No. 14-1146

IN THE
Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF THE CONSUMER DATA INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Consumer Data Industry Association ("CDIA") is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world, with a membership of approximately 180 consumer credit and other specialized CRAs operating throughout the United States and the world.

In its more than 100-year history, CDIA has worked with the United States Congress and state legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA participated in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, in 1970, and its subsequent amendments.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), letters from all parties consenting to the filing of *amicus* briefs have been submitted to the Clerk.

CDIA has a significant interest in this case because its members face an onslaught of class litigation under the FCRA. CRAs perform the economically vital function of gathering large amounts of consumer information and making that information available for use in credit decisions. Operating in a heavily regulated context, CRAs' activities by necessity touch on the vast majority of adult Americans, and entail the handling of billions of discrete pieces of data. Because of the large-scale nature of their businesses, coupled with a legislative scheme that a number of courts have construed to provide uncapped statutory damages irrespective of actual harm, CRAs have become a target of the class action bar. Many of the cases that are brought against CRAs are based on alleged violations that are technical at best, but because the potential liabilities are so enormous, class action lawyers are able to leverage lucrative settlements.

In *Spokeo, Inc. v. Robins*, No. 13-1339, this Court will decide whether a bare violation of the FCRA, without more, qualifies as an "injury in fact" allowing a plaintiff to file suit and seek statutory damages. CDIA has urged the Court to hold that an actual injury—not a mere "injury in law"—is necessary to establish Article III standing, and to qualify for damages under the statute itself. *See* Br. of CDIA as Amicus Curiae in Support of Pet'r in *Spokeo* (July 8, 2015). If the Court holds that actual harm is required, it should go without saying that any class action under the FCRA must similarly be limited to individuals who have suffered a real injury. Unfortunately, some lower courts may resist that straightforward conclusion, on the erroneous

premise that classes may be certified notwithstanding that not all class members are injured. In this case, the Court should confirm that whatever it holds in *Spokeo* applies to named plaintiffs and absent class members alike.

INTRODUCTION AND SUMMARY OF ARGUMENT

Rule 23 of the Federal Rules of Civil Procedure is just that—a rule of procedure. It enlarges no substantive rights, eliminates no defenses, and creates no Article III Case or Controversy where none would otherwise exist. If an individual could not bring a claim or receive relief in a traditional civil action, he may not have that claim advanced on his behalf as an absent member of a class action, and he certainly may not receive a monetary award that would have been impossible outside of a class action.

The court of appeals in this case and several others have embraced a different view of the class action. Using statistical methods to ignore questions of individual injury, the court of appeals treated class actions not as a species of joinder, but as a kind of jurisprudential alchemy, conjuring claims for absent class members who outside of a class action would have none. The Court should reject that expansive view of the class action.

The second question presented—whether class members who have suffered no injury may nonetheless be included in, and recover from, a class action—is especially fundamental. In a significant group of cases, the lower courts have allowed attorneys to pursue broad, "no injury" class actions,

seeking uncapped statutory damages for alleged statutory violations without proving any harm to any plaintiff. Before this Court in *Spokeo Inc. v. Robins*, No. 13-1339, is the question of whether in such cases, a bare statutory violation is enough to qualify a plaintiff to bring suit in Article III court and collect statutory damages. The Court should hold that it does not. In this case, the Court should confirm that anything it says in *Spokeo* cannot be limited to named plaintiffs. Like any individual seeking a remedy from an Article III court, absent class members in a statutory damages action must have suffered an actual injury in fact.

1. Class actions are a method of aggregating claims; they do not alter what an individual could otherwise recover outside of class litigation. If an individual could not come to court and secure relief as a plaintiff, she cannot seek and obtain judicial relief simply by virtue of inclusion in a class.

This basic rule follows from several overlapping legal principles. Article III requires a claimant proceeding before a federal court to demonstrate a sufficient injury-in-fact, and that rule cannot be disregarded in a class action. The Rules Enabling Act prevents class actions from being used to change substantive law and abridge rights, yet that is exactly what happens when uninjured individuals, who could not recover on their own, are permitted to recover in a class action. The Due Process Clause's guarantee that defendants be afforded an opportunity to pursue every available defense similarly forbids a theory of class litigation that does not allow the defendant to probe whether individual class members actually have claims.

