No. 20-297

In the Supreme Court of the United States

TRANS UNION LLC,

Petitioner,

v.

SERGIO L. RAMIREZ,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It directly represents approximately 300,000 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 the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.[1]

The Chamber has a significant interest in the class certification issue presented in this case because its members frequently face putative class action lawsuits, including lawsuits alleging violations of, and seeking to recover statutory damages under, the Fair Credit Reporting Act and other statutes. The district court here erred in certifying a class under Rule 23 despite stark differences between the circumstances of the named plaintiff and those of the remaining members of the putative class, thus permitting the

[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, and its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

plaintiffs' lawyers to leverage the idiosyncratic experiences and injuries of an entirely atypical named plaintiff into a multimillion class-wide damages bounty at trial.

If the decision below stands, other class-action plaintiffs' lawyers will be encouraged to follow that roadmap to transform what should be an individualized dispute between a uniquely sympathetic plaintiff and a defendant into a multimillion-dollar class action. And businesses will find themselves mired in massive lawsuits over alleged technical statutory violations that have not caused actual harm to the vast majority of the class.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case represents what the petition aptly describes as "a trifecta of class action abuse." Pet. 16. The divided Ninth Circuit panel (1) found Article III standing for the absent class members based on the flimsiest of rationales; (2) sustained a $32 million punitive damages award on top of the statutory damages that already more than sufficed to punish and deter the alleged misconduct; and (3) brushed aside the atypical experiences and injuries of the named plaintiff, which predictably became the focus at trial.

The petition persuasively explains why each of these three holdings independently warrants this Court's review. The Chamber has repeatedly expressed its views that Article III requires actual harm beyond the mere allegation of a statutory violation, see *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016), and that excessive punitive damages awards violate the Due Process Clause, see *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003).

Rather than elaborate upon those views here, the Chamber writes separately to focus on the problems posed by the Ninth Circuit's lax application of Rule 23.

The class as defined in this case should never have been certified. The named plaintiff, Sergio Ramirez, suffered difficulty in obtaining an auto loan and embarrassment in front of his wife and father-in-law because an automobile dealer received a credit report saying that Ramirez's name matched a name on the Treasury Department's Office of Foreign Asset Control (OFAC) Database. Ramirez also canceled a planned vacation out of concern about the alert.

But Ramirez did not seek to represent a class of individuals who shared that experience—or even anything remotely similar to it. Instead, he sought and obtained certification of a much broader nationwide damages class of every individual who received a letter from TransUnion informing them that they were potential OFAC matches (even though, for the overwhelming majority of those individuals, the information was not disseminated to any third party).

The panel majority acknowledged that "there was no evidence regarding whether other class members had experiences similar to Ramirez's as a result of the alerts." Pet. App. 39. It nonetheless brushed aside these differences as irrelevant to typicality, saying all that mattered was "the class-wide theory of liability" and dismissing Ramirez's unique injuries as at most "slightly more severe than some class members' injuries." *Id.* at 39-40.

But Judge McKeown pointed out in dissent that "[t]he only asserted uniform classwide experience was the existence of TransUnion's internal terrorist watch list alerts and the mailing of separate letters—faint

allegations that strain Rule 23's typicality requirements." *Id.* at 52 (McKeown, J., concurring in part and dissenting in part). Accordingly, "[a]bsent class members simply rode Ramirez's coattails, while his stark atypicality as the lone class representative ensured that he would become the focus of the litigation." *Ibid.* (quotation marks omitted). And the trial here in fact bore out these very concerns that Rule 23(a)(3)'s typicality requirement is designed to guard against. See *id.* at 53.

The Ninth Circuit's failure to rigorously enforce Rule 23(a)(3)'s typicality requirement is unfortunately only the latest example of a broader trend in that court of relaxing the standards for class certification. On issue after issue, the Ninth Circuit has adopted holdings—often in express conflict with other circuits—that make it easier for plaintiffs' lawyers to obtain class certification, despite this Court's repeated instructions that class treatment should be the exception rather than the rule.

Finally, the approach to Rule 23 applied below, if left uncorrected by this Court, would carry significant practical consequences for businesses and the judicial system. The allure of a class-wide bounty, combined with the hydraulic settlement pressure class actions place on defendants to settle claims regardless of their merits, encourage enterprising class-action plaintiffs' lawyers to try to turn every dispute, no matter how individualized a plaintiff's claim, into a statutory damages class action. The decision below, if allowed to stand, would encourage those lawyers to do so: if they are able to find an atypical named plaintiff, they can and will seek to leverage her or his uniquely sympathetic experiences into a multimillion-dollar statutory

damages award or settlement for alleged technical statutory violations.

For all of those reasons, the Court should grant the petition and reverse the decision below.

