IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 22-55332

AUDREY HEREDIA, successor-in-interest to the Estate of Carlos Heredia, et al.,

Plaintiffs-Appellees,
v.

SUNRISE SENIOR LIVING, LLC, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
Case No. 8:18-CV-1974

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae certifies that it has no outstanding shares or debt securities in the hands of the public, and it does not have a parent company. No publicly held company has a 10% or greater ownership interest in *amicus curiae.*

/s/ Adam G. Unikowsky

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STATEMENT REGARDING CONSENT

All parties consent to the filing of this brief.[1]

IDENTITY AND INTEREST OF AMICUS AND SUMMARY OF ARGUMENT

The Chamber of Commerce of the United States of America (the "Chamber") 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 curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community. The Chamber previously filed an amicus brief in this case in support of Defendants-Appellants' Rule 23(f) Petition, which this Court granted.

The district court's class-certification order conflicts with *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). *TransUnion* holds that federal courts lack the power under Article III to award damages to uninjured class members. Yet, the

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

district court certified a class in which most, if not all, class members were uninjured. Although assisted-living residents undoubtedly could be harmed from a lack of care, Plaintiffs here do not allege that absent class members experienced *any* physical or emotional harm from allegedly insufficient staffing. Nor do they even allege that they experienced inadequate care from staff members that created the risk of an injury. Instead, they allege that Sunrise used a staffing model that created a *risk* of lower staffing levels that in turn created a *risk* of harm—in effect, an allegation of a "risk of a risk" of harm. Under *TransUnion*, that is insufficient to establish injury under Article III. Yet the district court certified the class without even mentioning *TransUnion*, let alone conducting the analysis *TransUnion* requires. The district court should have concluded that individualized disputes over standing predominate over common issues, precluding class certification. More fundamentally, it should have declined to certify a class when there was no evidence of injury for most, if not all, class members.

The district court's decision contradicts Supreme Court precedent and, if followed by other courts, would lead to the evasion of *TransUnion* in a broad swath of cases. The Chamber and its members have a strong interest in ensuring that district courts comply with *TransUnion*, and in encouraging courts of appeals to correct class-certification decisions that stray from Supreme Court precedent.

ARGUMENT

The Chamber agrees with each of Sunrise's grounds for reversal. In particular, the Chamber agrees that Plaintiffs provided no evidence that all class members had common staffing expectations. Nor did they provide a plausible damages model. Nor did they provide any expert testimony that passes muster under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

In this brief, the Chamber will focus on one particularly consequential error by the district court: the certification of a class in which most, if not all, members were uninjured. The district court's decision conflicts with Supreme Court and circuit precedent, and if left undisturbed, it would yield harmful consequences. This Court should hold that a class cannot be certified when individualized disputes over standing predominate over common questions. More broadly, the Court should hold that a class cannot be certified unless the plaintiff proffers sufficient evidence that *all* class members have standing. Plaintiffs did not come close to making that showing here, so the class-certification order should be reversed.

I. The District Court Erred in Certifying a Class that Includes Uninjured Members.

In *TransUnion*, the Supreme Court held that Article III forbids a court from entering judgment in favor of class members who lack standing. Because that case had reached a final judgment, the Court did not need to determine whether a class containing uninjured members could be certified. In *Olean Wholesale Grocery*

Cooperative, Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022) (en banc), *petition for cert. filed*, 91 U.S.L.W. 3025 (U.S. Aug. 10, 2022) (No. 22-131), this Court did not squarely decide that question, but strongly implied that a damages class should not be certified when a plaintiff cannot show, "with the manner and degree of evidence required" at the class-certification stage, that every class member has standing. *Id.* at 682 (quotation marks omitted).

