more. As the Supreme Court has made clear, courts may not nullify defendants' due process rights by certifying a class "on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). To do so would violate the Rules Enabling Act, which embodies the due process principle that procedural rules, like Rule 23, cannot "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b).

Indeed, the Chief Justice has pointed out in a recent concurring opinion that "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*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (emphases added). Accordingly, even if Clark herself had standing to

sue, the district court erred in certifying a class because the class contained—in violation of Article III—large numbers of members who lack standing to sue on their own and the lower court's certification decision is premised on defendants' inability to raise those class members' lack of standing as grounds for precluding them from recovering damages.

The order of the district court should be reversed.

ARGUMENT

I. *Spokeo* And *Dreher* Compel Reversal Of The District Court's Conclusion That Clark Has Standing.

The "'irreducible constitutional minimum'" of Article III standing is that "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). To establish Article III standing, a plaintiff therefore must "'[f]irst and foremost'" demonstrate that she suffered "an injury in fact" that is both "concrete and particularized." *Spokeo*, 136 S. Ct. at 1547-48 (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998)); *see also Dreher*, 856 F.3d at 343.

Here, these principles required Clark to allege a "concrete and adverse effect" from the statutory violation—*i.e.*, that the violation "worked [a] real world harm on [her]." *Dreher*, 856 F.3d at 346. The district court's decision deviated from this clear requirement.

1. The district court held here that Congress's enactment of Section 1681g(a)(2) means that any "failure to reveal source information" in violation of the statute is an "informational injury" that automatically satisfies Article III's injury-in-fact requirement. (JA Vol. II 274.)

But that categorical approach is little different than the legal rule originally adopted by the Ninth Circuit in *Spokeo*, *see Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (9th Cir. 2014), and squarely rejected by the Supreme Court, which held that a plaintiff cannot plead a concrete "injury in fact" merely by alleging a bare statutory violation "divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549. Instead, the Court stated, "Article III standing requires a concrete injury *even in the context of a statutory violation*." *Id.* (emphasis added). And the Court identified considerations for determining when an intangible injury is concrete, observing that "both history and the judgment of Congress

play important roles," while also cautioning that "Congress' role in identifying and elevating intangible harms *does not mean* that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* (emphasis added).

This Court recognized these principles in *Dreher*, which rejected the proposition that a failure to disclose a source of information as required by Section 1681g(a)(2) automatically qualifies as concrete harm. 856 F.3d at 343-47. Put simply, *Spokeo* did not create a sweeping "informational injury" exception to the requirement that a plaintiff suffer a real-world harm from an alleged statutory violation. Rather, as this Court explained, while an "'informational injury' is a type of intangible injury that *can* constitute an Article III injury in fact," "a statutory violation *alone* does not create a concrete informational injury sufficient to support standing." *Id.* at 345 (first emphasis added). Instead, "a constitutionally cognizable informational injury requires that a person lack access to information to which he is legally

entitled *and* that the denial of that information creates a 'real' harm with an adverse effect." *Id.*

The district court's failure to apply the second half of that standard was legal error. After all, "it would be an end-run around the qualifications for constitutional standing if any nebulous frustration resulting from a statutory violation would suffice as an informational injury." *Id.*

The district court also relied heavily on the Supreme Court's citations to *FEC v. Akins*, 524 U.S. 11 (1998), and *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989) for the proposition that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Spokeo*, 136 S. Ct. at 1549. (JA Vol. II 271 & n.17, 275, 427.) But the district court vastly overread *Akins* and *Public Citizen*, neither of which holds that the violation of any statutory right to information is *itself* an injury in fact. Rather—as this Court explained in *Dreher*—the Supreme Court grounded *Akins* and *Public Citizen* in the separate, particularized, concrete *effects* on the plaintiffs of the denial of access to the requested information.

The *Akins* Court stated that "the information [not provided] would help [plaintiffs] (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election." 524 U.S. at 21. Because of these effects, the Court explained, the plaintiffs' "injury consequently seems concrete and particular." *Ibid.*; see also *id.* at 24-25 (the denial of information necessary to cast an informed vote is a deprivation "directly related to voting, the most basic of political rights," and therefore "sufficiently concrete and specific"). And in *Public Citizen*, the deprivation was of information the interest groups needed to scrutinize the "workings" of government in order to "participate more effectively in the judicial selection process." 491 U.S. at 449.

