UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Laquita Oliver, et al. Plaintiffs-Appellants, v. Navy Federal Credit Union, Defendant-Appellee.	Case No. 24-1656

A*mici Curiae* America's Credit Unions', Mortgage Bankers Association's, and Chamber of Commerce of the United States of America's Motion for Leave to file Amicus Brief

Amici Curiae America's Credit Unions, Mortgage Bankers Association, and Chamber of Commerce of the United States of America (collectively Amici) respectfully move this Court for leave to file a brief as *amici curiae* in support of Defendant-Appellee pursuant to Fed. R. App. P. 29(a). The proposed amicus brief accompanies this motion.

Under the Federal Rules, motions for leave to file amicus briefs must state "the movant's interest" and "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition

of the case." Fed. R. App. P. 29(a)(3) (amicus brief during consideration of the case on merits).

STATEMENT OF INTEREST

Amici have a significant interest in this case because of the impact that reversal of the district court's decision would have on the consumer credit industry. As detailed more fully in the attached amicus brief, the district court correctly struck the class allegations in the underlying litigation. Reversal of this decision would negatively impact the consumer credit industry, which is already highly and sufficiently regulated by sophisticated federal and state agencies. Moreover, reversal would encourage the use of improper class actions, causing harm to an array of financial service companies who are integral to the consumer credit markets.

REASONS AN AMICUS BRIEF IS DESIRABLE AND RELEVANT IN THIS APPEAL

Unlike the principal brief, the attached amicus brief focuses on the negative impact that improper class actions have on the consumer credit industry, access to credit generally, and the related economic harm suffered by lenders, borrowers, and American businesses.

STATEMENT OF CONFERENCE

Pursuant to Fed. R. App. P. 29(a)(2), counsel for the Amici conferred with counsel for Plaintiffs-Appellants who stated they took no position on Amici's request for consent to file an amicus brief.

WHEREFORE, the Amici respectfully request leave pursuant to Fed. R. App. P. 29 to submit their *amici curiae* brief in support of Defendant-Appellee.

Dated: November 19, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 19, 2024, I electronically filed the foregoing **AMICI CURIAE'S MOTION FOR LEAVE TO FILE AMICUS BRIEF** with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: November 19, 2024.

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Case No. 24-1656

In the United States Court of Appeals
for the Fourth Circuit

Laquita Oliver, *et al.*
Plaintiffs-Appellants,

v.

Navy Federal Credit Union,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia
Case No. 23-cv-1731
The Honorable Leoni M. Brinkema

Brief of *Amici Curiae* America's Credit Unions, Mortgage Bankers Association, and Chamber of Commerce of the United States of America In Support of Defendant-Appellee

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), amici curiae state they have no parent corporation, and no publicly traded companies own 10% or more of their stock:

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.

America's Credit Unions states it has no parent corporation, and no publicly traded companies own 10% or more of its stock.

Mortgage Bankers Association states it has no parent corporation, and no publicly traded companies own 10% or more of its stock.

I. STATEMENT OF INTEREST[1]

America's Credit Unions represents our nation's nearly 5,000 federally and state-chartered credit unions that collectively serve over 140 million consumers with personal and small business financial service products. America's Credit Unions delivers strong advocacy, resources, and services to protect, empower, and advance credit unions and the people they serve. It advocates for responsible legislative policies and regulations so credit unions can efficiently meet the needs of their members and communities.

The Mortgage Bankers Association is the national association representing the real estate finance industry, an industry that employs more than 300,000 people in virtually every community in the country. Its membership of more than 2,200 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional

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[1] Appellee consents to this filing. Appellants take no position. No party's counsel authored this brief in whole or in part, and no person or entity other than amici curiae, their counsel, or their members made a monetary contribution intended to fund the brief's preparation or submission.

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, like this one, that raise issues of concern to the nation's business community.

