No. 17-17244

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SERGIO RAMIREZ, on behalf of himself
and all others similarly situated,

Plaintiff-Appellee,

v.

TRANS UNION LLC,

Defendant-Appellant.

On Appeal from the U.S. District Court
for the Northern District of California
No. 3:12-cv-00632-JSC (Corley, J.)

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

Steven P. Lehotsky
Warren Postman
U.S. CHAMBER LITIGATION CENTER, INC.
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

Counsel 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 is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber 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.[1]

An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community, including cases addressing the requirements for Article III standing. 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 in this case because its members

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[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.

frequently face putative class action lawsuits alleging bare statutory violations of the Fair Credit Reporting Act and other statutes. The Supreme Court held in *Spokeo* 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. Many or all of the members of the class certified by the district court in this case cannot satisfy this standard for either of the two categories of claims at issue here, and the district court therefore erred in certifying a class under Rule 23.

If, despite Article III's mandate, district courts are permitted to certify damages classes full of uninjured individuals so long as the named plaintiff arguably has standing, businesses will be mired in massive lawsuits over alleged technical statutory violations that have not caused actual harm to most of the class. And class-action plaintiffs' lawyers will seek to leverage the idiosyncratic experiences of an atypical named plaintiff into a class-wide damages bounty.

The Chamber therefore has a strong interest in this case and in reversal of the decision below.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

TransUnion convincingly explains why this Court should reverse the decision below, or at a minimum vacate the excessive multimillion dollar damages award. The Chamber writes to address two of the district court's errors.

First, the district court's lax approach to Article III standing cannot be squared with the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), or this Court's subsequent precedents. The district court focused on the unique circumstances of the named plaintiff, Sergio Ramirez, who alleged that he had difficulty obtaining an auto loan because his name appeared on a credit report as a potential match to information listed on the Treasury Department's Office of Foreign Asset Control (OFAC) Database.

But Ramirez did not seek to represent a class of individuals who shared that experience. Instead, he sought certification of a much broader nationwide damages class of every individual who received a letter from TransUnion informing them that they were potential OFAC matches (even though, for the overwhelming majority of those individuals, the information was not disseminated to any third party),

and he alleged two types of violations of the Fair Credit Reporting Act (FCRA). Specifically, Ramirez alleged that TransUnion failed to maintain "reasonable procedures to assure maximum possible accuracy" of consumer reports, in violation of 15 U.S.C. § 1681e(b) (the "reasonable procedures" claims). And Ramirez further alleged that TransUnion violated two of the FCRA's disclosure requirements, 15 U.S.C. § 1681g(a)(1) and § 1681g(c)(2), because it informed consumers of the potential OFAC match in a separate letter from the mailing containing their consumer file and summary of rights (the "disclosure claims").

On the reasonable procedures claims, the undisputed evidence showed that over 75% of the class members never had the potential OFAC match communicated to *anyone* else, nor did they face any risk of future dissemination. Yet the district court held that the alleged inaccuracy itself supplied the injury, even in the absence of any resulting harm or risk of harm. As for the disclosure claims, neither Ramirez nor any class member demonstrated any real-world consequences, or even confusion, from the alleged procedural misstep: for instance, they did not show that if they had received the OFAC alert

in one mailing rather than two, they would have been better informed or better able to contact TransUnion about the alert; or that they would have done anything differently at all. Nonetheless, the district court held that the failure to provide the information required by statute in a single mailing automatically constituted a concrete "informational injury" cognizable under Article III. As we discuss below, the district court's approach to both of these claims cannot be squared with *Spokeo*.

Second, to make matters worse, the district court relied on that broad view of standing in granting class certification and refusing to decertify the class after *Spokeo* was decided. The district court brushed aside TransUnion's showing that the vast majority of putative class members would suffer no adverse effect from the alleged FCRA violations, concluding that only Ramirez himself needed to have standing. That result cannot be squared with Rule 23, due process, and the Rules Enabling Act, which require that each member of a class suffer an injury in fact, and that defendants be afforded the right to challenge each class member's 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 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 Ramirez himself had standing to sue under his atypical circumstances, the district court erred in certifying a class and awarding statutory damages to the entire class because the class contained—in violation of Article III—large numbers of members who lack standing to sue on their own.

The decision of the district court should be reversed.

ARGUMENT

I. The Class Certified By The District Court Contains Numerous Individuals Lacking Article III Standing Under *Spokeo.*

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 Env't*, 523 U.S. 83, 103 (1998)). And that burden increases as the case progresses: in order to recover "at the final stage," a plaintiff's standing "must be supported adequately by the evidence adduced at trial." *Lujan*, 504 U.S. at 561 (quotation marks omitted).