Thus, as this Court succinctly summarized in *Dreher*, *Akins* and *Public Citizen* "are inapposite because both cases involved the deprivation of information *that adversely affected the plaintiffs' conduct*." 856 F.3d at 347; *see also, e.g.*, *Dolan v. Select Portfolio Servicing*, 2016 WL 4099109, at *6 & n.7 (E.D.N.Y. Aug. 2, 2016) (rejecting the argument that *Akins* and *Public Citizen* stand for the

proposition "that the mere violation of a statute that requires disclosure of any type of public or consumer information is sufficient to confer standing on a plaintiff who was denied access to that information"); *Nokchan v. Lyft, Inc.*, 2016 WL 5815287, at *9 (N.D. Cal. Oct. 5, 2016) (rejecting, "in the wake of *Spokeo*," the "broad proposition that violation of a disclosure requirement under the FCRA, by itself, is sufficient to confer Article III standing on a plaintiff").

2. The district court fared no better in attempting to divine a congressional "judgment" (*Spokeo*, 136 S. Ct. at 1549) that each and every failure to report a source of information on a credit report should trigger a lawsuit in federal court. (JA Vol. II 273-280.)

In other contexts where Congress legislates against the backdrop of default rules, courts have consistently held that Congress must expressly state its intent to displace the generally applicable rule.[2] The same approach should govern here: A statute cannot be interpreted to expand the class of persons entitled to sue without (at minimum) some indication in the text that Congress intended that effect.

---

[2] See, *e.g.*, *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363 (2013); *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991).

Indeed, in explaining Congress's ability to elevate a *de facto* harm to the status of injury in fact, the Supreme Court cited (*Spokeo*, 136 S. Ct. at 1549) "Justice Kennedy's concurrence" in *Lujan*, which in turn explained that, if Congress seeks "to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before[,] . . . Congress must at the very least *identify the injury* it seeks to vindicate and *relate the injury to the class of persons entitled to bring suit*." 504 U.S. at 580 (Kennedy, J., concurring) (emphasis added). It would be "remarkable" and "unfortunate" to "hold[] that Congress may override the injury limitation of Article III" when "there is no indication that Congress embarked on such an ambitious undertaking." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1227 (1993).

Here, there is no evidence that Congress intended to make violations of Section 1681g(a) in particular specially actionable. When Congress enacted that section, the statute allowed private plaintiffs to sue only upon proof of "actual damages," and therefore expressly required plaintiffs to demonstrate actual harm of the sort normally required to obtain relief in court. Congress at that time plainly did not

identify a new class of intangible harms justifying access to court in the absence of real harm. Pub. L. No. 91-508, §§ 609, 616, 84 Stat. 1127, 1131, 1134 (1970). Indeed, the Senate Report relied upon by the court below stated that the statute's purpose "'is to prevent consumers from being unjustly *damaged* because of inaccurate or arbitrary information in a credit report.'" S. Rep. No. 91-517, at 1 (1969) (emphasis added) (cited at JA Vol. II 274).

Congress subsequently authorized statutory damages across the aboard for *every* willful violation of the FCRA. 15 U.S.C. § 1681n. The statute therefore does not reflect any particularized judgment by Congress that each and every failure to disclose the source of information on a credit report should be actionable because it automatically works a harm that is so significant that it should be "elevated" to one sufficient to open the door to an action in federal court.

The district court's background references to Congress's overarching "central purpose" in enacting the FCRA of "ensur[ing] 'fair and accurate credit reporting" (JA Vol. II 273 (quoting *Spokeo*, 136 S. Ct. at 1545 (quoting in turn 15 U.S.C. § 1681(a)(1)))) also do not circumvent Clark's burden of alleging concrete injury resulting from the

particular violation *in her case*. The district court's contrary rule renders *Spokeo* a nullity: Whenever Congress enacts a statutory requirement, its goal is to further some purpose. In nearly every case, therefore, a violation of a statutory requirement, at least to some degree, hinders full accomplishment of the statute's objectives.

The Supreme Court specifically cautioned in *Spokeo* that some violations of the FCRA could "result in no harm"—and thus no standing—even if they involve alleged conduct that violates the law *and* Congress' purpose in enacting that law. 136 S. Ct. at 1550. The Court pointed out that, in enacting the FCRA, "Congress plainly sought to curb the dissemination of false information," yet for purposes of Article III standing, "not all inaccuracies cause harm or present any material risk of harm." *Id.*; *see also, e.g.*, *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016) (explaining that, under *Spokeo*, "some statutory violations could 'result in no harm,' even if they involved producing information in a way that violated the law").