In this case, the Court need not decide that question either. Even if courts could certify damages classes that they know to contain uninjured class members, the class-certification order in this case should be reversed because individualized standing inquiries will predominate over common questions. But if the Court reaches that question, it should make explicit what *Olean* left implicit: if plaintiffs fail to produce sufficient evidence at the class-certification stage that *every* unnamed class member has standing, a damages class cannot be certified. Under that standard, the class-certification order in this case should be reversed because there is insufficient evidence that *any*—much less *every*—class member has standing.

A. Even if uninjured plaintiffs could be class members, individualized inquiries will predominate.

Regardless of whether classes with uninjured members can be certified, the district court's class certification order is wrong. Individualized inquiries over standing predominate over common questions, precluding class certification.

"When individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions." *Olean*, 31 F.4th at 668-69. "Because the Supreme Court has clarified that every class member must have Article III standing in order to recover individual damages, Rule 23 also requires a district court to determine whether individualized inquiries into this standing issue would predominate over common questions." *Id.* at 668 n.12 (quotation marks, alterations, and citation omitted).

In *Olean*, the court concluded that common questions into standing would predominate over individualized inquiries. The court reasoned that the jury's answer to a *single* question—whether the plaintiffs' expert's model was correct—would resolve the standing of *all* class members simultaneously. *See id.* at 681 ("If the jury found that Dr. Mangum's model was reliable, then the [plaintiffs] would have succeeded in showing antitrust impact on a class-wide basis .... On the other hand, if the jury were persuaded by Dr. Johnson's critique, the jury could conclude that the [plaintiffs] had failed to prove antitrust impact on a class-wide basis."). Hence, after class certification, *no* individualized inquiries into standing would be necessary. *Id.* ("In neither case would the litigation raise individualized questions regarding which members of the DPP class had suffered an injury.").

That is emphatically not the case here. For the reasons explained by Sunrise, being exposed to a purportedly faulty staffing model is not a cognizable harm under Article III. It is possible (though unproven) that *some* class members were harmed by the allegedly substandard staffing model. For instance, if a plaintiff could show that she sustained an injury that she would have avoided if a staff member had been present, that would be a legally cognizable injury. If the plaintiff could then trace that injury to the allegedly defective staffing model, then the plaintiff could show Article III standing.

However, there is no way to make this determination on a class-wide basis. To determine whether any particular resident was harmed by insufficient staffing, it is necessary to analyze that particular resident's individual circumstances. The fact-finder would have to assess *both* whether that resident experienced any legally cognizable injury while residing at the defendant's facilities (to establish injury-in-fact), *and* if so, whether that injury was attributable to allegedly insufficient staffing (to show that the injury was traceable to the defendant). These individualized inquiries would swamp any common questions and destroy the utility of the class-action device. As a result, individualized questions predominate, and the class should not have been certified.

B. A damages class should not be certified unless there is sufficient evidence for the class-certification phase that *every* class member has standing.

As Sunrise demonstrates, the class-certification order must be reversed in this case for numerous reasons, regardless of whether classes containing uninjured members can be certified. But if the Court reaches the issue, it should hold that a class cannot be certified unless the class representative proffers sufficient evidence at the class-certification stage that every class member has standing.

In *TransUnion*, the Supreme Court stated that "[e]very class member must have Article III standing in order to recover individual damages." 141 S. Ct. at 2208. The Court, however, did not "address the distinct question whether every class member must demonstrate standing before a court certifies a class." *Id.* at 2208 n.4.

This court addressed that question in *Olean*. *Olean* was an antitrust case involving a battle of the experts at the class-certification stage. The plaintiffs' expert put forth a model that they argued would show that *every* class member sustained injury as a result of the alleged antitrust violations. *See* 31 F.4th at 679. The defendants' expert disagreed with that model, taking the view that 28% of class members were uninjured by the violation. *Id.* at 680.

