No. 24-3327

In the United States Court of Appeals
for the Ninth Circuit

JAMES HEALY, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

MILLIMAN, INC., d/b/a INTELLISCRIPT,

Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Washington, Case No. 2:20-cv-01473-JCC
The Honorable John C. Coughenour

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF APPELLEE AND AFFIRMANCE

Jennifer B. Dickey
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062

Counsel for the Chamber of Commerce of the United States of America

Erik R. Zimmerman
Zachary A. Johnson
ROBINSON, BRADSHAW & HINSON, P.A.
1450 Raleigh Road, Suite 100
Chapel Hill, N.C. 27517
(919) 328-8800
ezimmerman@robinsonbradshaw.com

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America 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.

The Consumer Data Industry Association (CDIA) states that it is an industry trade association. CDIA has no parent corporation, and no publicly held company has 10% or greater ownership in CDIA.

Dated: December 20, 2024

s/ Erik R. Zimmerman
Erik R. Zimmerman
ROBINSON, BRADSHAW & HINSON, P.A.
1450 Raleigh Road, Suite 100
Chapel Hill, N.C. 27517
(919) 328-8800
ezimmerman@robinsonbradshaw.com

Counsel for Amici Curiae

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STATEMENT OF IDENTITY AND INTEREST*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 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 briefs in cases, like this one, that raise issues of concern to the nation's business community.

CDIA is a century-old international trade association for consumer reporting agencies, and it is the largest trade association of its kind in the world. Among other activities, CDIA establishes industry standards, provides business and professional education for its

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* All parties consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No entity or person, aside from amici curiae, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

members, and produces educational materials for consumers on their credit rights and the role of consumer reporting agencies in the marketplace.

Amici's members and the broader business community often face overbroad class actions that include many uninjured class members. These actions present significant risks of deadweight economic loss because the costs that they impose on businesses (and ultimately on consumers) are not justified by actual injuries. Amici and their members have a strong interest in avoiding that deadweight loss by ensuring that courts rigorously enforce Article III's standing requirements at summary judgment.

SUMMARY OF ARGUMENT

There is no class-action exception to Article III. *See, e.g.*, *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). Indeed, the ever-growing use of the class-action device is a reason for courts to "be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 246 (2011). For at least three reasons, those rules of standing confirm that absent

members of a damages class who lack standing cannot survive summary judgment.

First, after a class is certified, absent class members *are* plaintiffs. It is well established that if a plaintiff cannot offer evidence at summary judgment that he has Article III standing, his claim must be dismissed. After certification, class members are in the same position—they are parties to the case, and they have the burden to establish standing or see their claims dismissed.

Second, the logic of *TransUnion* compels this same result. In *TransUnion*, the Supreme Court held that at trial, the plaintiffs must offer evidence that absent members of a damages class have standing. *See* 594 U.S. at 437-39. The principles on which the Court based that holding, however, are not limited to trial. They apply to "all stages of litigation," including summary judgment. *Id.* at 431.

Third, a contrary rule would violate the Rules Enabling Act and due process. Barring defendants from challenging class members' standing at summary judgment would erroneously use the class-action device to enlarge plaintiffs' substantive rights and to eliminate defenses that could be raised in individual litigation.

Healy's counterarguments fail. None of the precedents he cites supports his rule. And his consequentialist argument that it would be difficult for a named plaintiff to present individualized evidence of class members' standing at summary judgment both overlooks the possibility of class-wide evidence of standing and is beside the point. Plaintiffs cannot avoid Article III just by arguing that it is hard to satisfy.

Worse still, Healy's proposed approach would inflict serious harms on the judicial system and the business community.

Healy's rule would force district courts to delay the resolution of standing issues until trial, even when those issues could be resolved far more efficiently at summary judgment. And it would impose pressure on defendants to settle even meritless claims because of the increased exposure that comes from a class bloated with uninjured individuals.

To prevent these harms, this Court should hold that absent members of a damages class are bound by the same rule that applies to all other plaintiffs: Without evidence of standing at summary judgment, they cannot proceed to trial.