Likewise, this Court emphasized in *Dreher* that these broad statements of the FCRA's purpose do not substitute for the required plaintiff-specific showing of "real world harm." 856 F.3d at 346. As in *Dreher*, Clark has not shown how the alleged violation here "would have

made any difference at all in the fairness or accuracy of [her] credit report." *Id.*

Indeed, the district court made quite clear in certifying a class that the accuracy of the report is irrelevant: "The Class Claim seeks redress not for *inaccurate* public records information, but for TransUnion's failure to disclose *the sources* of public records information on the class members' consumer reports—*irrespective of the accuracy of the information* those sources provide." (JA Vol. II 434 (emphasis added)).

Even if Clark could show that Congress had made the requisite determination—and she cannot—*Spokeo* makes clear that any such judgment is "instructive" rather than dispositive. 136 S. Ct. at 1549. Congress could not transform by fiat conduct that "works [no] concrete harm" (*id.* at 1550) into a "concrete" harm. That would transgress the "hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

In short, *Spokeo* and *Dreher* both confirm that the injury-in-fact requirement requires that the plaintiff allege *real-world adverse consequences* from an alleged statutory violation; simply pleading a

statutory violation without an accompanying concrete injury does not satisfy Article III.[3]

3. Finally, TransUnion persuasively argues that, as an alternative to ruling on Article III grounds, this Court should avoid the constitutional question by construing the FCRA to require proof of actual harm as a prerequisite to recovery of a statutory penalty. TransUnion Br. 24-26. That approach makes sound practical sense: For the reasons discussed above, Congress has not clearly stated its intent to relieve plaintiffs of the requirement of demonstrating real-world concrete harm simply by enacting a statutory damages provision applicable to any willful violation of the FCRA's provisions.

---

[3] TransUnion explains in its brief (at 26-27) why any injuries alleged by Clark from TransUnion's reporting of a state court judgment stem from problems in the original court source itself, not from TransUnion's alleged failure to disclose the role of LexisNexis in passing along the public record information. And in any event, the district court based its standing holding and its subsequent class certification order on the theory that *any* violation of the statute amounts to a concrete informational injury, rather than inquiring into the individual circumstances surrounding Clark's consumer report. Indeed, had the district court insisted on a showing of real-world harm from the alleged statutory violation, as *Spokeo* and *Dreher* require, it would have been apparent that Clark's bid to certify a class is improper, regardless of whether Clark herself could clear the Article III threshold. *See* pages 17-24, *infra*; TransUnion Br. 28-40.

Instead, the more plausible reading of Section 1681n is that, because it can be difficult to prove the *amount* of damages resulting from a defendant's failure to comply with the FCRA's procedural provisions, Congress spared plaintiffs who have been concretely harmed by willful noncompliance from the burden of quantifying that harm, permitting an award between $100 and $1,000 at the district court's discretion. As the Supreme Court has observed, there is nothing "peculiar" about providing "only to those plaintiffs who can demonstrate actual damages" an award of "some guaranteed damages, as a form of presumed damages not requiring proof of amount." *Doe v. Chao*, 540 U.S. 614, 625 (2004); *see also, e.g.*, *Memphis Cnty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310-11 (1986) (recognizing that "presumed damages may roughly approximate the harm that the plaintiff suffered" from the violation—because "ordinary compensatory damages" are too difficult to quantify).

II. The District Court's Certification Of A Class Consisting Of Numerous Uninjured Individuals Violates Rule 23, Due Process, And The Rules Enabling Act.

The district court also erred in certifying a class. As certified, the class contains numerous individuals who cannot establish Article III

injury in fact under the standards applied in *Spokeo* and *Dreher*. Article III forbids a federal court from exercising jurisdiction over a class action in which uninjured class members could recover damages. Moreover, Rule 23 and due process require affording TransUnion the opportunity to assess which putative class members, if any, have been injured—and that inquiry would require individualized mini-trials that would preclude class treatment.

TransUnion correctly notes that, although this Court has not yet addressed the issue of whether absent class members must demonstrate Article III standing to sue, many other circuits have held that a class must be defined to ensure that anyone in it would have Article III standing. *See* TransUnion Br. 28-30. The approach taken by those circuits is mandated by due process and the Rules Enabling Act.