Finally, whereas a number of courts have viewed Rule 23 as a *substitute* for the important limitations on class actions, this Court's precedents make clear that Rule 23 must be interpreted in keeping with the constraints of Article III and the Rules Enabling Act.

Both questions presented in this case flow from the principle that an individual's recovery cannot be one thing in an individual action and another in a class action: a claimant cannot recover more damages than he is entitled because of what a statistically "average" class member experienced, and an individual who was not injured at all cannot be treated as if he has a valid claim in a class action. FCRA class actions, in which statutory damages are often sought on behalf of millions of individuals with little reason to believe many (if any) are actually injured, illustrate the absurdity of an approach that is indifferent to class member injury.

2. Some courts have justified ignoring Article III and the Rules Enabling Act at the class certification stage with vague assurances that uninjured class members will not actually recover anything. In practice, however, courts certify classes with no clear plan for how the injured will be separated from the uninjured. More fundamentally, class action attorneys understand that no realistic plan will be necessary, because once an artificially large class is certified, the pressure to settle will be impossible to resist. This outcome harms not only defendants, but also class members who are actually injured and have strong claims, as their recovery is diluted by the presence of uninjured class members.

3. This case bears a close relationship with *Spokeo v. Robins*. Although the problem of "no

injury" statutory damage class actions has been extensively briefed in *Spokeo*, the case itself does not involve a certified class. If, as CDIA has urged, this Court holds that an FCRA plaintiff must adequately allege an actual injury beyond a bare statutory violation, class action attorneys may well try to circumvent that requirement by putting forward a single injured plaintiff to represent a class for whom injury is never demonstrated. Even if this Court is able to dispose of the present case based on the first question presented, it should reach the second question to ensure that whatever it decides in *Spokeo* cannot be evaded.

ARGUMENT

I. Uninjured Individuals Who Could Not Prevail In An Individual Action May Not Recover As Absent Class Members.

Class actions are a "method[] for bringing about aggregation of claims." *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 291 (2008). They are akin to other procedural tools, such as joinder, consolidation, and multi-district litigation, "by which multiple similarly situated parties get similar claims resolved at one time and in one federal forum." *Id.* Because this procedural device "merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits," the class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality op.).

If this fundamental characteristic of the class action is to be respected, every member of the class must stand to recover exactly what he could have recovered in an individual action—no less, but also no more. This was the holding in *Wal-Mart v. Dukes*, where the Court unanimously recognized that "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." 131 S. Ct. 2541, 2561 (2011). Whether the issue is a valid defense, a missing element of a claim, or a lack of standing to bring that claim, the overarching principle is the same: if an individual could not come to court and secure relief as a plaintiff, she cannot seek and obtain judicial relief simply by virtue of inclusion in a class.

This precept stems from several distinct but overlapping principles of law:

Article III. Federal courts have no power to adjudicate claims of individuals who did not suffer an "injury in fact" that is "fairly traceable to the challenged action of the defendant." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). The Constitution's "Case or Controversy" requirement, U.S. Const. art. III, § 2, "requires federal courts to satisfy themselves that 'the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction.'" *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (emphasis in original) (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)).

An absent class member "invokes federal-court jurisdiction" and seeks relief from that court. The only difference between such a claimant and a named plaintiff is that the absent class member is permitted, by procedural rule, to have her claim aggregated with others and decided without her direct participation. But an individual's substantive entitlement to seek and receive judicial relief cannot be expanded by resort to this "species" of "joinder." *Shady Grove*, 559 U.S. at 408 (plurality op.). Accordingly, if a named plaintiff would be turned away from court for failing to show injury in fact, the result must be the same for an absent class member for whom injury cannot be established.

Some courts, however, have refused to require absent class members to satisfy Article III standing. As one court of appeals recently confirmed, this view is premised on a remarkable proposition: that "the class action device treats individuals falling within a class definition as members of a group *rather than as legally distinct persons*." *Neale v. Volvo Cars of N. Am., LLC*, __ F.3d __, No. 14-1540, 2015 WL 4466919, at *7 (3d Cir. July 22, 2015) (emphasis added). That cannot be correct. If, as this Court has recognized, a class action is simply a procedural device for aggregating individual claims, what each class member possesses is nothing more or less than her own original claim. Certification of a class does not create some new, joint claim; it merely permits efficient adjudication of existing claims.