II. SUMMARY OF ARGUMENT

The Court should affirm the district court's decision. As detailed below, existing federal, state, and local laws adequately protect against discrimination in the lending industry. Federal and state agencies enforce those laws through supervision, examination, administrative proceedings, and enforcement litigation. Thus, contrary to the arguments made by Plaintiffs-Appellants (and the amici supporting them), the district court's decision in no way undermines the highly regulated nature of the consumer credit industry or otherwise creates obstacles for aggrieved consumers to vindicate their rights.

Reversal of the district court's decision would have harmful effects. It would encourage improper use of the class action procedure, which places undue pressure on defendant companies to settle even weak claims for which they have a meritorious defense. The significant costs that attend such spurious class actions harm the American economy because those costs are ultimately absorbed by consumers, employees, borrowers, and small businesses through higher prices, lower wages,

reduced credit, and otherwise restricted service offerings. Additionally, reversal of the district court's decision would impede consumers' access to credit or raise its cost, thereby harming the very people that Plaintiffs-Appellants purport to represent. This Court should thus affirm the district court's ruling in striking the class allegations.

III. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Bob Otondi, Dennis Walker, Charles Gardner, Marie Pereda, Laquita Oliver,[2] John Jackson, Carl Carr, Constantina Batchelor, and Christina Hill (collectively "Plaintiffs") filed the consolidated complaint in these proceedings (the "Complaint") against Navy Federal Credit Union ("Navy Federal"), a member-owned, not-for-profit credit union. Plaintiffs initiated these civil proceedings individually and on behalf of a putative class of similarly situated individuals alleging that Navy Federal's underwriting processes resulted in disparate treatment of, and disparate impact on, minority applicants for mortgage products in violation of both federal and state law, including the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.*, and the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq*. Plaintiffs proposed the following nationwide class:

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[2] Plaintiff Oliver initiated the present operative complaint in December 2023.Two additional class complaints followed, ultimately leading to the present Consolidated Amended Complaint.

> All minority residential loan applicants from 2018 through the present (the "Class Period") who submitted an application for any home mortgage loan to Defendant, who sought to refinance or modify a home mortgage loan through Defendant, and/or who sought a Home Equity Line of Credit from Defendant and whose application was:
>
> (a) denied;
>
> (b) approved at higher interest rates and/or subject to less favorable terms as compared to similarly situated non-minority applicants; or
>
> (c) processed at a rate slower than the average processing time of applicants submitted by similarly situated nonminority applicants.

JA70, Compl. at ¶ 241.

Navy Federal moved to dismiss Plaintiffs' Complaint and strike the class allegations. The District Court for the Eastern District of Virginia granted Navy Federal's motion to dismiss in part, dismissing Plaintiffs' claims based on disparate treatment, and denied in part, allowing those claims based on disparate impact to proceed. *See* JA123; *see also generally* JA101–23 (hereafter, "May 30 Order"). Additionally, the district court struck the proposed class allegations under Fed. R. Civ. P. 23(d)(1)(D). *See* JA122.

The district court took particular note of critical differences among the Plaintiffs in four respects: 1) the loan product for which they applied, 2) their incomes, 3) their credit scores, and 4) their existing debt. *See* JA104. Indeed, Plaintiffs applied for four different types of loan products: a conventional purchase-money first mortgage, a Veteran Administration (VA) first mortgage, a refinance,

and a VA cash-out refinance. Some of the plaintiffs stated that their incomes ranged from $80,000 per year to "several hundred thousand dollars per year," while others provided no information on the topic at all. Similarly, some of the plaintiffs' stated credit scores ranged from "above 620" to "approximately 800," while others made no allegation of their credit score. *Id.*; *see also* JA111 ("[P]laintiffs do not adequately detail their credit score, assets, loan value, property value, ratio of the total amount of debt security by the property to the property value ("LTV"), or ratio of total monthly debt to total income ("DTI") at the time they applied for any of Navy Federal's mortgage products . . . ."). The range of scores actually provided notably spans four different categories of credit scores: "fair" to "exceptional"[3] and presumably the credit scores of the putative class members would vary even further. And finally, Plaintiffs' allegations related to their existing debt ranged from non-existent to general statements about it being "minimal." JA104.

