No. 14-325

In the United States Court of Appeals for the Fourth Circuit

MICHAEL T. DREHER,
on behalf of himself and all others similarly situated,
Plaintiff-Respondent,

v.

EXPERIAN INFORMATION SOLUTIONS, INC.
Defendant-Petitioner.

On Petition for Permission to Appeal from the
United States District Court for the Eastern District of Virginia

ANSWER IN OPPOSITION TO PETITION FOR INTERLOCUTORY APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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INTRODUCTION

Invoking Federal Rule of Civil Procedure 23(f), Experian urges this Court to take the unusual step of granting interlocutory review of a class-certification order in a quintessential consumer class action: a case alleging that a credit-reporting agency followed a uniform, deliberate policy of withholding important information from consumers, in violation of the Fair Credit Reporting Act.

This Court, however, makes only "careful and sparing use of Rule 23(f)," recognizing the Court's "limited capacity" for "interlocutory appeals" and the district court's "institutional advantage" in "managing the course of litigation." *Lienhart v. Dryvit Sys.*, 255 F.3d 138 (4th Cir. 2001). "Routine interlocutory review of class certifications is simply not feasible." *Id.*

Experian's plea for an exception to that rule rests entirely on its claim that the certification order here was "manifestly erroneous." But this case does not come close to the "extreme case[]" in which that high bar is satisfied—a case in which "decertification is a functional certainty." *Id.* at 145. In fact, it is Experian's arguments that are extreme—so extreme that they lack support in the precedent of any circuit and would, if accepted, make most consumer class actions impossible.

First, Experian contends that the class lacks Article III standing. But that argument mischaracterizes the district court's decision, overlooks established precedent holding that the denial of a right to information under a federal statute is

a cognizable injury, and mistakenly relies on ERISA cases in which plaintiffs seek standing to sue on behalf of pension plans.

Second, Experian claims that the order is "manifestly erroneous" because statutory damages would entail individualized determinations. But this Court held just the opposite in an indistinguishable FCRA case: Where the liability issues are common, "individual statutory damages issues are insufficient to defeat class certification." *Stillmock v. Weis Markets*, 385 F. App'x 267, 273 (4th Cir. 2010). The same is true here.

BACKGROUND

1. The Fair Credit Reporting Act. "Congress enacted FCRA in 1970 out of concerns about abuses in the consumer reporting industry." *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 414 (4th Cir. 2001). "Congress found that in too many instances [consumer-reporting] agencies were reporting inaccurate information," often without consumers' knowledge. *Id.*; *see* S. Rep. No. 91-157, at 3-4 (1969) (describing "inability" of consumers to discover errors). And even if consumers learned of an error, they usually had "difficulty in correcting inaccurate information" because of skewed market incentives: "a credit reporting agency earns its income from creditors or its other business customers"—the same entities it relies on to obtain credit information—and "time spent with consumers going over individual reports reduces . . . profits." 115 Cong. Rec. 2412 (1969).

With the FCRA, Congress sought to change this. Recognizing the "vital role" that consumer-reporting agencies play in the modern economy, Congress determined that they must "exercise their grave responsibilities" in a way that "ensure[s] fair and accurate credit reporting." 15 U.S.C. § 1681(a); *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 239 (4th Cir. 2009). The FCRA thus contains "a variety of measures designed to insure that agencies report accurate information." *Dalton*, 257 F.3d at 414–15.

One of these is the requirement that reporting agencies, upon any request by a consumer, "clearly and accurately disclose to the consumer . . . [a]ll information in the consumer's file at the time of the request," as well as "[t]he sources of the information." 15 U.S.C. § 1681g(a)(1) & (2). By giving consumers the right to access the information in their files—and to know where it came from—this requirement serves two important purposes: it allows consumers to confirm that the information is accurate, and it tells them who to contact if it's not. Indeed, Congress "felt that it was necessary to give consumers a specific statutory right to acquire such information on sources" because in some cases it "may be the only way in which the consumer can effectively" correct mistakes. 116 Cong. Rec. 35,940 (1970).

Like other disclosure statutes, the FCRA enforces its provisions by creating a private right of action with a two-tier damages scheme. "If a violation is negligent, the affected consumer is entitled to actual damages. If willful, however, the

consumer may have actual damages, or statutory damages ranging from $100 to $1,000, and even punitive damages." *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 53 (2007).