First, the class action is merely a procedural device, "ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) (a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged"). The requirements for class certification must be

applied in a manner consistent with the Rules Enabling Act, which embodies the due process principle that procedural rules cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("[N]o reading of [Rule 23] can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.") (quotation marks omitted); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 613 (1997)) ("Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act"). As the majority in *Tyson Foods* explained, courts may not violate the "Rule Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.'" *Tyson Foods*, 136 S. Ct. at 1046.

Similarly, due process precludes use of the class action mechanism to alter the substantive rights of the parties to the litigation, and the Supreme Court and lower federal courts have recognized that Rule 23's requirements must be interpreted to avoid that result. *See Dukes*, 564 U.S. at 367; *see also Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers) (noting the due process concerns raised when "individual plaintiffs who could not recover had they sued

separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action"); *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues."); *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010) ("The Rules Enabling Act . . . and due process . . . prevent[] the use of class actions from abridging the substantive rights of any party.").[4]

A plaintiff who has not suffered a concrete injury has no right to relief, because standing is "an indispensable part of [a] plaintiff's case." *Lujan*, 504 U.S. at 561. Certifying a class in which large numbers of absent class members *lack* standing thus impermissibly "enlarge[s]"

[4] As the Supreme Court explained in *Dukes*, in light of the Rules Enabling Act, "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims." 514 U.S. at 367 (2011) (citations omitted). But nothing in *Dukes* limits its logic to "*statutory* defenses"; the same rationale applies equally to constitutional defenses, including that a class member lacks Article III standing because he or she has not suffered an injury-in-fact.

absent class members' rights—and correspondingly "abridge[s]" defendants' rights—by permitting those unharmed absent class members to bring and potentially recover statutory damages on claims that they could not pursue as individuals because of their lack of concrete injury.

The Supreme Court highlighted the potential constitutional problems with certifying a class that includes uninjured individuals in its recent decision in *Tyson Foods*. In that case, workers at a pork processing plant brought a collective action under the Fair Labor Standards Act (FLSA) and class action under Iowa law, alleging they had not received overtime pay for the time spent donning and doffing protective gear. 136 S. Ct. at 1042. Some class members were likely entitled to overtime pay under the FLSA and state law if the plaintiffs prevailed, but many class members would not have been able to show a violation of the FLSA and state law—and therefore no cognizable injury—because their time at work would not reach 40 hours a week even including the donning and doffing time. *Id.* at 1043-44. The Court granted certiorari in part to review the question "whether a class may

be certified if it contains members who were not injured." *Id.* at 1049 (quotation marks omitted).

Because the petitioner abandoned its argument on the issue, however, the Court ultimately did not address it. *Tyson*, 136 S. Ct. at 1049. But the majority noted that "the question whether uninjured class members may recover is one of great importance." *Id.* at 1050. And in a concurrence joined by Justice Alito, Chief Justice Roberts answered the original question presented succinctly: "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Id.* at 1053 (Roberts, C.J., concurring).

This case presents a straightforward example of the standing problem that the Supreme Court identified in *Tyson Foods*. Here, TransUnion showed (with evidence) that very few, if any, of the absent class members suffered a concrete injury—and identifying those who did would require fact-specific individualized inquiries. *See* TransUnion Br. 37-39. The district court dodged those individual questions, generating a class with large numbers of wholly uninjured class members.

Yet Article III has no less force in a class action than in an individual one, and it bars a class consisting of large numbers of uninjured class members from recovering damages in federal court. Courts following *Spokeo* have correctly recognized this principle and refused to certify classes with large numbers of uninjured members. That is especially so when weeding out the injured members of the putative class would require an unmanageable series of individualized mini-trials. As one judge put it, "[w]hether characterized as problems with overbreadth, commonality, typicality, or Article III standing," "class certification is not proper to the extent that Plaintiffs raise claims and theories they do not have standing to raise, and to the extent *that the class includes consumers who have no cognizable injury*." *Sandoval v. Pharmacare US, Inc.*, 2016 WL 3554919, at *8 (S.D. Cal. June 10, 2016) (emphasis added) (citing *Spokeo*, 136 S. Ct. at 1549); *see also Legg v. PTZ Insurance Agency, Ltd.*, 2017 WL 3531564, at *4 (N.D. Ill. Aug. 15, 2017) (denying class certification in a TCPA case where many class members orally consented to receive the calls despite the TCPA's requirement of written consent; "if an adopter has expressly agreed and expected to receive calls from defendant, and did receive those calls, the

adopter has not been injured in any way, even if defendants technically violated a procedural requirement of the TCPA").