Neale and similar decisions further err when they invoke this Court's decisions permitting a case to proceed so long as one plaintiff can establish standing. *See id.* (citing *Horne v. Flores*, 557 U.S.

433, 446 (2009) and *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977)). Tellingly, these cases concern generally-applicable injunctive relief, which presents a wholly different situation from individualized monetary awards. *See Horne*, 557 U.S. at 441; *Arlington Heights*, 429 U.S. at 258. Many civil rights and similar cases for injunctive relief necessarily resolve the rights of absent parties, whether a class is certified or not. *See, e.g.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660 (2013) (non-class action filed by "two same-sex couples who wish to marry," resulting in order "permanently enjoining the California officials named as defendants from enforcing [Proposition 8]"). It makes no difference in such cases whether particular absent individuals are included in the class or not, because there are no individualized issues to be adjudicated or relief to be awarded. As this Court has recognized in distinguishing Rules 23(b)(2) and (b)(3), a mechanism for awarding "indivisible" injunctive relief is very different from one in which individualized monetary awards are sought. *Wal-Mart*, 131 S. Ct. at 2557-59. There is no support for the notion that an individual may proceed in federal court on a personal monetary claim without standing, whether in a class action or otherwise.

Rules Enabling Act. The same result follows from the Rules Enabling Act. As a rule of procedure, Rule 23 "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). But an absent class member's substantive rights are indeed enlarged—and the defendant's abridged—if

she is allowed relief in a class action that she could not secure in an individual action.

This principle was the basis of the Court's rejection of "Trial by Formula" in *Wal-Mart*. 131 S. Ct. at 2561. *Wal-Mart* involved claims of employment discrimination, and as a matter of substantive law, the defendant should have been entitled to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977)). But instead, the Ninth Circuit authorized a class action in which the claims and defenses of "[a] sample set of the class members" would be litigated, and "the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery." *Id.* This, the Court held, violated the Rules Enabling Act, which forecloses a class from being "certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Id.*

The same is true here. In traditional litigation, an individual who suffered no harm from the challenged conduct could not secure judicial relief. A class action cannot, by use of statistics or otherwise, be certified on the premise that uninjured individuals can litigate claims and be awarded relief.

Due Process. Allowing uninjured individuals to be included in a class would similarly violate the Due Process Clause, which "requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)).

As Justice Scalia has observed, it is constitutionally problematic when "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action." *Philip Morris USA, Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers).

Rule 23. Finally, Rule 23 itself precludes a class action in which a putatively injured plaintiff represents *uninjured* class members. As this Court has held, "a class representative must be part of the class and possess the same interest and *suffer the same injury* as the class members." *Wal-Mart*, 131 S. Ct. at 2550 (emphasis added) (quoting *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). Where members of the class suffer no injury from the challenged conduct, the class cannot be "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Indeed, inclusion of uninjured class members in a class is a recipe for conflicting interests, as class members who *are* injured face dilution of their ultimate recovery. *See infra* at 15-16.

Some courts have suggested that fundamental questions of class member standing can be ignored in favor of "[f]ocusing on certification questions." *Neale*, 2015 WL 4466919, at *11. As discussed below, assurances that "certification questions" will exclude uninjured members often prove to be empty in practice. But this approach also misunderstands this Court's precedents. Far from permitting courts to rely on a loose view of Rule 23 as a substitute for compliance with Article III and the Rules Enabling

Act, the Court has instructed that "Rule 23's requirements must be interpreted *in keeping with* Article III constraints, and with the Rules Enabling Act." *Amchem*, 521 U.S. at 613 (emphasis added).

* * *

Each of these legal principles—embodied in Article III, the Rules Enabling Act, the Due Process Clause, and Rule 23—establishes that an individual cannot be included in a class seeking relief that he could not have requested or received proceeding alone. The answer to both questions presented in this case flows directly from this rule. A class member who suffered limited damages, and whose recovery would be constrained by those actual damages in an individual action, cannot be entitled to a greater judgment simply because a class action is certified and "average" damages are calculated and awarded. Even more fundamentally, an individual who was not injured at all, and thus would not have had standing to obtain *any* relief in an individual action, cannot be treated as if he has a valid legal claim through inclusion in a class action.