The availability of statutory damages in lieu of actual damages is crucial to this scheme. As this Court has explained, Congress generally "creates statutory damages remedies because it wants to encourage civil enforcement suits in situations where actual damages are difficult to prove." *Doe v. Chao*, 306 F.3d 170, 198 (4th Cir. 2002). That is true of the FCRA in particular, as one treatise explains: "Statutory damages for willful violations are available when actual damages are difficult to prove or nonexistent," as is often the case when consumers are deprived information to which they are entitled. Wu, *Fair Credit Reporting* § 11.11.

2. The Facts. In late 2010, Michael Dreher discovered that someone had stolen his identity and opened a credit card in his name two years before. Dreher learned of this when the National Security Agency, while processing his security clearance for work, notified him that his credit report listed a delinquent account under the name "Advanta Bank"—an account that he did not open and had never heard of. ECF No. 76-2, at 1. The NSA investigator told him that if he could not prove that he made payments on the account, it could jeopardize his clearance. *Id.*

To see his credit report for himself, Dreher requested a copy from Experian. It listed one delinquent account—Advanta Bank—with a P.O. box as the only contact information. "No phone number [is] available," the report read. *Id.* No.

76-3, at 4. When Dreher requested a second report in early 2011, it said the same thing. *Id.* No. 76-4, at 4. Because he'd never had any contact with Advanta Bank and didn't recognize the name, he wrote a letter to the address provided, in which he explained the situation, disputed the debt, and requested verification that the account was in fact his. *Id.* No. 76-2, at 1–2. He waited a month, didn't hear back, and then wrote another letter. *Id.* at 2. This time he received a response (on Advanta letterhead), but it did not resolve the problem. *Id.* So he wrote to Advanta once more the next month; Advanta didn't respond. *Id.*

Shortly thereafter, in June 2011, Dreher requested a third credit report from Experian. It still showed the delinquent account, but now the account was listed under a slightly different name: "Advanta Credit Cards." *Id.* No. 76-5, at 4. After he disputed the debt on the account and explained to Experian that his identity had been stolen, Experian sent Dreher a letter informing him that the "Advanta Credit Cards" account had been deleted but that a new account—"Advanta Bank Corp."—"remain[ed]." *Id.* No. 76-7, at 2; 76-8, at 2–3. The letter included a note saying that the "credit grantor requests that you contact them directly." *Id.* No. 76-8, at 2–3 (initial capitalization removed). There was no phone number—only the same P.O. Box to which he had already written three times, to no avail. *Id.* at 5.

Eventually Dreher discovered that Advanta didn't actually exist. It was closed by the Utah Department of Financial Institutions in March 2010—eight

months before Dreher requested his first credit report from Experian. ECF No. 76-1, at 3. A different company, CardWorks, had begun servicing Advanta credit-card accounts on August 1, 2010. *Id.* at 1–5. Experian knew this. *Id.*

But instead of listing CardWorks as one of the sources for Advanta accounts, Experian adopted a different policy: It asked CardWorks—its customer—what *it* wanted Experian's reports to say. CardWorks' answer? "We want the subscriber code to remain in the Advanta company ID"—as "Advanta Credit Cards," not CardWorks—even though CardWorks was now "the only party servicing the accounts" and handling the credit reporting, and thus a source of information. *Id.* No. 76-18, at 2–3; No. 76-19, at 5, 15; *see id.* No. 76-1, at 2 ("We would like for this new code to report on the consumers' trade line as Advanta Credit Cards."). Experian asked if CardWorks wanted its name identified as well, as is industry practice. *Id.* No. 76-19, at 7. CardWorks replied: "No, we would not want CWS or CardWorks mentioned in the trade line, just Advanta Credit Cards." *Id.* at 8.

Experian obliged. It adopted a companywide policy—for all relevant accounts—to have "the name changed to 'ADVANTA Credit Cards,'" not CardWorks, while giving CardWorks "access" to those accounts so it can "view the trades [it is] servicing" and "handle disputes" from consumers (that is, from those who know where, how, and to whom to make their dispute). *Id.* at 9–12.