Another court put it clearly in denying certification in a class action involving disclosures required under federal Truth-in-Leasing regulations: "Because *Spokeo* has clarified that a mere procedural violation is not sufficient to create an injury-in-fact under Article III of the United States Constitution . . . common issues of fact and law do not predominate over the individual inquiries necessary to determine whether each class member, in fact, suffered a cognizable injury." *Britts v. Steven Van Lines, Inc.*, 2017 WL 769209, at *4 (N.D. Ohio Feb. 28, 2017).

The same principles apply here and require reversal of the district court's order certifying a class containing large numbers of uninjured persons.

III. No-Injury Lawsuits Like This One Impose Unjustified Costs On Businesses.

Finally, the district court's failure to properly apply Article III's injury-in-fact requirement to both named plaintiffs and absent members of the putative class carries significant practical consequences for the courts and businesses.

Indeed, this is hardly the only case of its kind. In the past few years, plaintiffs' lawyers have pursued at least four dozen putative class actions in federal district courts across the country alleging violations of Section 1681g(a)'s disclosure provisions in particular—and of course the number of putative class actions invoking the FCRA in general is far greater.[5]

This stream of litigation is not surprising. "What makes these statutory damages class actions so attractive to plaintiffs' lawyers is simple mathematics: these suits multiply a minimum $100 statutory award (and potentially a maximum $1,000 award) by the number of individuals in a nationwide or statewide class." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 (2009).

But in the absence of real-world injury (or a certainly impending one), these unproductive and abusive lawsuits simply generate fees for the lawyers rather than benefits for consumers. As the Seventh Circuit recently put it, the only "'victims'" of strict adherence to Article III's

---

[5] Using Bloomberg, we searched the federal district court dockets for class action complaints citing Section 1681g(a) filed since January 1, 2015. That search yielded 49 results, after subtracting the complaints filed in this case.

injury-in-fact requirement are, by definition, "persons or organizations who suffer no significant deprivation if denied the right to sue." *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 912 (7th Cir. 2017).

Yet in stark contrast to Clark's purported injury here, the injuries inflicted upon businesses by the relaxation of constitutional standing requirements are anything but abstract. Lawsuits such as this one create a risk of excessive damages for conduct that has caused no actual harm—often resulting in *in terrorem* settlements that impose substantial costs on businesses (and ultimately their customers) even though no one has actually been injured and even when the underlying claims lack merit.[6]

To be sure, the high stakes of class actions do not themselves alter the requirements of Article III. *See Spokeo*, 136 S. Ct. at 1547 n.6. But they do highlight the practical significance of insisting on the constitutional minimum of concrete injury in fact. The Supreme Court

---

[6] *See, e.g.*, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims."); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial.").

has recognized this problem, observing that "courts must be more careful to insist on the formal rules of standing, not less so," in this "era of frequent litigation [and] class actions." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

At the end of the day, the approach to standing adopted by the court below means that the mere technical violation of a statute automatically enables the plaintiffs' bar to launch class-action litigation designed to wrest massive settlements from businesses in the absence of actual harm. That approach should not be permitted to stand.

CONCLUSION

The district court's order should be reversed.

Dated: December 22, 2017

Respectfully submitted,

Steven P. Lehotsky
Warren Postman
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

s/ Andrew J. Pincus
Andrew J. Pincus
Archis A. Parasharami
Daniel E. Jones
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Attorneys for Amicus Curiae
The Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,379 words, excluding the parts exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

Dated: December 22, 2017

/s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2017, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: December 22, 2017

/s/ Andrew J. Pincus
Andrew J. Pincus

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 17-2208 as

☒ Retained ☐ Court-appointed(CJA) ☐ Court-assigned(non-CJA) ☐ Federal Defender ☐ Pro Bono ☐ Government

COUNSEL FOR: _____

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☒ amicus curiae ☐ intervenor(s) ☐ movant(s)

/s/ Andrew J. Pincus
(signature)

Andrew J. Pincus
Name (printed or typed)

202-263-3220
Voice Phone

Mayer Brown LLP
Firm Name (if applicable)

202-263-5220
Fax Number

1999 K St NW

Washington, DC 20006
Address

apincus@mayerbrown.com
E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on 12/22/2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Andrew J. Pincus
Signature

12/22/2017
Date