NO. 19-1059

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PHILLIP ALIG; SARA J. ALIG; ROXANNE SHEA; DANIEL V. SHEA, INDIVIDUALLY AND ON BEHALF OF A CLASS OF PERSONS,
Plaintiffs-Appellees,

v.

QUICKEN LOANS INC.; AMROCK INC., F/K/A TITLE SOURCE, INC., D/B/A/ TITLE SOURCE INC. OF WEST VIRGINIA, INCORPORATED,
Defendants-Appellants,

DEWEY V. GUIDA; APPRAISALS UNLIMITED, INC.; RICHARD HYETT,
Defendants.

On Appeal from the United States District Court
for the Northern District of West Virginia
(Case No. 5:12-cv-114) (District Judge John Preston Bailey)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND REVERSAL

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* urging strict adherence to rules barring federal-court adjudication of claims by those who lack Article III standing. *See*, *e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021); *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020). WLF also participates in litigation to remind the courts that the Fifth Amendment's Due Process Clause is not an empty vessel. *See*, *e.g.*, *United States ex rel. Sheldon v. Allergan Sales, LLC*, 24 F.4th 340 (4th Cir. 2022).

INTRODUCTION

"Mistakes are a fact of life. It is the response to error that counts." Nan van de Meerendonk, *Monitoring in language perception: Electrophysiological and hemodynamic responses to spelling violations*, 54 NeuroImage 2350, 2350 (2011) (citation omitted). Justice Jackson eloquently described how judges should respond to error: "I see no reason

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[*] No party's counsel authored any part of this brief. No one, except WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties consented to WLF's filing the brief.

why I should be consciously wrong today because I was unconsciously wrong yesterday." *Massachusetts v. United States*, 333 U.S. 611, 639-40 (1948) (Jackson, J., dissenting); *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 750 n.11 (2014) (Ginsburg, J., dissenting) (same). Even though such admissions may "sting[]," judges should "accept" that they erred and correctly decide the issue when presented a chance to do so. *See Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 102 (2014) (Scalia, J., dissenting).

The panel erred when first considering this appeal. Recently, the Supreme Court has reined in lower courts' practice of adjudicating uninjured plaintiffs' claims. As the Court has properly held, uninjured plaintiffs lack Article III standing to maintain suit in federal court. Rather than follow the logical conclusion of the Court's recent jurisprudence, the panel followed the Ninth Circuit's lead in affirming an order certifying a class despite the absent class members' lack of Article III standing.

The Supreme Court, however, reversed the Ninth Circuit's decision in *TransUnion* and held that all absent class members must suffer an injury-in-fact for a district court to have jurisdiction to certify a class.

After that decision, Quicken sought certiorari. Because this Court's decision conflicts with *TransUnion*, the Court granted the petition and remanded for further proceedings.

So rather than having to take the mistake "to the grave," *Dart Cherokee*, 574 U.S. at 102 (Scalia, J., dissenting), the Court has the chance to fix its error. *Cf. United States v. LaRouche*, 4 F.3d 987 (table) (4th Cir. 1993) (*per curiam*) (judges are presumed to lack bias despite prior adverse rulings against a party (citing *United States v. Parker*, 742 F.2d 127, 129 (4th Cir. 1984)). The Court should seize the opportunity to correctly decide the case and hold that the District Court lacked subject-matter jurisdiction to grant Plaintiffs' class-certification motion.

STATEMENT

When applying for a mortgage or refinancing a loan, borrowers must complete a loan application. Companies use this information to decide whether borrowers are credit risks. When applying for a loan, borrowers agree that mortgage companies can share application information with their servicers and agents.

Among the information borrowers must provide is their home's estimated value. But mortgage companies don't take these self-reported

estimates as gospel. Rather, the companies use independent appraisers to determine the values. Before 2009, appraisal companies received borrowers' estimates. But then a standards amendment forced mortgage companies to withhold that information when borrowers refinance mortgages.

Plaintiffs refinanced their mortgages with Quicken Loans in 2007 and 2008. Because this was before the 2009 standards change, the appraisal companies received their estimated house values. The four named Plaintiffs successfully refinanced their mortgages and gave Quicken perfect reviews.

Still, the two couples sued Quicken under West Virginia's Consumer Credit and Protection Act. They moved to certify a class of 2,769 West Virginians who refinanced their mortgages before 2009 and whose estimated house values were shared with appraisal companies. The District Court certified the class, granted Plaintiffs summary judgment, and awarded more than $10 million in damages. *See* J.A. 385-446. A sharply divided panel affirmed. *See generally Alig v. Quicken Loans Inc.*, 990 F.3d 782 (4th Cir. 2021). Because that decision conflicts with the Supreme Court's *TransUnion* decision, that Court granted

certiorari, vacated the decision, and remanded for further proceedings consistent with *TransUnion*. *See Rocket Mortg., LLC v. Alig*, 142 S. Ct. 748 (2022) (*per curiam*).