3. This Case. In September 2011, Dreher brought this case challenging Experian's policy as a willful violation of the FCRA's requirement that consumer-reporting agencies disclose all "sources of information" in a credit report. 15 U.S.C. § 1681g(a)(2); ECF No. 1; *id.* 19. Because he ultimately received clearance, Dreher sought statutory damages rather than actual damages. And because he challenged a uniform policy—Experian's refusal to identify CardWorks as a source—he sought certification of the claim as a class action. ECF No. 140–41.[1]

Experian moved for summary judgment on the claim, which the district court denied. *Id.* No. 87. The court held that "[a]lthough Experian posits that the word 'sources' could have many meanings, in the context of this case and the FCRA, the term clearly embraces CardWorks. Whatever else it might mean, the term 'sources of the information' certainly includes the entity that gave the information to Experian." *Id.* at 8–9. The court drew added support for its holding from the standard industry practice of "identify[ing] both the previous servicer/issuer of the debt and the current servicer," and from the fact that "Experian actually considered following this practice and using the trade line 'Advanta/CWS' but instead deferred judgment to CardWorks,'" which a jury could conclude is a willful violation of the FCRA. *Id.* at 11–12.

[1] Even after Dreher filed this case, Experian still had not listed CardWorks as a source of information on its credit reports. In November 2011, his Experian credit report identified the delinquent account as "Advanta Bank" and listed the same P.O. box as before, with no telephone number. ECF No. 76-6, at 4.

Because Experian wants to continue deferring to its customers, it repeatedly told the district court in the recent class-certification hearing that it will litigate the case to final judgment and then seek review from this Court if it loses. As Experian's counsel put it, "this is not a case that can be settled." Hearing Tr. 6/10/14, 5:1–2; *see also id.* at 6:20 (same); 7:17–18 (same). If "this case ends up as class action," he said flatly, "it is going to be tried." *Id.* at 7:9–11; *see also id.* at 7:19–21 ("[I]f this case is going to be certified as a class, we are going to go forward.").

4. The Class-Certification Order. The court certified a class of all people who "(1) requested a copy of their consumer disclosure from Experian on or after August 1, 2010; (2) received a document in response that identified 'Advanta Bank' or 'Advanta Credit Cards' as the only source of the information for the tradeline; (3) and whose 'date of status' or 'last reported' field reflected a date of August 2010 or later." Dist. Ct. Op. 2.

The court's order rejected Experian's two arguments against certification: "that the question of individual statutory damages will predominate over any common questions regarding liability," and that "evidence of Dreher's personal suffering will inappropriately increase the award of allowable statutory damages." *Id.* at 3–4. As to the first argument, the court found that "the question of Experian's liability represents the central, dominant issue before the Court" and is common to the class. *Id.* at 4. "The 'overarching issue,'" the court explained, "concerns

Experian's willfulness: whether Experian acted in objectively reasonable fashion in failing to identify Cardworks as a source of information." *Id.* at 5. By contrast, the "questions of statutory damages (the very existence of which hinge, of course, on the jury's resolution of Experian's willfulness) are secondary considerations" that "do not preclude the common issue of liability from predominating." *Id.* at 4–5. The court quoted from this Court's holding in *Stillmock v. Weis Markets*: "[W]here, as here, *the qualitatively overarching issue by far is the liability issue of the defendant's willfulness*, and the purported class members were exposed to the same risk of harm every time the defendant violated the statute in the identical manner, the individual statutory damages issues are insufficient to defeat class certification under Rule 23(b)(3)." *Id.* (quoting 385 F. App'x 267, 273 (4th Cir. 2010)).

As to Experian's second argument, the court "agree[d] with Experian that the jurors may be tempted to conflate Dreher's suffering with the value of th[e] statutory" right to receive sources, which all class members were deprived of, but emphasized that the court "will not allow this to occur" *Id.* at 8. "The plaintiff cannot have it both ways": Because he "seeks to recover statutory damages," the court stressed, "he may not introduce evidence of the horrible angst [he] suffered." *Id.* Instead, the "jury's calculation of statutory damages must focus on the nature of the particular statutory violation in question," which is common to the class. *Id.* at 9. The court elaborated: "That violation—in this case, Experian's alleged failure to

disclose Cardworks as a source of information about consumer credit—is the same for each plaintiff, in each instance. The only variation among the individual plaintiffs, then, concerns the number of discrete statutory violations as to each," which is easily addressed by "a simple, per-violation statutory damages calculation." *Id.* at 4, 9. So the "'individual question' of statutory damages," the court explained, "is reduced to mouse-clicking simplicity" using Experian's own database—and thus "does not complicate matters very much at all," as this Court has recognized. *Id.* at 9 (quoting *Stillmock*, 385 F. App'x at 273).