The district court certified the class, and this court affirmed that decision. This court reasoned that the plaintiffs' model "was *capable* of showing that the … class members suffered antitrust impact on a class-wide basis," which is "all that was

necessary at the certification stage." *Id.* at 681. Although a jury might disbelieve the plaintiffs' model, "that is a question of persuasiveness for the jury once the evidence is sufficient to satisfy Rule 23." *Id.* Put another way, if a jury *could* conclude—in one fell swoop, without individualized inquiries—that all class members suffered a monetary injury, then the case was amenable to classwide resolution.

In reaching this conclusion, the court was careful *not* to suggest that classes containing uninjured members could be certified. The court declined to decide whether "the possible presence of a large number of uninjured class members raises an Article III issue," because "*all class members have standing here*." *Id.* at 682 (emphasis added). The court explained that "[a] plaintiff is required to establish the elements necessary to prove standing 'with the manner and degree of evidence required at the successive stages of the litigation.'" *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). Because it believed that "evidence was capable of establishing antitrust impact on a class-wide basis," and "supra-competitive impact on a class-wide basis—is sufficient to show an injury-in-fact traceable to the defendants and redressable by a favorable ruling," the Court concluded that "the [plaintiffs] ha[d] adequately demonstrated Article III standing at the class certification stage for all class members, whether or not that was required." *Id.*

The court's reasoning reflects its effort to align class-action procedure to procedure in individualized litigation. Suppose a single plaintiff brought an antitrust claim and proffered sufficient evidence, at summary judgment, for a jury to conclude that the plaintiff had been injured and all other elements of an antitrust claim were satisfied. That case would reach a jury—even if the defendant proffered contrary evidence at summary judgment that, if believed, would show that the defendant was uninjured. The Court's theory in *Olean* was that this same rule should apply at class certification. If the plaintiff could satisfy Rule 23 and proffer sufficient evidence that would allow a reasonable jury to find that *all* class members were injured, then, according to the *Olean* Court, a case could proceed past class certification to a jury trial.

But what if the plaintiff could not make that showing for every class member at the class-certification stage? As noted above, the court did not expressly decide that question, but it strongly implied that a damages class should not be certified in that scenario. The court reasoned as follows:

> Outside the class action context, the Supreme Court has held that each plaintiff must demonstrate Article III standing in order to seek additional money damages and, therefore, a litigant must demonstrate Article III standing in order to intervene as a matter of right. *Town of Chester v. Laroe Ests., Inc.*, … 137 S. Ct. 1645, 1651 … (2017). But the Supreme Court has long recognized that in cases seeking injunctive or declaratory relief, only one plaintiff need demonstrate standing to satisfy Article III. … We therefore overrule the statement in *Mazza* [*v. Am. Honda*

> *Motor Co., Inc.*, 666 F.3d 581, 596 (9th Cir. 2012)] that "no class may be certified that contains members lacking Article III standing," 666 F.3d at 594, which does not apply when a court is certifying a class seeking injunctive or other equitable relief. We do not overrule *Mazza* as to any other holding which remain good law.

Id. at 682 n.32 (citations omitted). In other words, for non-damages classes, only one class member needs to have standing, but for damages classes, all class members need to have standing.

This reasoning makes sense. In cases involving non-damages classes, individual class members frequently have standing to obtain an injunction that would benefit the entire class. For instance, if a business is polluting, a single nearby homeowner might have standing to obtain an injunction to stop the business from polluting—even if that injunction would also benefit other members of a class of nearby homeowners. As such, because the presence of a single plaintiff with standing is sufficient to authorize the court to issue the sought-after injunction, the court does not require every class member to have standing.

But damages classes are different. In damages cases, *all* class members seek damages judgments on their *own* behalf which do not duplicate the judgments in favor of other class members. As such, each of them must prove their standing at class certification, because "class certification" is the moment "that brings unnamed class members into the action" and thus subject to the coercive power of the court. *Moser v. Benefytt, Inc.*, 8 F.4th 872, 878 (9th Cir. 2021) (quotation marks omitted).