The experience of CRAs illustrates the practical absurdity of the view that only named plaintiffs need establish standing. To facilitate the operation of a consumer reporting system on which "[t]he banking system is dependent," 15 U.S.C. § 1681(a)(1), (2), CRAs in the United States maintain files concerning more than 200 million adults, and each month receive information on more than 1.3 billion "trade lines" (an industry term for accounts that are included in a credit report). Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System*, at 3

(Dec. 2012), *available at* http://tinyurl.com/CFPB-CRA. As a result, when CRAs are sued for (often technical) violations of the FCRA, the putative classes can number into the "millions," *see, e.g.*, Br. for Pet'r in *Spokeo* at 33-34 (July 2, 2015), or even include most of the adult population of the United States. *See, e.g.*, *Trans Union LLC v. Fed. Trade Comm'n*, 536 U.S. 915 (2002) (Kennedy, J., dissenting from the denial of certiorari) (noting a "series of class actions brought under the FCRA" against Trans Union LLC, "allegedly on behalf of the 190 million individuals in [its] database").

The fact that class action attorneys can identify a handful of plaintiffs who have suffered an injury in fact says nothing relevant about whether *millions* of absent individuals have a basis to have claims heard in Article III court. Indeed, errors in individual credit reports can have differential effects, and frequently *no* effects, on ultimate credit decisions for different consumers. *See* Br. of Trans Union LLC as Amicus Curiae Supporting Pet'r (Aug. 14, 2015). If a small group of injured plaintiffs brings an FCRA class action, the question of injury for millions of absent class members cannot be assumed or deemed irrelevant.

II. Allowing Class Certification To Ignore Class Member Standing Vitiates Important Protections Against Abusive Class Actions.

Some courts of appeals have disregarded this Court's instruction that class certification requirements must be construed "in keeping with" Article III and the Rules Enabling Act, *Amchem*, 521

U.S. at 613, offering instead only vague assurances that uninjured individuals will not actually *recover* unwarranted monetary relief. *See, e.g.*, *In re Nexium Antitrust Litig.*, 777 F.3d 9, 31-32 (1st Cir. 2015); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 856 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198-1201 (10th Cir. 2010); *Kohen v. Pac. Inv. Mgt. Co. LLC*, 571 F.3d 672, 677-79 (7th Cir. 2009). Yet that is not what happens in practice.

Courts have endorsed shortcuts to recovery for absent class members, under which the substantive law that governs individual actions does not really apply in class actions. This Court's decision in *Comcast Corp. v. Behrend* is testament to the loose approach lower courts have taken in allowing aggregate evidence to be divorced from the substantive law governing individual claims. *See* 133 S. Ct. 1426, 1433-34 (2013). The Seventh Circuit has proposed "depos[ing] a random sample of class members to determine how many . . . were not injured." *Kohen*, 571 F.3d at 679. In other words, Trial by Formula. Even after *Comcast*, in a case where "as many as 24,000 consumers" suffered no injury, the First Circuit decided "*sua sponte*" that the problem of uninjured class members could be solved through an unclear affidavit process, without explaining "[h]ow exactly . . . defendants [will] exercise their acknowledged right to 'challenge individual damage claims at trial.'" *Nexium*, 777 F.3d at 32-35 (Kayatta, J., dissenting).

As a practical matter, class action attorneys have little reason to worry about proposing lawful

and workable means of separating the injured from the uninjured. In light of the "risk of '*in terrorem*' settlements that class actions entail," defendants can be "pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). In FCRA cases, for example, "[o]nce a class is certified, a statutory damages defendant faces a bet-the-company proposition and likely will settle rather than risk shareholder reaction to theoretical billions in exposure even if the company believes the claim lacks merit." *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 281 (4th Cir. 2010) (Wilkinson, J., concurring) (quoting Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104 (2009)). Class certification is thus the end-point for the vast majority of cases. When a class is artificially inflated to include uninjured individuals, that simply increases the pressure to settle and the ultimate price of doing so.