Here, these principles required Ramirez to demonstrate that he *and* each class member suffered "a concrete injury," "even in the context

of a statutory violation." *Spokeo*, 136 S. Ct. at 1549.[2] The district court erred by excusing him from that requirement.

With respect to the reasonable procedures claims, TransUnion's brief explains in detail why absent class members lacked standing. TransUnion Br. 30-35. Notably, for over three-quarters of the class, the potential OFAC match was never published or disseminated to anyone but that individual, and there was no risk of dissemination in the future.

The Supreme Court has explained that Congress, in enacting the reasonable procedures provision of the FCRA, "plainly sought to curb the *dissemination* of false information by adopting procedures designed to decrease that risk." *Spokeo*, 136 S. Ct. at 1550 (emphasis added). That undisputed lack of dissemination makes these individuals' claims entirely different from the claims that this Court upheld in its recent decision in *Spokeo* (after the case was remanded by the Supreme Court).

The basis of this Court's decision was that the plaintiff in *Spokeo* adequately alleged an injury at the pleading stage because purportedly inaccurate information was published on the Internet and thereby made

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[2] We explain in Part II, *infra*, why Article III's standing requirements apply with equal force to absent class members.

available to third parties. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1117 (9th Cir. 2017). Indeed, the Court expressly "decline[d] to consider whether a plaintiff would allege a concrete harm if he alleged only that a materially inaccurate report about him was *prepared* but never *published*." *Id.* at 1116 n.3.

The district court overlooked this critical distinction. The court appears to have been troubled by the content of the alleged inaccurate statement. But the class members here are analytically indistinguishable from the plaintiff who lacked standing in *Bassett v. ABM Parking Services, Inc.*, 883 F.3d 776 (9th Cir. 2018), for receiving a purchase receipt that disclosed extra credit card information in violation of the Fair and Accurate Credit Transactions Act of 2003, an amendment to the FCRA. As this Court noted, "Bassett's private information was not disclosed to anyone but himself," and he therefore suffered no harm or risk of future harm such as identity theft. *Id.* at 783; *see also id.* ("We need not answer whether a tree falling in the forest makes a sound when no one is there to hear it. But when this receipt fell into Bassett's hands in a parking garage and no identity thief was there to snatch it, it did not make an injury."). The content of the information here therefore should also have been beside the point:

what mattered is that it was not disclosed or at risk of disclosure to any third parties.

With respect to the disclosure claims, the district court, relying on a single prior district court decision in another case involving TransUnion, held that a plaintiff who alleges a violation of Section 1681g(a)'s disclosure requirements has standing to pursue the violation based on an intangible "informational injury" that automatically satisfied Article III's injury-in-fact requirement. ER30 (citing *Larson v. Trans Union LLC*, 201 F. Supp. 3d 1103, 1106-07 (N.D. Cal. Aug. 11, 2016)).

But the categorical approach adopted by both the district court here and the court in *Larson* is little different than the legal rule originally adopted by this Court 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 Supreme 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).

Instead of reflexively invoking "informational injury," the district court should have applied these standards to determine whether the alleged intangible harm was sufficiently concrete. Doing so would have revealed that a bare allegation that information was disclosed in two contemporaneous mailings instead of one, without more, falls far short of what Article III requires.

1. Any purported harm from the violation of FCRA's disclosure requirements in this case bears no resemblance to cognizable informational injuries.

The district court noted that "*Spokeo* implicitly recognized 'informational injury' as sufficient to establish concrete injury." ER30. But alleging only that information was not presented in the proper ***format***—in two mailings instead of one—is an alleged harm that is

different in kind from the statutory violations at issue in the "informational injury" cases cited in *Spokeo*, which involved plaintiffs' ***inability*** to obtain information that the government was required by statute to disclose. *See* 136 S. Ct. at 1549-50 (citing *Federal Election Commission v. Akins*, 524 U.S. 11 (1998); *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989)).

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." *Id.*; *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.

As the Fourth Circuit put it in rejecting an overbroad informational injury theory for an alleged violation of Section 1681g(a)'s disclosure requirements quite similar to plaintiff's theory here, "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." *Dreher v. Experian Information Solutions, Inc.*, 856 F.3d 337, 346 (4th Cir. 2017). 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.* at 345.[3] Neither of those preconditions to a cognizable informational injury was met here.

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[3] *See also, e.g.*, *Smith v. Bank of Am., N.A.*, 679 F. App'x 550 (9th Cir. Feb. 16, 2017) (holding that "[m]ere receipt" of a "form" that does not adhere to the standards of a federal statute, "without more, is insufficient to establish injury-in-fact"); *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"); *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"); *Jamison v. Bank of Am., N.A.*,

This Court's decision in *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017), further confirms the district court's error here. The plaintiff in *Syed* alleged that the company violated the FCRA "stand-alone" disclosure requirement (that no other information may be included on the same page as certain required FCRA disclosures). *See* 15 U.S.C. § 1681b(b)(2)(A). The panel initially held that the failure to comply with the statutory requirement automatically established standing. 846 F.3d 1034 (9th Cir. 2017).