When the court certifies a class, it effectively adds new plaintiffs to the litigation—plaintiffs whose claims will be resolved, one way or the other, by the litigation. Under *Town of Chester*, outside the context of class-action litigation, newly-joined plaintiffs must have Article III standing. Likewise, class-certification orders require the newly-joined class members to have Article III standing. Or, more precisely, the plaintiff must put forth evidence that—if believed by a reasonable jury—would show that all class members have Article III standing. If such a showing cannot be made for a class member at the class-certification stage, then that class member cannot be part of a certified class.

C. Plaintiffs have not shown that any—much less every—class member has standing.

These principles establish that the class-certification order should be reversed. Plaintiffs have not met their burden at this stage to show that any—let alone every—class member was injured.

It is important to pin down the exact nature of Plaintiffs' asserted injury. First, Plaintiffs explicitly state that they "do[] not seek recovery for personal injuries, emotional distress, or bodily harm that may have been caused by Sunrise's conduct." C.D. Cal. Order at 28, ECF No. 503 ("Order") (quoting complaint). Undoubtedly, many seniors who reside in assisted-living facilities need care and are often dependent on staff members for it. If a resident experiences physical or emotional

mistreatment, that resident indisputably has standing under Article III to seek recourse. But Plaintiffs have not alleged any physical or emotional injury. *See id.*

Second, Plaintiffs do not even allege that the class actually encountered substandard staffing. Nor do they allege that they were promised a specific level of staffing and did not receive it. Hence, this case does not present the question whether a resident who actually experiences substandard staffing suffers an Article III injury.

Instead, Plaintiffs allege they were "exposed" to a staffing *model* that *might*, in some cases, result in substandard staffing. ECF No. 411-1, at 16 ("all class members are exposed to the challenged staffing policies"). This is the injury that the district court deemed sufficient to warrant class certification. *See* Order at 8 ("Plaintiffs assert as a result of Sunrise's deficient staffing model, '[a]ll residents are subject to a corporate staffing model that fails to ensure staffing sufficient to meet promised services.'"). It is no accident that Plaintiffs frame their injury that way. If the asserted injury were exposure to low levels of staffing, then variations in staffing levels—and Sunrise's declarations of residents who experienced adequate staffing—would have foreclosed class certification. Only by framing their injury as exposure to the *risk* of low levels of staffing were Plaintiffs able to convince the district court that class certification was warranted. Order at 24-25 ("Sunrise further argues that Plaintiffs' claims fail as to predominance and commonality because 'staffing at Sunrise varies based on local manager's discretion, the "neighborhood" where the

resident lived, the time period, and each resident's needs.' … But the Court is not convinced that these issues would predominate in this action given Sunrise's own admissions that all residents … are all subject to Sunrise's *allegedly deficient staffing model*." (emphasis added) (quoting Opp. at 1, ECF No. 402-1)).

TransUnion forecloses Plaintiffs' claim that mere exposure to a deficient staffing model constitutes an Article III injury. In *TransUnion*, the Supreme Court concluded that the mere risk of harm is not an injury giving rise to standing. 141 S. Ct. at 2208, 2210-11. Here, the claim of injury is even weaker than in *TransUnion*. In effect, Plaintiffs assert a "risk of a risk" of harm—they allege that their exposure to the staffing model created a *risk* of insufficient staffing, which, in turn, created a *risk* that they would encounter a physical or emotional injury. That double bank shot does not establish an Article III injury.

In an attempt to establish actual injury, Plaintiffs assert two theories of economic injury, neither of which satisfies Article III. First, Plaintiffs allege that they seek to recover "move-in fees." Order at 15. Residents pay those fees prior to admission, before they receive daily care services. Order at 27. But those move-in fees are not "fairly traceable to the challenged conduct of the defendant," as required by Article III. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Plaintiffs do not allege that Sunrise's alleged misrepresentations induced any, much less all, class members to move into Sunrise's assisted-living facilities. And if Plaintiffs would

have moved into the assisted-living facilities regardless of whether the alleged misrepresentations were made, Plaintiffs cannot trace the move-in fees to the alleged misrepresentations.