ARGUMENT

I. After a damages class is certified, class members who lack standing cannot survive summary judgment.

In a case between one plaintiff and one defendant, the plaintiff cannot survive summary judgment if he lacks Article III standing. The same rule applies to members of a damages class after the class is certified.

A. In individual cases, a plaintiff who lacks standing cannot survive summary judgment.

At summary judgment, a plaintiff in an individual case must offer evidence that creates a genuine dispute of material fact on Article III standing. This rule follows from basic summary-judgment principles.

When a plaintiff does not offer evidence on an essential element of her case, she cannot survive summary judgment. *See, e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). For example, if a negligence plaintiff does not offer evidence of damages at summary judgment, her claim fails. *See id.* at 322-23; *Weinberg v. Whatcom County*, 241 F.3d 746, 751-52 (9th Cir. 2001).

Article III standing is one of the essential elements that a plaintiff must establish at summary judgment. Indeed, standing is an

"indispensable part of the plaintiff's case." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Thus, as Healy admits, plaintiffs must make the same showing on standing at summary judgment that they must make on any other element of their case. *See* Healy Br. 9; *see also, e.g.*, *Jones v. L.A. Cent. Plaza LLC*, 74 F.4th 1053, 1058 (9th Cir. 2023).

B. The same rule for plaintiffs in individual cases applies to absent class members after a damages class is certified.

The above rule for individual cases applies to damages class actions after a class is certified. Thus, at summary judgment, plaintiffs must offer evidence that creates a genuine dispute of material fact on absent class members' Article III standing. That is so for at least three reasons.

1. When a damages class is certified, absent class members become plaintiffs, so the rule for plaintiffs applies to them.

The first reason is that after class certification, absent class members become full-fledged plaintiffs. Thus, after certification of a damages class, the rule that plaintiffs who lack standing cannot survive summary judgment squarely applies to absent class members.

Class certification is a crucial moment that changes the status of absent class members. Those class members are not parties "*before the class is certified*." *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011). But as that statement from the Supreme Court implies, absent class members *are* parties *after* a class is certified. *See, e.g.*, *TransUnion*, 594 U.S. at 436 n.7, 437-38 (repeatedly referring to absent class members as "the 6,332 plaintiffs"). Certification gives the court the power to enter dispositive judgments that bind absent class members, just like they would bind a party in an individual case. *See, e.g.*, *Cooper v. Fed. Rsrv. Bank of Richmond*, 467 U.S. 867, 874 (1984); *In re MI Windows & Doors, Inc., Prods. Liab. Litig.*, 860 F.3d 218, 224 (4th Cir. 2017). Thus, when a court certifies a class, it "confers on absent persons the status of litigants." *Palumbo v. Tele-Commc'ns, Inc.*, 157 F.R.D. 129, 133 (D.D.C. 1994). And plaintiff litigants must show standing to prevail on their claims.

2. The logic of *TransUnion* shows that class members who lack standing cannot survive summary judgment.

The Supreme Court's reasoning in *TransUnion* confirms that after certification of a damages class, class members who lack standing cannot survive summary judgment.

In *TransUnion*, the Supreme Court held that at trial, plaintiffs must offer evidence that the absent members of a damages class have standing. *See* 594 U.S. at 437-39. The Court based that holding on two key principles. First, plaintiffs must "maintain their personal interest in the dispute at all stages of litigation." *Id.* at 431. Second, plaintiffs must show standing "with the manner and degree of evidence required at the successive stages of the litigation." *Id.* (quoting *Lujan*, 504 U.S. at 561).

Those principles apply at all stages of litigation, including summary judgment. *See Lujan*, 504 U.S. at 561. As a result, *TransUnion* teaches that plaintiffs must offer evidence of absent class members' standing at summary judgment as well.

Healy's suggestion that *TransUnion* requires evidence of class members' standing to be offered only in post-trial proceedings where

"damages are distributed to the class," Healy Br. 32, conflicts with the decision. For example, the Court noted that when a case "proceeds to trial, the specific facts set forth by the plaintiff to support standing 'must be supported adequately *by the evidence adduced at trial*.'" 594 U.S. at 431 (quoting *Lujan*, 504 U.S. at 561) (emphasis added). And the Court analyzed the absent class members' standing based on that evidence, discussing the testimony of the named plaintiff and other trial evidence in detail before concluding that such evidence failed to show standing for most of the absent class members. *See id.* at 421, 433-42.