In fact, at a hearing on the motion, the district court noted the "very, very" different types of mortgage products and described the proposed class as comparing "apples, oranges, grapefruits, and bananas." JA095–96. The district court accordingly concluded that "[b]ecause the circumstances of each plaintiff's loan

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[3] Generally speaking, the two credit scoring agencies in the United States categorize credit scores into the following matrix based on a scare from 300 to 850: 300 to 579 is "Poor"; 580 to 669 is "Fair"; 670 to 739 is "Good"; 740 to 799 is "Very good"; and 800 to 850 is "Exceptional."

application process are so varied, and to promote the efficient use of resources and to streamline the claims to be considered in this civil action, the Court will strike the allegations and allow the nine plaintiffs to proceed . . . individually." JA125.

Plaintiffs then filed the present interlocutory appeal under Fed. R. Civ. P. 23(f).

IV. ARGUMENT

The district court decision is correct and should be upheld. Any reversal would result in improper use of the class action procedure and all the attendant risks that come with such improper certification. The lending industry is highly regulated by sophisticated agencies and numerous existing laws protect against discrimination. Allowing improper class actions like this one to move forward would undermine the purpose and plain language of Rule 23 and ultimately harm the American economy, including the very consumers and borrowers that Plaintiffs-Appellants purport to represent.

A. Existing Law Protects Against Discrimination in the Credit Industry.

1. The Lending Industry is Highly and Sufficiently Regulated.

Consumer lenders are highly regulated entities. Multiple regulatory bodies—at both the federal and state level—supervise and examine the mortgage lending industry's practices and enforce federal and state fair lending laws. These regulators, which include the Consumer Financial Protection Bureau, the National Credit Union

Administration, the U.S. Department of Housing and Development, the Department of Justice, and State Attorneys General, to name just a few, are sophisticated in consumer financial services and understand the intricacies of mortgage and other consumer credit underwriting. Disparate impact litigation is thus not the only, or even a primary, mechanism for monitoring the lending industry and enforcing applicable statutory prohibitions.

The Consumer Financial Protection Bureau ("CFPB"), for example, actively examines the industry's practices and enforces federal consumer financial laws and consumer protection laws in the marketplace. Specifically, for example, the CFPB establishes Mortgage Origination Examination Procedures to test compliance with regulations such as Regulation Z (12 C.F.R. § 1026) and general requirements that underwriting procedures do not violate restrictions against unfair, deceptive, or abusive acts and practices.[4] The CFPB actively enforces ECOA and a variety of other federal requirements requiring fair treatment of consumers. Indeed, over the last decade, the CFPB has initiated at least 315 enforcement actions.[5] As relevant to the underlying facts here, since November 2023, the CFPB has taken action against

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[4] *Mortgage Origination Examination Procedures*, CFPB (Dec. 2021), *available at* https://files.consumerfinance.gov/f/documents/cfpb_mortgage-origination-examination-procedures_2021-12.pdf.

[5] *See* Enforcement by the Numbers, CFPB (Nov. 2024), *available at* https://www.consumerfinance.gov/enforcement/enforcement-by-the-numbers/.

various lenders for concerns about the reporting complete and accurate data under the Home Mortgage Disclosure Act.[6]

Similarly, the United States Department of Justice ("DOJ") has jurisdiction over the consumer credit industry with respect to ECOA. And the U.S. Department of Housing and Urban Development ("HUD"), the National Credit Union Administration ("NCUA"), and state supervisory agencies and attorneys general all have overlapping jurisdiction to monitor and police the mortgage industry. Mortgage lenders submit to public and non-public inspections conducted by each of these entities and are subject to enforcement actions.