Plaintiffs' second theory of actual damages is that they are entitled to recover a "portion of the monthly fees paid for care services." Order at 15-16 (quoting Opp. at 3, ECF No. 442-1). Plaintiffs argue that they are entitled to compensation of the value of what was promised and not received—*i.e.*, an allegedly more favorable staffing model. But that argument is irreconcilable with *TransUnion*. The Supreme Court held that bare risk of harm is not itself an actionable harm. Plaintiffs cannot transmute a risk of harm into actual harm merely by characterizing the risk as lowering the value of the service they purchased.

Indeed, although this Court has yet to weigh in on this issue post-*TransUnion*, a recent Eighth Circuit case makes precisely this point. In *Johannessohn v. Polaris Industries, Inc.*, 9 F.4th 981 (8th Cir. 2021), the plaintiffs alleged that Polaris "failed to disclose heat defects and that this artificially inflated the price of their all-terrain vehicles." *Id.* at 983-84. Plaintiffs theorized that "they can show economic injury by the mere fact that they paid an inflated purchase price." *Id.* at 988. The Eighth Circuit rejected this claim and held the plaintiffs lacked Article III standing, applying the principle that "purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product

they own." *Id.* at 987 (quotation marks omitted); *see also, e.g.*, *Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816, 824 (5th Cir. 2022) ("A plaintiff always must be able to point to a concrete injury to bring suit. And if a risk hasn't materialized, the plaintiff hasn't yet been injured."); *Maddox v. Bank of N.Y. Mellon Tr. Co., N.A.*, 19 F.4th 58, 63 (2d Cir. 2021) (same). Here, too, Plaintiffs were not injured by merely being exposed to an allegedly defective staffing model and cannot cure that defect by asserting that they paid an inflated purchase price.

To be sure, there is some pre-*TransUnion* circuit law suggesting that a purchaser is injured by buying a defective product, such as a car with a defective component, even if that defective component yields no physical injury. *See*, *e.g.*, *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 820 (9th Cir. 2019). Even assuming that case law remains good law post-*TransUnion*, this case is readily distinguishable. Those cases have involved the sale of *goods* with undisclosed risks, like cars. Perhaps one could argue that one is injured by purchasing a risky *product* because the risk—if exposed—could decrease the product's resale value. But the services offered by Sunrise are personal to the residents, and once received, they cannot be resold. Simply asserting that an allegedly faulty staffing model resulted in the plaintiffs paying "too much"—even though they got exactly what they paid for—cannot transform a bare risk of harm into an Article III injury.

At a minimum, the Court should vacate and remand to the district court to conduct a *TransUnion* analysis. Plaintiffs must demonstrate standing through evidentiary proof. *TransUnion*, 141 S. Ct. at 2208 ("A plaintiff must demonstrate standing with the manner and degree of evidence required at the successive stages of the litigation." (internal quotation marks omitted)). Plaintiffs theorized that all class members suffered economic harm, but they bore the burden of proving that theory, not just alleging it. Sunrise persuasively argued that numerous class members were uninjured. The district court could not merely ignore Sunrise's argument, make no findings on actual injury, and certify the class. This Court should, at a minimum, remand for the district court to conduct a *TransUnion* analysis.

II. Affirming the District Court Would Have Harmful Consequences.

If affirmed by this Court, the district court's reasoning would lead to evasion of *TransUnion* in a broad swath of cases and result in deleterious policy consequences.

The district court's decision, if accepted at the appellate level, would seem to mean that a mere risk of harm could be deemed economic injury every time a plaintiff has an economic relationship with the defendant. For example, hotel guests could sue over an allegedly flawed corporate staffing formula. *See* Rule 23(f) Pet. at 18, 9th Cir. No. 21-80121, ECF No. 1. In such a case, if an expert were willing to assert that a more favorable staffing formula would have made a hotel reservation

marginally more valuable, the district court's theory would allow the judge to certify the class on the ground that all class members suffered economic injury consisting of a miniscule fraction of the purchase price.