RULE 23(f) STANDARDS

This Court has adopted the Eleventh Circuit's five-factor test for determining whether to grant a Rule 23(f) petition, which considers (1) whether the certification ruling is likely dispositive of the litigation; (2) whether the certification decision contains a substantial weakness; (3) whether the appeal raises important and unsettled questions; (4) the nature and status of the litigation; and (5) the likelihood that future events will make appellate review unlikely or unnecessary, such as "settlement negotiations" that would sound the "'death knell' for the litigation." *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144–46 (4th Cir. 2001) (citing *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274–76 (11th Cir. 2000)). The substantial-weakness factor, "viewed in terms of the likelihood of reversal under an abuse of discretion standard, operates on a 'sliding scale' in conjunction with the other

factors." *Id.* at 145. Only "[i]n extreme cases, where decertification is a functional certainty," may this factor "alone suffice" for immediate review. *Id.* Otherwise, "a commensurately stronger showing on the other factors is necessary." *Id.*

That showing is a heavy one. Because Rule 23(f) appeals are "inherently disruptive, time-consuming, and expensive," they are "generally disfavored" under the five-factor test. *Prado-Steiman*, 221 F.3d at 1276. The test is designed to encourage "restraint in accepting Rule 23(f) petitions," insisting that the petitioner show a truly "compelling need for resolution of the legal issue sooner rather than later." *Id.* at 1274. Short of that, the Court "should err, if at all, on the side of allowing the district court an opportunity to fine-tune its class certification order rather than opening the door too widely to interlocutory appellate review." *Id.*

ARGUMENT

I. Experian's Article III standing argument mischaracterizes the district court's decision, the allegations in this case, and this Court's precedent.

A. Mischaracterizing the district court's decision by carefully selecting quotations out of context, Experian suggests that the district court "expressly recognized" that "the vast majority" of class members lacked an injury-in-fact cognizable under Article III, but nevertheless decided to certify the class. Pet. 1, 7–8. If that were what the district court really held, it would surely have been error. But that is not remotely what the district court held.

The section of the district court's opinion from which Experian quotes (at 6–9) is not about Article III at all. It discussed a very different question: the available statutory *remedies*, and specifically, the FCRA's distinction between actual and statutory damages. As the court correctly explained, the FCRA allows plaintiffs to recover one of two alternative remedies in the event of a willful violation: damages equal to "any actual damages sustained by the consumer as a result of the failure *or* damages of not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A) (emphasis added).

"Attempting to cloud the waters," Experian argued below that the class should not be certified because any award of statutory damages would require individualized determinations of harm, including the ordeal suffered by Michael Dreher. Dist. Ct. Op. 6 ("Experian tries to confuse this issue by conflating actual and statutory damages."). But the district court correctly rejected that argument. The "jury's calculation of statutory damages must focus on the nature of the particular statutory violation in question," the court explained, which is common to the class. *Id.* at 9. The district court's discussion referred to the determination of the *amount of damages* for the alleged FCRA violations, not to whether the class members suffered an injury-in-fact in the first place. To be sure, the district court loosely referred in this discussion to a lack of "actual injury" on the part of class members,

but in context these references must be understood as referring to a lack of provable "actual *damages*" on the part of class members, not Article III standing.

B. In any event, Experian's petition ignores the nature of the alleged injuries in this case. This case challenges a corporate policy to deliberately withhold from each class member a particular source of credit information, in files about those class members—a policy to which every class member was necessarily subjected. It is a common question whether that policy violated the FCRA's requirement that Experian "clearly and accurately disclose to the consumer . . . [a]ll information in the consumer's file at the time of the request," as well as "[t]he sources of the information." 15 U.S.C. § 1681g(a)(1) & (2).

Thus, every member of the class, by definition, is alleged to have suffered the same concrete and particularized injury: the denial of specific information to which they were entitled under the FCRA. As this Court has recognized, such "informational injury"—that is, the denial of a right to certain information to which the plaintiff has a right—is "sufficiently concrete and specific to satisfy Article III." *Salt Institute v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006); *see Project Vote/Voting For Am., Inc. v. Long*, 752 F. Supp. 2d 697, 703 (E.D. Va. 2010). This doctrine of informational injury is well established in Supreme Court precedent, and the federal circuits uniformly hold such deprivation of information to be a sufficient injury for standing purposes in a wide variety of statutory contexts, from

government-sunshine and election law to health, safety, and environmental regulation. *See Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 449 (1989; *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998); *Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 542 (6th Cir. 2004); *Grant v. Gilbert*, 324 F.3d 383, 387 (5th Cir. 2003); *Heartwood v. U.S. Forest Serv.*, 230 F.3d 947, 952 n.5 (7th Cir. 2000); *Pub. Citizen v. FTC*, 869 F.2d 1541, 1543 (D.C. Cir. 1989); *Alvarez v. Longboy*, 697 F.2d 1333, 1338 (9th Cir. 1983).