Improper class actions are not necessary to serve a "compliance function" as amici curiae National Consumer Law Center, Public Justice, the National Association of Consumer Advocates, Connecticut Fair Housing Center, and Impact Fund (collectively "Plaintiffs' Amici") contend. *See* Dkt. 6 at 34. To the extent private lawsuits drive internal compliance reviews, these occur whether the suit is brought by an individual plaintiff or on a class action basis. Stated differently, an individual asserting a claim is just as likely to trigger a lender's internal review—

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[6] B. Conner, A. Gonzalez, D. Harris, and H. Ryan, *The CFPB is Working to Reinforce the Foundation of a Fair, Nondiscriminatory and Competitive Mortgage Market*, CFPB (Jun. 28, 2024), *available at* https://www.consumerfinance.gov/about-us/blog/the-cfpb-is-working-to-reinforce-the-foundation-of-a-fair-nondiscriminatory-and-competitive-mortgage-market/.

again, in addition to those reviews regularly required by statute and by the regulatory bodies—as an individual pursuing a putative class claim. Institutions recognize reputational risk from such claims regardless of whether a claim is asserted individually or on behalf of a putative class. The same is true for regulatory scrutiny. For example, under the CFPB's ECOA baseline review examination procedures, the CFPB is directed to "identify *any* recent private litigation . . . related to fair lending."[7] An improper class action is thus unnecessary for ensuring compliance with governing law.

Finally, contrary to the Plaintiffs' Amici's arguments, Rule 23 is not intended to serve a deterrence or enforcement function. Rather, Rule 23 is a procedural device designed to create judicial efficiency. *See American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974) (observing that the "principal purpose" of "Rule 23 class actions" is the "efficiency and economy of litigation"); *Catholic Soc. Servs., Inc. v. I.N.S.*, 232 F.3d 1139, 1146–47 (9th Cir. 2000) ("Class actions promote 'efficiency and economy of litigation' by consolidating numerous individual suits in a single suit.") (quoting *American Pipe*, 414 U.S. at 553). Indeed, precisely because Rule 23 may not "abridge, enlarge, or modify and substantive right," courts must take care

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[7] CFPB, ECOA Examination Procedures (Apr. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_ecoa-baseline-exam-procedures_2019-04.pdf.

to avoid altering substantive rights and thus interfering with the powers of Congress and state legislatures to decide governing laws. *See Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform* 44–45, U.S. Chamber Institute for Legal Reform (Aug. 2022), *available at* https://instituteforlegalreform.com/research/unfair-inefficient-unpredictable-class-action-flaws-and-the-road-to-reform/. This Court thus should not interpret Rule 23 as a "free-standing device to do justice." *Id.* at 46. Issues of deterrence and enforcement must be tackled as a matter of the substantive law, primarily by the federal and state entities tasked with enforcement of it.

2. The District Court Decision Creates No Obstacles for Victims of Discrimination to Vindicate Their Rights.

The district court's order also does not erect barriers for borrowers to bring properly pleaded claims based on discrimination. Notably, the district court allowed Plaintiffs' individual suits to proceed. It merely struck the class allegations because of the specific facts alleged which showed meaningful differences among Plaintiffs regarding credit scores, loan products, income levels, and existing debt. *See, e.g.*, JA122 ("Because of the circumstances of each plaintiff's loan application process are so varied . . . the Court will strike the class allegation . . . ."). The decision thus does not prevent properly pleaded class discrimination claims—those that meet the requirements of Fed. R. Civ. P. 23 and relevant precedents—from proceeding.

B. If the District Court Decision Is Overturned, It Will Encourage Improper Use of the Class Action Process.

Circumventing Rule 23 restrictions on class actions harms American businesses, consumers, borrowers, and the economy as a whole. As other courts have recognized, there is a "procedural unfairness to which class actions are uniquely susceptible." *In re Ford Motor Co.*, 86 F.4th 723, 729 (6th Cir. 2023). Thus, it is critically important that the class action device only be utilized in circumstances where the putative class can actually meet Rule 23's requirements.