That conclusion, in turn, would seem to nullify *TransUnion* in all cases in which the plaintiff is a buyer and the defendant is a seller. Many such plaintiffs could claim that a supposed risk of harm decreased the value of the service or product such that the plaintiff overpaid for the good or service. But that would leave *TransUnion*'s explicit holding that "risk" of harm is insufficient to constitute concrete injury confined to the rare case in which the plaintiff lacks a direct relationship with the defendant. The Court should not countenance a ruling that limits *TransUnion* so dramatically.

Permitting Plaintiffs to evade *TransUnion* would have harmful policy consequences. Class actions dominated by uninjured class members have no social value. The theory behind class-action litigation is that each member of a large class of plaintiffs may have suffered an injury that is too small to justify bringing an individual suit. Thus, the class-action suit, in theory, deters wrongdoers from causing injuries that are, in the aggregate, large. That theory does not work where, as here, most if not all class members suffers *zero* damage, resulting in an aggregate actual damage amount that is similarly near zero, while carrying staggering statutory-damages price tags.

What is more, if class members need not prove injury, it would be easy to assemble overbroad classes—such as every person who has ever used a service or purchased a product. In this case, for instance, the class includes thousands of members, seeking hundreds of millions of dollars in damages. Order at 29.

Large classes inevitably yield unfairness to defendants. The Supreme Court has noted "the risk of '*in terrorem*' settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.* The bigger the class, the bigger the *in terrorem* risk. What is more, the bigger the class, the less realistic it is for defendants to provide individualized defenses for particular class members. It is true that the presence of individualized defenses does not automatically foreclose class certification: "That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014). Yet providing individualized rebuttals is particularly difficult when thousands of claims must be simultaneously investigated and defended.

As a practical matter, "[c]lasswide settlements in such cases essentially offer free money to class members who would never be able to recover (or even consider filing a lawsuit) individually against the defendant." John H. Beisner, Jordan M.

Schwartz, & Paden Gallagher, *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform*, U.S. Chamber of Commerce Inst. for Legal Reform, 38-40 (Aug. 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/08/ILR-Class-Action-Flaws-FINAL.pdf. Worse, overbroad class actions may be used as "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." *Id.* at 40.

Class actions harm not only businesses, but also their customers who ultimately bear the costs. Assisted-living facilities, in particular, have struggled enormously during the COVID-19 pandemic. Hundreds of senior-care facilities have closed or today teeter on the edge of bankruptcy.[2] Diverting the time of facilities to defending against class-action lawsuits and spending limited resources on defense-attorney fees and class-counsel fees ultimately harms these facilities and their residents—just as it harms all businesses and customers. Indeed, "allowing even modest compensation for uninjured class members could easily double a defendant's total liability" and thereby exacerbate price increases for consumers.

[2] Press Release, Am. Health Care Ass'n, *Nursing Homes Need Financial Support to Prevent Mounting Closures* (June 17, 2021), https://www.ahcancal.org/News-and-Communications/Press-Releases/Pages/Nursing-Homes-Need-Financial-Support-To-Prevent-Mounting-Closures.aspx; Tony Pugh, *Bankruptcies, Closures Loom for Nursing Homes Beset by Pandemic*, Bloomberg Law (Dec. 30, 2020), https://news.bloomberglaw.com/health-law-and-business/bankruptcies-closures-loom-for-nursing-homes-beset-by-pandemic.

Beisner, *supra*, at 40. Faithful adherence to *TransUnion* can avoid that result at a crucial time when our economy is already struggling to recover from the pandemic.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

September 16, 2022

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/s/ Adam G. Unikowsky

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I hereby certify that on this 16th day of September, 2022 a true and correct copy of the foregoing Brief was served via the court's CM/ECF system.

/s/ Adam G. Unikowsky