If Healy were right that class members' standing need not be established until after trial, this discussion would have served no purpose.

TransUnion thus confirms the point above. Plaintiffs must have standing at all stages of the litigation, and they must establish their standing with the manner and degree of evidence that each stage of the litigation requires. Because those same principles apply at summary judgment, the logic of *TransUnion* requires that evidence of absent class members' standing be offered at summary judgment as well.

3. Letting absent class members bypass standing requirements at summary judgment would violate the Rules Enabling Act and due process.

The final reason why absent class members who lack standing cannot survive summary judgment is that any other approach would violate the Rules Enabling Act and the Due Process Clause.

The Rules Enabling Act forbids using Rule 23 to "abridge, enlarge or modify any substantive right." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (quoting 28 U.S.C. § 2072(b)). Rule 23 is a procedural mechanism for aggregating claims, not a substantive tool for creating claims or eliminating defenses to them. Thus, a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion).

The Due Process Clause reinforces these principles. Under that clause, class-action defendants, no less than other defendants, are entitled to raise unique and legally relevant defenses to each class member's claims. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1972); *Dukes*, 564 U.S. at 366.

A defendant thus must be able to challenge absent class members' lack of standing at summary judgment. A simple illustration proves the point: Suppose that Mr. Jones brought an individual case against the ABC Corporation. In that individual case, for the reasons discussed above, ABC could secure dismissal at summary judgment if Mr. Jones lacks standing. *See supra* pp. 5-6. Now suppose that Mr. Jones is an absent class member in a class action against ABC. Under the Rules Enabling Act and due process, the outcome on Mr. Jones's claim must be the same as in his individual case. Otherwise, the class-action device would impermissibly "giv[e] plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 458 (2016). Thus, whether Mr. Jones is an individual plaintiff or an absent class member, his lack of standing calls for dismissal at summary judgment.

The federal rules, precedent, and scholarship confirm that a lack of Article III standing is a problem that Rule 23 cannot be used to circumvent. Rule 82 makes clear that the federal rules, including Rule 23, "do not extend" the "jurisdiction of the district courts." Fed. R. Civ. P. 82. The Supreme Court has held that "Rule 23's requirements

must be interpreted in keeping with Article III constraints." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); *see also Tyson Foods*, 577 U.S. at 455, 458. And scholars recognize that "Rule 23, the Rules Enabling Act, and due process" require that "a defendant have the opportunity to challenge each putative class member's claim of Article III injury." 1 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 4:28 (21st ed. 2024).

In sum, using Rule 23 to let absent class members dodge standing requirements at summary judgment would do just what the Rules Enabling Act and due process forbid: change the parties' substantive rights.

C. Healy's counterarguments fail.

Healy argues from both precedent and policy that absent class members in a certified damages class can survive summary judgment without establishing standing. *See* Healy Br. 26-27. He fails on both fronts.

On precedent, Healy's decisions do not speak to the question here: whether uninjured members of a damages class can survive summary

judgment after the class is certified. And his policy arguments are both wrong and ultimately irrelevant.

With respect to precedent, Healy first relies on cases about injunctive relief, not damages. For example, he cites *Bates v. United Parcel Service, Inc.*, 511 F.3d 974 (9th Cir. 2007) (en banc), for the point that Article III is satisfied if at least one named plaintiff has standing. Healy Br. 26. That rule, however, is specific to injunctive relief. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 682 n.32 (9th Cir. 2022) (en banc). Indeed, in *Bates*, "only liability and equitable relief were at issue in the district court, not damages." 511 F.3d at 985. To obtain damages, in contrast, "*[e]very* class member must have Article III standing." *TransUnion*, 594 U.S. at 431 (emphasis added).

This distinction between damages cases and injunctive-relief cases is sound. A single plaintiff may seek an injunction that incidentally benefits others whether or not they would have standing. But that same plaintiff could not compel a court to resolve damages claims that belong to others.