1. The District Court Correctly Found that Dissimilar Plaintiffs Cannot Make up a Class.

The district court correctly held that the dissimilar claims pressed by the named Plaintiffs could not meet the standards set forth in Rule 23. Under Rule 23(a), a class action must meet the requirements of numerosity, commonality, typicality, and adequacy. Further, because plaintiffs moved for certification under Rule 23(b)(3), they were required to show that the questions of law or fact common to the class members would predominate over questions affecting only individual members, and the class action would be superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3).

Here, as plainly evidenced from the Complaint, the nine named Plaintiffs cannot meet the commonality requirement in Rule 23(a) nor the predominance requirement in Rule 23(b)(3) among themselves, let alone on behalf of a putative

class. As noted above, Plaintiffs applied for four different types of loan products and had widely varying financial profiles. Their credit scores spanned from the 600s to the 800s. Their incomes ranged from $80k annually to "several hundred thousand." Their outstanding debt (critical to determining debt-to-income ratios) ranged from "non-existent" to an amorphous description of "minimal." JA104. Moreover, in each of these three afore-listed categories, some named Plaintiffs did not allege any information. *Id.* And the four different credit products for which Plaintiffs applied (conventional first mortgage, VA first mortgage, refinance, and VA cash-out refinance) are each subject to unique underwriting standards, many of which are expressly prescribed by the federal government agencies that administer these programs. The district court thus aptly characterized Plaintiffs' respective claims as "apples, oranges, grapefruits, and bananas." JA095.

The unique and varied circumstances of each named Plaintiff will require individual assessments of each plaintiff to determine whether or not they can proceed on their discrimination claims. It is a threshold requirement in lending discrimination cases that the plaintiff be able to demonstrate that, absent the allegedly discriminatory animus or policy, they would have qualified for a loan or would have been approved for the credit at different or "better" terms. Here, because each plaintiff has widely ranging incomes, credit scores, and debt-to-income ratios, the determination of whether each was qualified for the loan product for which they

applied will require an individualized evidentiary analysis and determination. Indeed, the district court expressly permitted the nine named Plaintiffs to proceed as individuals because it recognized that determination of the legal issues in the case will depend on the threshold inquiry of whether each plaintiff was qualified for a particular credit product in the first place.

Indeed, it is hard to imagine any manageable way for the district court to conduct the individualized inquiries that would be necessary if Plaintiffs' class claims were to proceed. Plaintiffs' proposed class definition would have encompassed ***all*** minority applicants over the past six years who submitted an application for ***any*** home mortgage loan product, ***any*** home mortgage refinance or modification, and ***any*** Home Equity Line of Credit from Navy Federal. Naturally, such a broad class definition will suffer from the same varied circumstances as from the nine named Plaintiffs.

Appellants' characterization of Navy Federal's underwriting policy as "uniform" does not change the fact that each plaintiff's situation is too varied for class certification. Indeed, even the different loan products at issue require different underwriting. For example, VA loans are partially guaranteed by the U.S. Department of Veterans Affairs. The VA authorizes loans up to 100% loan to value, limits closing costs, and waives the need for Private Mortgage Insurance ("PMI"). This, in turn, drives differing underwriting considerations. For example, VA loans

require borrowers meet certain residual income[8] thresholds based on family size and geographic location. A VA loan's risk is thus fundamentally different from a conventional first mortgage that requires a downpayment to manage risk, sets market-based requirements for loan to value, and often requires PMI. Additionally, VA loan appraisals typically take more time because they use different requirements than conventional mortgages and the appraiser must be registered with the VA.

Appellants repeatedly return to statistical data from the HMDA collection, but ignore that such statistics are insufficient to prove their claims. Commentary from the Federal Reserve Bank of St. Louis has explicitly noted that "[w]hile HMDA data provide a useful start in assessing lending practices, the data alone do not prove discrimination."[9] This is especially true where the loan products themselves are not subject to the same underwriting standards because, as a matter of federal law, such standards are prescribed by the agencies that oversee those programs. Even in the face of such statistics, for the allegations as pleaded in their complaint, Plaintiffs' individual circumstances—such as the wide variance in credit scores, income, and existing debt— predominate.