Consumer-protection statutes often permit the recovery of statutory damages for informational injuries. The Eighth Circuit, for example, recently rejected a similar Article III challenge in a case under the Electronic Funds Transfer Act, holding that banks' failure to provide consumers with a "particular form of notice" of fees at automatic teller machines resulted in Article III injury. *Charvat v. Mut. First*, 725 F.3d 819, 823 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1515 (2014).

Experian's approach, by contrast, is not the law in any circuit. Indeed, Experian does not cite any cases finding Article III standing lacking in a case involving the FCRA in general—let alone allegations of the sort of concrete and particularized information-disclosure violations at issue here. And, at the end of the day, Experian's argument proves too much: If informational injury were not cognizable, statutory notice and disclosure requirements under a variety of statutes would be rendered unenforceable.

C. Unable to point to cases concerning standing under the FCRA and similar federal consumer-proteciton statutes, Experian looks further afield, relying on this Court's decision in *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013). But the ERISA claims in that case were different from the FCRA claims here in a fundamental way: They involved a suit by plan members who sued "on behalf of the Pension Plan," and were "not permitted to recover individually." *Id.* at 332. When someone violates the fiduciary requirements of ERISA, they are liable to the retirement plan itself—not to the individual members of the plan. 29 U.S.C. §1109. The private cause of action is merely an enforcement mechanism. In contrast, the FCRA creates both a cause of action and an individualized right: When someone violates the FCRA with respect to a particular consumer, they are "liable to that consumer." 15 U.S.C. §1681n. *David* therefore did not address the question whether an individual has standing when he brings a suit on his own behalf alleging that an illegal action has caused him a personal injury, like the informational injury at issue here.

II. The district court did not manifestly err by following *Stillmock* and finding that common questions predominate over individual issues.

Experian's other bid to show manifest error is its argument that the existence of statutory damages in this case by itself defeats certification. But just as Experian's first argument ignores the informational injury that all class members suffered, its

second argument fails to confront the fact that statutory damages here are designed to remedy that uniform injury. No further proof of harm is required. Damages can therefore be calculated based on the jury's assessment of (1) the value of the right to receive the sources of information and (2) the willfulness of Experian's uniform corporate policy—both of which are common. The only variable is how many times Experian's policy deprived each class member of the information to which they're entitled. That ministerial task is no bar to certification; Rule 23(b)(3) requires that common questions *predominate* over individual issues, not that there be *no* individual issues.

This Court held exactly that in *Stillmock*, an FCRA case seeking statutory damages. There, the district court denied certification "on the ground that determining the quantum of damages with respect to each class member would be too individualized for class-wide treatment under Rule 23(b)(3)." 385 F. App'x at 272. The district court "rejected [the plaintiffs'] contention that a jury could decide that every class member should receive the same amount of statutory damages by considering only matters pertaining to [the defendant] and common to each and every class member." *Id.* at 271. This Court reversed, holding that Rule 23(b)'s predominance requirement was met because "the qualitatively overarching issue by far is the liability issue of the defendant's willfulness, and the purported class members were exposed to the same risk of harm every time the defendant violated

the statue in the identical manner." *Id.* at 273. When that's the case, as it is here, "individual statutory damages issues are insufficient to defeat class certification under Rule 23(b)(3)," particularly when they do "not complicate matters very much" because damages can be calculated based on how many times each class member's rights were violated. *Id.*

The district court did not manifestly err by following *Stillmock*, and Experian's arguments to the contrary are meritless. *First*, Experian argues that *Stillmock* and the decision below are inconsistent with *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), which disapproved of a "Trial by Formula." Pet. 12–13, 16. But the class in *Dukes* sought "to sue about literally millions of employment decisions at once" without any "glue holding the alleged *reasons* for all those decisions together." 131 S. Ct. at 2552. The Supreme Court rejected the "novel project" of getting around this shortcoming by using a "sample set of the class members" to determine liability and then extrapolating from that set "to the entire remaining class" (so that if 10% of a sample set of 150 class members were found to have valid claims, then 10% of the 1.5 million total class members would as well, and the total recovery amount would then be divided among the entire class). *Id.* at 2561. That is nothing like what would happen here, where liability is common to the class and the only question is how to calculate statutory damages.