SUMMARY OF ARGUMENT

I. *TransUnion* held that all absent class members must have Article III standing for a district court to have subject-matter jurisdiction to grant class certification. Plaintiffs failed to meet their burden of proving that all absent class members have Article III standing. At bottom, they argue that the failure to obtain "independent" appraisals for their homes was an injury-in-fact. But this argument fails for three reasons.

First, they could not show that the appraisers themselves received the estimated home values. Second, they did not show that the estimated home values affected the appraisals. Finally, Plaintiffs failed to show that the alleged non-independent appraisals harmed the absent class members.

One of these evidentiary shortcomings was enough to deprive the District Court of subject-matter jurisdiction to certify the class. All three combined is overwhelming proof that the District Court erred by

certifying the class. In short, the District Court ignored subject-matter jurisdiction so it could quickly get the case off its docket.

II. This rush to judgment caused a second constitutional error. The Fifth Amendment protects litigants' due-process rights. Yet the District Court disregarded those protections in the name of supposed efficiency. Rather than follow the correct procedure of certifying a class, allowing merits discovery, and then ruling on motions for summary judgment, the District Court certified the class and granted summary judgment in the same order. Even if this were more efficient, courts cannot deprive parties of due process in the name of efficiency. The Court can reach the issue because it is of great public importance.

ARGUMENT

I. THE ABSENT CLASS MEMBERS LACK ARTICLE III STANDING.

Federal courts' jurisdiction is limited to "'Cases' and 'Controversies.'" *California v. Texas*, 141 S. Ct. 2104, 2113 (2021) (quoting U.S. Const. art. III, § 2). For a case or controversy to exist, plaintiffs must have standing. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011) (citation omitted). Plaintiffs bore the

burden of establishing standing. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). They failed to meet that burden.

"[T]he irreducible constitutional minimum of standing consists of three elements." *Spokeo v. Robins*, 578 U.S. 330, 338 (2016) (citations omitted). A plaintiff must show "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion*, 141 S. Ct. at 2203 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiffs failed to satisfy the first element because Quicken's actions did not harm the absent class members.

All absent class members must have suffered an Article III injury. Because the "constitutional requirement of standing is equally applicable to class actions," "each [class] member must have standing." *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778-79 (8th Cir. 2013) (citations omitted). In other words, "a named plaintiff cannot represent a class of persons who lack the ability to bring suit themselves." *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 620 (8th Cir. 2011) (quotation omitted).

The Supreme Court's *TransUnion* decision highlights this requirement. There, the Court held that every member of a class must have standing to assert claims against a defendant. *See TransUnion*, 141 S. Ct. at 2203-07. *TransUnion* shows that, to sustain a class-certification order, all absent class members must have standing to sue. Although the Court held that over 1,800 absent class members had standing to assert one claim, it held that those same absent class members lacked standing to assert two other claims.

The Court distinguished between those whose credit reports were distributed to third parties and those whose credit reports were not. *TransUnion*, 141 S. Ct. at 2207-13. It analyzed standing for each subgroup; it did not paint with a broad brush. This case is easier. Even though the two named couples suffered an injury-in-fact, there was no evidence that the absent class members suffered any harm. To show that the absent class members suffered an injury-in-fact, Plaintiffs had to clear several hurdles.

First, they had to show that the appraisers themselves received the estimated home values. Yet they proved only that the appraisal companies received the estimated home values. Second, they had to show

that the estimated home values affected the appraisals. Again, at most Plaintiffs showed that a material issue of fact existed about whether appraisals for the named plaintiffs were affected by Quicken disclosing the estimated home values. There was not enough evidence about the absent class members to establish standing for final judgment. Third, Plaintiffs had to show that any non-independent appraisal harmed the absent class members. There was zero evidence of such harm. It is insufficient to show that the absent class members might have received an appraisal that was anchored by the estimated home value. The absent class members only bore the appraisal costs because they were refinancing a mortgage. So they had to show that the refinancing was affected by the home value disclosures. Because no refinancing was affected, Plaintiffs could not meet that burden.

Plaintiffs cleared no hurdle, much less all the hurdles. So rather than having to split the absent class members into different groups, the entire absent class lacks standing to assert any claims in the complaint. The District Court therefore lacked subject-matter jurisdiction to certify the class.