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[8] Residual income is the discretionary income a borrower has each month after paying off all their major expenses.
[9] Julie L. Stackhouse, *Do Home Mortgage Disclosure Act Data Prove Lending Discrimination?*, Federal Reserve Bank of St. Louis (Mar. 21, 2018), *available at* https://www.stlouisfed.org/on-the-economy/2018/march/do-hmda-data-prove-lending-discrimination.

In sum, the district court's decision to allow Plaintiffs to proceed individually but not as a class is well rooted in Rule 23.

2. Improper Class Actions Are a Serious Cost Concern for Lenders, Borrowers, and American Businesses Generally.

Class actions are very costly for small businesses and lending institutions and the people that depend on them. Indeed, class action litigation costs in the United States are becoming increasingly oppressive. In 2023, the costs of class action litigation reached $3.9 billion.[10] These costs are meaningful for credit unions and mortgage bankers. For example, credit unions do not issue stock; their capitalization is based on member deposits and retained earnings. Thus, member deposits are directly at risk from litigation. Furthermore, defending even one class action can cost a single business over $100 million. *See, e.g.*, Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (July 2011). The complex nature of class actions creates an environment ripe for abuse where the suits routinely drag on for years, accruing legal fees without resolving class certification, let alone the underlying legal dispute. *See U.S. Chamber Institute for Legal Reform, Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 1 (Dec. 2013), *available at* https://instituteforlegalreform.com/wp-content/uploads/

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[10] *See* Carlton Field Class Action Survey 6–7 (2024), *available at* https://://ClassActionSurvey.com.

media/Class-Action-Study.pdf ("Approximately 14 percent of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis.").

Likewise, the cost of spurious class action litigation strains the already tight economics for mortgage bankers. The cost to originate a mortgage loan has increased significantly. These costs are driven by many factors, including compliance burdens imposed by regulation and examination. While the need to ensure compliance with consumer finance laws is a necessary part of the business, undue litigation risk from improper class actions only increases these costs—directly through the cost of litigation defense or indirectly through risk-averse behaviors that stifle innovation or raise compliance costs. These additional costs are passed on to consumers, which is especially problematic when consumers are increasingly under pressure to afford homeownership.

Improper use of the class action device also promotes unfair settlement pressure, even when the target companies have not engaged in any wrongdoing. Indeed, the extraordinary exposure created by certifying a class often coerces defendants to settle even cases that should be resolved in their favor. *See, e.g.*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious

defense."). Judge Friendly appropriately termed these "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View*, 120 (1973).

The risks of unfair settlement leverage arising from a spurious class action litigation are exacerbated when the action is brought for claims of disparate impact in consumer lending. Plaintiffs' Complaint provides a crystal-clear example. As recognized by the district court, the Plaintiffs' furnished information about income and credit scores evidences a wide variance of credit-worthiness and other individual factors, all of which require individual consideration for eligibility for various loan products. But Plaintiffs (supported by their amici) seek an end-around of the focus placed on those individualized questions by merely pointing to HMDA data which, they allege, evidences systematic discrimination. If successful in achieving the broad nationwide class certification they seek, Plaintiffs would be in a position to pressure Navy Federal into a significant settlement—without having to prove that they were actually denied credit on an unlawful basis.

Thus, it is critical that courts rigorously apply Rule 23 to prevent improper classes from being certified. Enforcing these requirements as early as practicable ensures that parties and courts do not needlessly expend time, money, and other resources litigating a case that should not proceed on a class-wide basis. Relatedly, proper enforcement of Rule 23 and the requirements promulgated thereunder will shield innocent defendants from unjustified settlement pressure.