Second, Experian presses the novel argument that this Court's decision in *Soutter v. Equifax Info. Servs.*, 498 F. App'x 260 (4th Cir. 2012)—by citing a sentence in Judge Wilkinson's *concurring* opinion in *Stillmock*—somehow overruled *Stillmock*. Pet. 13. *Soutter* did nothing of the sort. The Court in that case held that the plaintiff's claim was not sufficiently typical of the class's claims, as required by Rule 23(a), and so resolving liability as to her wouldn't necessarily resolve liability as to everyone else—the opposite of what we have here. 498 F. App'x at 265. The Court noted that this defect was "exacerbated because Soutter [was] claiming only statutory damages, which typically require an individualized injury," and cited Judge Wilkinson's concurrence for support. *Id.* The question here isn't whether statutory damages are "individualized." It's whether common questions predominate. "Indeed," as this Court recently noted, "common issues of liability may still predominate even when some individualized inquiry is required." *Ealy v. Pinkerton Gov't Servs.*, 514 F. App'x 299, 305 (4th Cir. 2013) (citing *Stillmock*). They did in *Stillmock*; they do here. Neither case "directly conflicts" with *Soutter*. Pet. 13.

As for Judge Wilkinson's concurrence in *Stillmock*, he did not express disagreement with the majority's holding on predominance. To the contrary, he wrote separately to explain why in his view—"[r]egardless of whether common liability issues . . . predominate over individualized damages determinations"—it is "well within a district court's discretion to consider the magnitude of the costs upon

the company and its employees that class certification may impose" by "forcing a defendant to settle in the face of billions in liability." 385 F. App'x at 276, 281–82. That concern isn't presented here: Experian hasn't shown that it faces "annihilative liability," *id.* at 276; it repeatedly told the district court that "this case cannot be settled," Hearing Tr. 6/10/14, 6:20; and the district court exercised its discretion to grant certification under Rule 23.

Third, Experian suggests that another decision, *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), overrules *Stillmock*. Pet. 16. That too is wrong. The plaintiffs there alleged four antitrust injury theories, only one of which was capable of classwide proof. 133 S. Ct. at 1430–31. The plaintiffs thus had to show "that the damages resulting from *that injury*" could be measured using a "common methodology" because "any model supporting a plaintiff's damages case must be consistent with its liability case." *Id.* at 1430, 1433. The plaintiffs' model, however, "failed to measure damages resulting from the particular antitrust injury on which" liability was premised, instead "assum[ing] the validity of all four theories of antitrust impact" even though only one "remained in the case." *Id.* at 1433–34. Because this methodology "identifie[d] damages that [were] not the result of the wrong," Rule 23 was not satisfied. *Id.* at 1434.

Here, by contrast, there is a single theory of liability, damages are tied directly to that theory, and damage calculations will be ministerial. Experian's

argument contradicts (1) the *Comcast* majority opinion, which stated that the case "turn[ed] on the straightforward application" of Rule 23, *id.* at 1433; (2) the dissent, which noted that "the opinion breaks no new ground," *id.* at 1436; and (3) *Amgen v. Connecticut Retirement Plans & Trust Funds*, which explained that Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof," 133 S. Ct. 1184, 1196 (2013).

Finally, Experian attempts to distinguish *Stillmock* by arguing that "each class member" there "arguably suffered exactly the same harm" because the class was defined to exclude actual-damages plaintiffs. Pet. 16, 18-19. That conflates harm (the injury) with damages (the remedy)—the same mistake Experian makes in mischaracterizing the district court in its standing argument. Once this elementary distinction is understood, Experian's two attempts at "manifest error" disintegrate.

That Experian (at 19-20) pays only lip service to the remaining *Lienhart* factors—settlement pressure, issues of general importance, suitability for review, and future events—shows that its petition rests entirely on "manifest error." Because this case is not even close to the sort of "extreme case" in which "decertification is a functional certainty," the manifest-error factor alone does not "suffice to permit the Court of Appeals to grant review." *Lienhart*, 255 F.3d at 145.

CONCLUSION

The petition for permission to appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2014, I electronically filed the foregoing answer with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ Deepak Gupta
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