Permitting certification of a class including those who suffered no Article III injury raises the same issues as allowing uninjured plaintiffs to sue individually on their own behalf. If anything, the concerns here are greater than when a single uninjured plaintiff sues in federal court. In those cases, the uninjured plaintiff decides what violations of law to vindicate. Here, however, the absent class members are not choosing to vindicate a right. Rather, Plaintiffs and their counsel are purportedly vindicating interests for these uninjured individuals. This Court should reject this skirting of important standing requirements and reverse the District Court's order.

II. GRANTING CLASS CERTIFICATION AND SUMMARY JUDGMENT CONCURRENTLY VIOLATED QUICKEN'S DUE-PROCESS RIGHTS.

Certifying a class while granting summary judgment violates parties' Fifth Amendment due-process rights.

A. The Court Can Reach This Issue As It's Resolution Is Of Public Importance.

Although Quicken did not pursue the issue in its brief, this Court may reach a pure question of law despite a forfeiture when "refusal to reach the issue would result in a miscarriage of justice or where the issue's resolution is of public importance." *Polansky v. Exec. Health Res.*

Inc, 17 F.4th 376, 383 (3d Cir. 2021) (quotation omitted). Whether the District Court's procedures are acceptable is an issue of public importance that deserves review.

The District Court's granting summary judgment and class certification simultaneously violated Quicken's due-process rights. If that were the only problem with affirming the District Court's order, there would be no reason to overlook the forfeiture. But this issue implicates due-process issues for all class-action plaintiffs and defendants in this circuit. That is of sufficient public importance to trigger the public-import exception to forfeiture.

B. Affirming The District Court's Order Would Erode Plaintiffs' And Defendants' Due-Process Rights.

1. Allowing a district court to grant class certification and summary judgment in the same order would lead to serious due-process problems. If the district court grants summary judgment for plaintiffs, all class members will likely treat the judgment as preclusive. But if the defendant wins, class members will claim that the judgment violates their due-process rights. So they will argue that the judgment binds only those few class members who received actual notice. In reality, the

defendant defeats only a handful of plaintiffs' claims and would not buy its peace from suits by absent class members.

Granting class certification and summary judgment at the same time erodes defendants' right to know whom the litigation will bind before entry of final judgment. When a judgment issues, the class defendant wants "the entire plaintiff class bound by res judicata"—just as the defendant is bound. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985). One corollary of *Shutts* is that a class-action defendant has a right to know *before* dispositive motions who is in the class and that the judgment will bind every one of them. The parties should bear equally the benefits and burdens of any judgment.

The District Court's view would revive the same win-against-one, lose-against-all unfairness that was the hallmark of one-way intervention. But Rule 23 was amended "specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before [merits adjudication] and would be bound by all subsequent orders and judgments." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974).

Requiring class certification before dispositive motions "protects defendants by clearly identifying the individuals to be bound by the final judgment." *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013). It lets defendants know that litigation settled, resolved through dispositive briefing, or tried to verdict will fully end the controversy. So the rule against one-way intervention "exists because it is unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *Costello v. BeavEx, Inc*, 810 F.3d 1045, 1058 (7th Cir. 2016) (citation omitted). The District Court's order granting class certification and summary judgment together thus deprived Quicken of due process because it did not ensure that the parties bore the same risks.

2. Defendants, however, are not the only ones harmed by a district court deciding class-certification and summary-judgment motions at the same time. First, absent class members will have to fight the preclusive effect of an unfavorable judgment if a district court grants class certification at the same time it grants a defendant's summary-judgment motion. This, of course, will cost money to litigate and decrease the

likelihood of success. So fewer contingency-fee lawyers will represent absent class members trying to vindicate their rights.

Second, when a district court simultaneously rules on both motions, plaintiffs may lose the ability to appeal a denial of class certification. *See Costello*, 810 F.3d at 1059. That is why the parties here agreed that class certification briefing would be completed before summary judgment briefing to avoid the one-way intervention problem. *See* ECF No. 156. And Plaintiffs specifically asked the District Court to delay its ruling on their summary judgment motion until after ruling on class certification "to avoid any issues with the one way intervention rule." ECF No. 231, 13 (quoting ECF No. 173-1, 1 n.1). In short, it's not just defendants who are harmed by district courts ruling on the motions simultaneously; plaintiffs suffer as well.

The District Court ignored the pleas from both sides and decided the motions in one order. Affirming the District Court's order would bless this practice and lead to future problems when defendants properly preserve the issue. Thus, it is in the public interest for the Court to reverse the District Court's order on this ground if the Court does not do so on standing grounds.

* * *

How will this Court respond to its mistake last year? Will it learn from that error, follow the Supreme Court's *TransUnion* decision, and reverse the District Court's class-certification order? Or will this Court double down, ignore *TransUnion* and the Supreme Court's other recent standing decisions, and invite another certiorari grant by affirming the District Court's order? The Court should choose the first option and reverse the District Court's class-certification order.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,692 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

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