If courts abandon these principles, as Appellants request, the negative consequences for lenders, borrowers, consumers, and American businesses generally will continue to grow. The already immense pressure on businesses to settle improper class actions will keep ballooning regardless of actual underlying harm. This coercion harms the entire economy because the significant attorneys' fees and costs generated by overbroad and otherwise improper class actions are ultimately absorbed by consumers, employees, borrowers, and small businesses through higher prices, lower wages, reduced credit, and otherwise restricted service offerings. *See U.S. Chamber Institute for Legal Reform, Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform*, at 40 (explaining "overboard class actions are nothing more than a mechanism for expanding the size of a given class to justify a windfall for attorneys who claim to represent the interests of uninjured class members").

3. Economic Feasibility of Individual Suits Does Not, and Should Not, Trump Traditional Rule 23 Inquiries When Evaluating Class Actions.

Appellants claim it will be too costly for individuals to pursue claims if they cannot be part of a class,[11] but, that contention is not relevant to Rule 23's

[11] While not relevant to the inquiry of a class action's ability to clear the bar imposed by Rule 23, this claim is particularly unpersuasive in the context of the statutes are issue here. ECOA explicitly allows for the recovery of attorney's fees for individual litigants. 15 U.S.C. § 1691e(d).

requirements. Plaintiffs bear the burden of proving that their proposed class action satisfies each of the required elements of Fed. R. Civ. P. 23. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). The evidence supporting certification must be sufficient to withstand a court's "rigorous analysis." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011). While a court may be sympathetic to the economic challenges of individual plaintiffs, such sympathy is not a basis for ignoring the requirements of Rule 23. Here, the nine named Plaintiffs may have achieved some economic efficiencies through the pretrial consideration of their claims in one action. But the economic incentives of a class action are not a reason to grant certification; if anything, the economic realities of settlement pressure created by class actions warrants particular care and attention to the requirements of Rule 23.

C. Reversal of the District Court's Decision Would Contravene the Varying Underwriting Standards for the Relevant Loan Products.

In repeatedly asserting that Navy Federal utilizes a "secret" algorithm that discriminates across all products, Plaintiffs elide important distinctions between the different underwriting standards for the different loan products at issue in this case. Those standards are a function in part of detailed and complicated regulations that only further underscore why class certification is inappropriate here. *See Rose v. SLM Financial Corp.*, 254 F.R.D. 269, 272 (W.D.N.C. 2008) (concluding that differences in interest rates, written disclosures, oral representations, and types and amounts of charged fees on mortgage products defeated commonality); *Love v.*

Johanns, 439 F.3d 723, 730–31 (D.C. Cir. 2006) (affirming district court's holding that individualized justifications such as "failure to meet collateral requirements, poor credit, [and] insufficient income" on loan applications failed to meet class action commonality requirement); *see also EQT Production Co. v. Adair*, 764 F.3d 347, 368 (4th Cir. 2014) (recognizing that "variable terms will make it difficult, if not impossible, for a court to assess the validity of the defendants' . . . practices on a classwide basis").

Underwriting processes typically originate from investor requirements and federal regulations or statutes, not from individual lenders. Indeed, virtually every lender nationwide, including Navy Federal, uses underwriting standards and tools dictated by statute and government-sponsored entities like the Federal National Mortgage Association ("Fannie Mae"). Fannie Mae's authority to "purchase, service, sell, or otherwise deal in [] mortgages" makes it a principal driver of this process. *See* 12 U.S.C. § 1717(b)(1). The majority of newly originated mortgages are sold by lenders into the secondary market to entities like Fannie Mae or functionally "guaranteed" by federal agencies like the VA or FHA. Lenders who use qualified mortgages—meaning the borrower has not taken on excessive monthly debt payments in comparison to their pre-tax income; the lender has not charged more than 3% in points and origination fees; and the loan has not been issued as a risky or overpriced loan by the use of negative amortization, balloon payment, or an

interest-only period[12]—have a much easier time transacting in this secondary market.