Healy next relies on decisions about standing principles before class certification, not after. For example, he cites *In re Zappos.com, Inc.*, 888 F.3d 1020 (9th Cir. 2018), for the point that only one plaintiff in a damages class action needs standing for the class action to proceed. Healy Br. 27. But *Zappos* involved a motion to dismiss *before* a class was certified, 888 F.3d at 1023, not a motion for summary judgment after a class was certified. As shown above, this temporal distinction is crucial, because it is the certification of a class that changes absent class members from nonparties to parties. A dismissal before class certification does not bind absent putative class members. None of Healy's decisions supports his argument that even after absent members of a damages class become parties, they can avoid the requirements of Article III.

On policy, Healy argues that it would be "difficult" for plaintiffs to offer individualized evidence at summary judgment that absent class members have standing. Healy Br. 34-35. He says that discovery conducted up to that point may have focused only on the named plaintiffs, resulting in a lack of information about how each individual class member has been injured. *Id.* at 34.

That argument overlooks that plaintiffs can try to show absent class members' standing at summary judgment through class-wide evidence. *See* Milliman Br. 31. Indeed, because of Rule 23(b)(3)'s predominance requirement, if plaintiffs lack class-wide evidence of standing, a damages class should not have been certified in the first place. *See, e.g.*, *Olean*, 31 F.4th at 668 & n.12; *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273-75 (11th Cir. 2019); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53-54 (1st Cir. 2018).

In any event, Article III does not have a "difficulty" exception. If plaintiffs needed to show standing only when it was easy, standing doctrine would be a dead letter. The Supreme Court made this point clear in *TransUnion*: Article III's requirements cannot be "ditched" merely because a different approach would be "more efficient or convenient." 594 U.S. at 429.

* * *

In sum, after a damages class is certified, absent class members who lack standing cannot survive summary judgment. That rule follows from (1) the point that absent class members become parties after class certification, (2) the logic of *TransUnion*, and (3) the

requirements of the Rules Enabling Act and due process. Healy's efforts to show otherwise fail.

II. Healy's approach would cause serious practical harms.

Healy's proposed rule would also create unjustified harms. Immunizing absent class members from standing challenges at summary judgment would burden the judicial system by requiring unnecessary trials on standing issues. Likewise, allowing overbroad classes to proceed to trial would impose undue settlement pressure on defendants, compelling them to settle even meritless claims.

A. Postponing the resolution of standing issues until trial would burden the judicial system.

By delaying the resolution of standing questions until trial, Healy's approach would impose unnecessary burdens on the judiciary. Under *TransUnion*, if a damages class action proceeds to trial, absent class members must establish standing at the trial. *See supra* pp. 8-9. If the standing questions could instead be resolved at summary judgment, forcing district courts to punt those questions to trial would waste judicial resources and inflict pointless burdens on district judges, jurors, and litigants.

These burdens would be especially pronounced in large class actions like this one. If the issue of standing turns on particularized inquiries for individual class members, Healy's rule would require district courts to conduct endless mini-trials on the threshold matter of standing, even before reaching the merits of the case. Yet any other approach would violate the defendant's right, guaranteed by the Rules Enabling Act and the Due Process Clause, to raise defenses to each class member's claims. *See supra* pp. 10-12.

B. Healy's approach would impose undue settlement pressure on defendants.

The practical problems with Healy's approach would not end there. His rule would also impose excessive settlement pressure on defendants. Enforcing Article III's requirements is "a crucial part of avoiding the procedural unfairness to which class actions are uniquely susceptible." *In re Ford Motor Co.*, 86 F.4th 723, 729 (6th Cir. 2023). If those requirements are not enforced at summary judgment, businesses will be pressured to settle before trial, at deadweight economic loss to businesses and, ultimately, consumers at large.

Litigating class actions is expensive. Defending against a single large class action can cost tens of millions of dollars—or more. *See*

Adeola Adele, Dukes v. Wal-Mart*: Implications for Employment Practices Liability Insurance* 1 (2011) (noting defense costs of $100 million in a single action). Among large companies alone, class-action litigation costs reached a record-breaking $3.9 billion in 2023 and are projected to surpass $4.2 billion in 2024, more than doubling the figure from 2014. *See* Carlton Fields, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 6-7 (2024), https://bit.ly/3gX6AZo.