As the result of a rehearing petition, however, the panel amended its opinion to find standing based on *real consequences* alleged to have flowed from the statutory violation—the plaintiff's agreement to a liability waiver that he would not have accepted absent the statutory violation. The panel "fairly infer[red]" from the complaint "that Syed was confused by the inclusion of the liability waiver with the disclosure and *would not have signed it* had it contained a sufficiently clear disclosure, as required in the statute." 853 F.3d at 499-500 (emphasis

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194 F. Supp. 3d 1022, 1028 (E.D. Cal. 2016) (distinguishing *Akins* and *Public Citizen* in holding that the plaintiff had failed to allege concrete injury for an alleged violation of the Truth in Lending Act's disclosure "requirements for payoff statements"; "[a] procedural violation of the TILA provision may result in no concrete harm if the lender provides the omitted information through other means").

added); *see also Saltzberg v. Home Depot USA, Inc.*, 2017 WL 4776969, at *2 (C.D. Cal. Oct. 18, 2017) (holding, post-*Syed*, that a plaintiff lacked standing for a claim under the same provision of the FCRA because he "failed to allege a concrete injury" resulting from the violation). Those real consequences are absent here.

2. In addition, there is no congressional "judgment" (*Spokeo*, 136 S. Ct. at 1549) that each and every failure to provide information in the precise format mandated by the FCRA should give rise to a lawsuit in federal court, even when not accompanied by any "real" injury or concrete consequence. Congress created a private cause of action for *every* violation of the FCRA (*see* 15 U.S.C. § 1681*o*(a)); and it subsequently authorized statutory damages for *every* willful violation (*see id.* § 1681n(a)(1)). There is no evidence that Congress made any special determination regarding private actions based on the statute's disclosure provisions, let alone that it make a judgment that every violation of those provisions, no matter how technical and without real-world consequence, should give rise to a right to statutory damages.

The district court concluded that Congress enacted FCRA's disclosure provisions with the purpose of preventing the "risk that the consumer is not made aware of material inaccurate information in the

consumer's file, nor aware of how to dispute the inclusion of the harmful information." ER29. But the district court did not take the required next step of evaluating whether the alleged violation in each class member's case actually presented that harm or risk of harm. As this Court put it on remand in *Spokeo*, a plaintiff "must allege more than a bare procedural violation of the statute that is 'divorced from' the real harms that FCRA is designed to prevent"; and this "requirement makes clear that, in many instances, a plaintiff will not be able to show a concrete injury simply by alleging that a consumer-reporting agency failed to comply with one of FCRA's procedures." *Robins*, 867 F.3d at 1115-16 (quoting 136 S. Ct. at 1549). The district court's focus on hypothetical and unsubstantiated "risks" rather than "injury" is, therefore, a different inquiry than the one the Supreme Court required—and one that improperly casts aside *Spokeo*'s holding that "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1549.

Indeed, the Supreme Court specifically cautioned in *Spokeo* that some violations of the FCRA could "result in no harm," 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").

Yet Ramirez and the class members failed to demonstrate that the two-mailing format hindered in any way their ability to monitor and correct information in their credit files. TransUnion Br. 28-30. Indeed, Ramirez himself succeeded in contacting TransUnion and correcting his report, and TransUnion submitted additional evidence showing that the two-mailing format actually encouraged class members to contact TransUnion regarding OFAC alerts. *Id.* at 29.

In short, the district court failed to properly apply *Spokeo*'s mandate that a plaintiff must suffer a real harm from an alleged statutory violation in order to sue in federal court.

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 compounded its error by certifying a class that contains numerous individuals who suffered no concrete harm.

As Chief Justice Roberts has explained, Article III forbids a federal court from exercising jurisdiction over a class action in which uninjured class members could recover damages. *Tyson Foods*, 136 S. Ct. at 1053 (Roberts, C.J., concurring). TransUnion correctly points out that "no one—whether named plaintiff or unnamed class member—may recover damages in an Article III court without proving an Article III injury." TransUnion Br. 21. Moreover, Rule 23 and due process required that TransUnion be afforded the opportunity to challenge each and every putative class member's claim of Article III injury—and that inquiry would have required individualized mini-trials that should have precluded class treatment.