By way of example, Fannie Mae's standards and requirements impact the mortgage industry at all levels. From a wider lens, Fannie Mae requires that any lender with which it does business develops and implements a quality control program to assure, among other factors, compliance with federal, state, and local laws and regulations.[13] Fannie Mae also employs more specific statutory strictures, setting criteria for loans that govern the underwriting process. Fannie Mae has established a detailed documentation and verification process. As part of this process, all loan servicers (including those processing Fannie Mae loans) must comply with, among other factors, ability to repay requirements under Regulation Z. *See* 12 C.F.R. § 1026. Navy Federal, and other credit providers, must make a good-faith determination that the borrower will have a reasonable ability to repay the loan, which includes considering the borrower's income or assets, monthly payments on existing debt obligations, and the borrower's credit history. *See* 12 C.F.R. § 1026.43(c)(1), (2). Moreover, the provider is required to verify, through

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[12] CFPB, *What is a Qualified Mortgage* (June 10, 2022), *available at* https://www.consumerfinance.gov/ask-cfpb/what-is-a-qualified-mortgage-en-1789/.
[13] Fannie Mae, *Lender Quality Control Programs, Plans, and Processes* (Sept. 4, 2024), *available at* https://selling-guide.fanniemae.com/sel/d1-1-01/lender-quality-control-programs-plans-and-processes.

a third party, the information on which it relied in making that determination. *See* 12 C.F.R. § 1026.43(c)(3). This is only one segment of a larger process that requires extensive documentation and verification to make eligibility decisions based on credit history, loan-to-value ratios, and overall financial health, among other variables.

For their part, underwriting for VA loans is strictly governed by federal statute. *See* 38 U.S.C. §§ 3701 *et seq*. Indeed, VA loans "shall bear interest not in excess of such rate as the Secretary [of Veterans Affairs] may from time to time find the loan market demands." 38 U.S.C. § 3703(c)(1). To determine that rate, the Secretary is required to consult with "the Secretary of Housing and Urban Development regarding the rate of interest applicable to home loans insured under section 203(b) of the National Housing Act (12 U.S.C. 1709(b))." *Id.* Federal regulations on VA loans then proceed, for example, to provide that the "two primary underwriting standards [to determine] the adequacy of the veteran's present and anticipated income are debt-to-income ratio and residual income analysis." 38 C.F.R. § 36.4340(c).

These two standards for underwriting are expressly laid out in the regulations. The debt-to-income ratio is

> determined by taking the sum of the monthly Principal, Interest, Taxes and Insurance (PITI) of the loan being applied for, homeowners and other assessments such as special assessments, condominium fees, homeowners association fees, etc., and any long-term obligations

divided by the total of gross salary or earnings and other compensation or income.

Id., at § 36.4340(d). The regulations even prescribe the digit to which that ratio should be rounded: the nearest two digit number and prescribes the exact threshold standard that triggers additional considerations: 41%. *Id.* And in applying the residual income analysis, the regulations provide guidance on appropriate sources of income, how geography impacts the residual income adequacy to meet living expenses, etc. *Id.*, at § 36.4340(e).

These regulations protect and provide certainty for ***all*** players in the credit industry. Borrowers receive appropriately sized loans for which they can make payments. Creditors operate within a clearly delineated system and thus can extend credit to borrowers and comprehensively understand the risk any loan represents.

In sum, the mortgage industry is highly regulated, and the underwriting standards are no exception. To allow Plaintiffs to ignore this context and pursue an omnibus challenge to the standards governing the four different products at issue in this case would be difficult if not impossible for the district court, inappropriate under Rule 23, and would inject harmful uncertainty into the lending industry.

V. CONCLUSION

For the above reasons, this Court should affirm the district court, rigorously enforce the requirements of Rule 23, and hold that the class allegations were appropriately stricken.

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Certificate of Compliance

This brief complies with the length limits permitted by Federal Rule of Appellate Procedure 29(a)(f).

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I hereby certify that on November 19, 2024, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit via the appellate CM/ECF system. The participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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