These extraordinary defense costs, together with massive damages exposure, can compel defendants to settle even meritless claims.

The Supreme Court has long recognized the "risk of 'in terrorem' settlements that class actions entail." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 662 (2022) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011)). As Justice Ginsburg observed, even "the mine-run case" risks "potentially ruinous liability." *Shady Grove*, 559 U.S. at 445 n.3 (Ginsburg, J., dissenting) (quoting Fed. R. Civ. P. 23 advisory committee's note to 1998 amendment).

"[E]xtensive discovery" and "the potential for uncertainty and disruption" allow "plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). And "the prospect of aggregating thousands of weak or frivolous individual claims into a single sprawling class action—with the potential to coerce companies into settlement—has invited a bevy of dubious consumer class action suits." U.S. Chamber of Com. Inst. for Legal Reform, *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform* 22 (2022), https://bit.ly/3P33WPi. When "questionable lawsuits" are allowed to proceed, "companies have to choose between entering into '*in terrorem*' settlements or rolling the dice on a class trial and relying on the judgment of an unpredictable jury." *Id.*

Class certification heightens settlement pressure to the point that "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010). It is "no wonder" why class actions "settle so often": "If a court certifies a class, the potential liability at trial

becomes enormous, maybe even catastrophic, forcing companies to settle even if they have meritorious defenses." *Olean*, 31 F.4th at 685 (Lee, J., dissenting).

The costs of defending and settling class actions directly harm the businesses that pay them. But those businesses pass along at least some of these costs to others in the form of higher prices and lower wages. *See* U.S. Chamber of Com. Inst. for Legal Reform, *Nuclear Verdicts: An Update on Trends, Causes, and Solutions* 46-49 (2024), https://bit.ly/3BNqoc5. The result is that defense and settlement costs are ultimately borne by consumers, employees, other businesses, and the economy as a whole. *See id.*

Damages classes that are inflated by uninjured class members typify these types of harms. In theory, uninjured class members' claims should fail in the end. But that is cold comfort to a defendant that, in the meantime, must bear the costs of going to trial against an overbroad class and face the risk of a catastrophic verdict. As a result, allowing uninjured class members to go to trial would exert hydraulic pressure on many class-action defendants to settle.

These harms are especially acute in FCRA class actions, like the one here. As *TransUnion* illustrates, many alleged FCRA violations do not cause actual injuries to the plaintiffs. *See* 594 U.S. at 442. FCRA classes thus often include large numbers of uninjured members. Until those uninjured members are dismissed, however, each one is able to seek up to $1,000 in statutory damages, plus punitive damages and attorney's fees. *See id.* at 419; 15 U.S.C. § 1681n(a). Thus, allowing overbroad FCRA classes to bypass summary judgment would create massive financial risks for defendants. Those risks would force many defendants to pay inflated settlements that are not justified by actual injuries to consumers.

Enforcing Article III against absent class members at summary judgment would help reduce this "unjustified settlement pressure" and the waste of resources that would occur if a court did "conclude at final judgment that significant portions of the certified class lack standing." U.S. Chamber of Com. Inst. for Legal Reform, TransUnion *and Concrete Harm: One Year Later* 51 (2022), https://bit.ly/4iCG42M. For these reasons, if a damages class has been certified, absent class members

must be subject to the same rule as all other plaintiffs: Without standing, they cannot survive summary judgment.

CONCLUSION

This Court should affirm the grant of partial summary judgment.

Dated: December 20, 2024

Respectfully submitted,

s/ Erik R. Zimmerman

Jennifer B. Dickey
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062

Counsel for the Chamber of Commerce of the United States of America

Erik R. Zimmerman
Zachary A. Johnson
ROBINSON, BRADSHAW & HINSON, P.A.
1450 Raleigh Road, Suite 100
Chapel Hill, N.C. 27517
(919) 328-8800
ezimmerman@robinsonbradshaw.com

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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I am an attorney for Amici Curiae the Chamber of Commerce of the United States of America and the Consumer Data Industry Association.

This brief contains 3,856 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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