Moreover, while enlarging the size of the class is an unalloyed good for the plaintiffs' class action attorney who stands to collect fees, it is not so positive for those class members who *are* injured. Emboldened by decisions allowing recovery of statutory damages without proof of harm,[2] attorneys have been willing to "forego actual damages to seek

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[2] *But see* Br. for Pet'r in *Spokeo* at 53-56; *Dowell v. Wells Fargo Bank, NA*, 517 F.3d 1024, 1026 (8th Cir. 2008) (per curiam) (noting that "[a] reasonable reading of the [FCRA] could still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award").

only statutory damages" in order to ease class certification. *White v. E-Loan, Inc.*, No. C 05-02080, 2006 WL 2411420, at *2 (N.D. Cal. Aug. 18, 2006). When the claims of the injured and uninjured are litigated together, those with the strongest claims—*i.e.*, those who suffered an Article III injury—are likely to see their recovery diluted.

III. The Court Should Make Clear That The Standing Requirement At Issue In *Spokeo* Applies To Every Class Member.

This case, and the second question presented in particular, bears a close relationship to another case pending before the Court this Term. In *Spokeo*, the Court is considering whether allegation of a bare statutory violation, without any concrete harm, is sufficient to satisfy the "injury in fact" requirement. Br. for Pet'r in *Spokeo* at i. CDIA in that case explained that, in addition to contravening this Court's standing precedents, allowing "injury in law" claims exposes FCRA defendants to abusive class actions. Br. of CDIA as Amicus Curiae in *Spokeo* at 22-24.

The second question presented in this case is a critical complement to *Spokeo*. Although the issue of "no injury" class actions has been extensively briefed in *Spokeo*, *see, e.g.*, Br. for Pet'r in *Spokeo* at 32-35; Br. of the Chamber of Commerce of the United States of America et al. as Amici Curiae in *Spokeo* at 12-26 (July 9, 2015), no class has yet been certified in that case. If the Court in *Spokeo* holds that an FCRA plaintiff is required to suffer actual injury beyond an "injury in law," it is not hard to envision how enterprising class action attorneys might seek to

circumvent that ruling. Pointing to the court of appeals decisions that find Article III standing inapplicable to absent class members, named plaintiffs with genuine injuries may be put forward to represent exactly the same type of "no injury" classes that prevailed pre-*Spokeo*.

The facts of *Spokeo* illustrate the dangers of this outcome. In that case, the plaintiff has charged that publication of *favorable* information about him "injured his employment prospects," on the apparent theory that it caused employers to view him as overqualified. Resp.'s Br. in Opp'n to Cert. in *Spokeo* at 3 (Aug. 6, 2014). The actual allegations supporting this (and any other) theory of injury are "sparse," *Robins v. Spokeo, Inc.*, 742 F.3d 409, 410 (9th Cir. 2014), and rely too much on "speculation about the decisions of independent actors" to satisfy Article III. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 (2013). But it is conceivable that some other plaintiff could actually establish that he was denied a job, or suffered some other concrete harm, because of the conduct complained of in *Spokeo*.

The question, then, would be what this highly individualized showing means for the millions of others in a putative class that is not carefully tailored to reach individuals who have actually suffered a particular injury. Can the claims of this large group stand or fall on the idiosyncratic facts of a handful of plaintiffs who happen to bring suit? Article III, the Rules Enabling Act, the Due Process Clause, and Rule 23 all dictate that the answer is no. Yet if this Court does not correct the misimpression in the lower courts that standing requirements do not apply to every class member, the injury of a

single individual may become the basis for adjudicating—in reality, settling—the claims of millions who may well be uninjured.

If that is the result, any decision in *Spokeo* that a bare statutory violation is not an "injury in fact" would be a pyrrhic victory for constitutional standing principles. Even if the Court concludes that the Eighth Circuit's decision in this case is reversible based solely on the use of statistics to effect a Trial by Formula, the Court should also address the second question to ensure that whatever it decides in *Spokeo* cannot be evaded.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Petitioner's brief, the decision of the court of appeals should be reversed.

Respectfully submitted,

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