In denying TransUnion's request for decertification, the district court papered over these difficulties, holding that class certification is appropriate so long as the named plaintiff has standing. ER31-32 (citing *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974 (9th Cir. 2007) (en banc)). The district court reached that conclusion notwithstanding

TransUnion's showing (with evidence) that the named plaintiff's experience was markedly different from the experiences of the putative class he sought to represent. *See* TransUnion Br. 15-18.

That holding was error.

A. This Court's Precedent Requires Members Of A Damages Class To Have Standing.

First, the district court extended *Bates* from its context—certification of an injunctive class under Rule 23(b)(2)—to apply to a money damages class under Rule 23(b)(3). Yet *Bates* itself made clear that its holding was limited; because "only liability and equitable relief were at issue in the district court, not damages," "we consider *only* whether at least one named plaintiff satisfies the standing requirements for *injunctive* relief." 511 F.3d at 985 (emphasis added). In the context of Rule 23(b)(2) class actions for injunctive relief, a "single injunction or declaratory judgment * * * provide[s] relief to each member of the class." *Dukes*, 564 U.S. at 360. It therefore makes no practical difference whether a certified class under Rule 23(b)(2)—which does not even require notice or the right to opt out—includes uninjured individuals.

In a damages class action under Rule 23(b)(3), by contrast, this Court has held that "'[n]o class may be certified that contains members

lacking Article III standing.'" *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 594 (9th Cir. 2012) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006)). And while the Court has concluded that this standard does not require each and every absent class member to submit evidence "prov[ing] such injury at the certification phase" (*Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 n.6 (9th Cir. 2016)), it still requires that the class "'be defined in such a way that anyone within it would have standing'" (*id.* (quoting *Denney*, 443 F.3d at 264)); *see also, e.g.*, *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (quoting same; "to put it another way, a named plaintiff cannot represent a class of persons who lack the ability to bring suit themselves"). That was not the case here, and the district court's certification of a damages class must be reversed.[4]

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[4] The district court clearly erred in purporting to find support for its approach in *Lewis v. Casey*, 518 U.S. 343 (1996). *See* ER31. The language the district court characterized as a holding of the Supreme Court was in fact from Justice Souter's partial *dissent*. *See* 518 U.S. at 395 (Souter, J., concurring in part and dissenting in part).

The district court also cited (ER31) this Court's opinion in *Ollier v. Sweetwater Union High School District*, 768 F.3d 843 (9th Cir. 2014), which quoted the operative language from *Bates* by way of background. *Id.* at 865. But *Ollier* likewise involved injunctive relief only; and the defendant did not argue on appeal that the district court erred in certifying a class, thereby waiving the issue. *Id.* at 854 n.4.

B. Principles Underlying Rule 23 And Due Process Require All Class Members To Have Standing.

That result is also compelled by the Rules Enabling Act and due process.

The Supreme Court recognized nearly four decades ago that 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 states 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.[5]

The Supreme Court explained in *Dukes* that, 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." 564 U.S. at 367 (citations omitted). But nothing in *Dukes* limits its logic to "*statutory* defenses"; the same rationale applies equally to constitutional defenses, including the defense that a claim must be dismissed because a class member lacks Article III standing.

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

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[5] 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"); *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.").

absent class members *lack* standing thus impermissibly "enlarge[s]" absent class members' rights—and correspondingly "abridge[s]" defendants' rights—by permitting those unharmed absent class members to bring (and here actually 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*. 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 that few, if any, of the absent class members suffered a concrete injury. *See* TransUnion Br. 27-30. Yet the district court refused to decertify the overbroad class after the Supreme Court decided *Spokeo*, keeping in place through trial and final judgment a class with large numbers of wholly uninjured class members.

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. 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).

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); *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").

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

III. An Improperly Lax Approach To Article III Standing And Class Certification Imposes Adverse Consequences On Businesses.

Finally, failure to properly apply the requirements of Article III and Rule 23 carry significant practical consequences for the courts and businesses.

In the absence of widespread injury, decisions like the one below transform what should be an individualized dispute between an atypical plaintiff and a defendant into a multi-million dollar class action that generates 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 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 if this Court upholds the decision below, class-action plaintiffs' lawyers will be emboldened to evade the requirements of Article III and due process by seeking out unusually situated plaintiffs rather than legitimate class representatives. The allure of a class-wide payday, however unwarranted, is too great: "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).

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 importance of insisting on the constitutional minimum of concrete injury in fact—and doing so for all potential class members. The Supreme Court has endorsed this conclusion, 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).

CONCLUSION

The district court's decision should be reversed.

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Respectfully submitted,

/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

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

Counsel for Amicus Curiae *the Chamber of Commerce of the United States of America*

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/s/ *Andrew J. Pincus*
Andrew J. Pincus
Counsel for Amicus Curiae

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 2, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Andrew J. Pincus*
Andrew J. Pincus
Counsel for Amicus Curiae