ARGUMENT

I. This Court's Review Is Urgently Needed To Curb The Ninth Circuit's Impermissibly Lax Application Of Rule 23.

This Court has repeatedly recognized that abuse of the class-action device imposes deeply unfair burdens on both absent class members and defendants, and the Court has held that Rule 23 therefore must be construed in a manner that protects against these abuses. *E.g.*, *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 33 (2013); *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 363 (2011); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 629 (1997). Because class actions are an "'exception to the usual rule'" that cases are litigated individually, it is essential that courts apply a "rigorous analysis" to the requirements governing class certification before a lawsuit is approved for class treatment. *Dukes*, 564 U.S. at 349, 351 (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979)).

The Ninth Circuit's decision below represents a stark departure from these principles. It allows a wholly idiosyncratic named plaintiff to serve as the standard bearer for a much broader class of individuals that do not share his injury—rendering the typicality requirement of Rule 23(a)(3) ineffectual. And it is only the latest in a series of rulings by that court that weaken the requirements for certifying a class.

A. The Decision Below Makes Rule 23(a)(3)'s Typicality Requirement Toothless And Easily Manipulated.

1. Rule 23(a)(3) requires that "claims or defenses of the representative parties [be] typical of the claims or defenses of the class."

This Court has not had occasion to discuss the typicality requirement in detail. But it has instructed that typicality requires the class representative to "possess the same interest and suffer the *same injury* as the class members." *Dukes*, 564 U.S. at 348-49 (emphasis added) (quotation marks omitted). That requirement, like the other requirements of Rule 23(a), "ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Id.* at 349. And while the Court in *Dukes* decided the case on commonality grounds, it noted that both commonality and typicality require "the existence of a class of persons who have suffered *the same injury* as that individual [named plaintiff], such that the individual's claim and the class claims will share common questions of law and fact and that the individual's claim will be *typical* of the class claims." *Id.* at 353 (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 157-58 (1982)) (emphasis added).

Consistent with the text of the Rule and this Court's cases, lower courts, including the Ninth Circuit in prior cases, have recognized that the "test of typicality" includes "whether other members have the same or similar injury" as the named plaintiff. *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (quoting *Hanon* v. *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)); see also, *e.g.*, *Doe* v. *Chao*, 306 F.3d 170, 184 (4th Cir. 2002), aff'd on other grounds, 540 U.S. 614 (2004).

Thus, in *Doe*, the Fourth Circuit held that the plaintiffs' decision "to pursue only the $1,000 minimum statutory damages" did not eliminate their "grave typicality problems" because none of the named plaintiffs could show actual damages, and therefore, "[a]ssuming that the claims of unnamed class members include a number of claims for which there is some evidence of adverse effect and actual damages, the putative class representatives have not suffered injuries similar to the injuries suffered by the other class members." 306 F.3d at 184 (quotation marks and alterations omitted).

A number of courts have reached the same conclusion, holding that typicality is not satisfied when the named plaintiff "is subject to unique defenses which threaten to become the focus of the litigation." *Hanon*, 976 F.2d at 508 (quoting *Gary Plastic Packaging Corp.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990), abrogated in part on other grounds by *Microsoft Corp.* v. *Baker*, 137 S. Ct. 1702 (2017)); accord *Beck* v. *Maximus, Inc.*, 457 F.3d 291, 300-01 (3d Cir. 2006).

This case presents the other side of the same coin, in which the named plaintiff and his counsel affirmatively made the plaintiff's unique circumstances the "focus of the litigation." In either scenario, the named plaintiff does not resemble the absent class members, and the adjudication of the class claims impermissibly focuses on the named plaintiff rather than the class as a whole.

2. The court below acknowledged the principles just discussed and their relevance to this case. But it held that it was enough to satisfy typicality that the named plaintiff's claims fit within a "class-wide theory of liability." Pet. App. 40. A common legal theory,

however, is a necessary but not sufficient prerequisite for satisfying typicality. The Ninth Circuit's contrary holding defies this Court's instruction that typicality requires absent class members to have suffered the "same or similar injury" as the named plaintiff. *Dukes*, 564 U.S. at 348-49.

The Ninth Circuit also insisted that "the unique aspects of Ramirez's claims" did not "threaten to become the focus of the litigation." Pet. App. 40 (quotation marks and alterations omitted). But that statement was blind to reality: the trial had already occurred, and that improper focus is exactly what happened at trial.

As the dissent explained, the trial centered on "'the story of Mr. Ramirez'" and his experiences at the car dealership, while "[t]he story of the absent class members, in contrast, went largely untold." Pet. App. 53 (McKeown, J.) (quoting class counsel's opening argument at trial). Indeed, "the hallmark of the trial was the *absence* of evidence about absent class members, or any evidence that they were in the same boat as Ramirez." *Ibid.* (emphasis added).

The result was that "[t]he jury was left to assume that the absent class members suffered the same injury" (*ibid.*), notwithstanding the uniquely troubling nature of Ramirez's injury. As a result, "TransUnion now owes 8,185 class members tens of millions of dollars based on the unfortunate and unrepresentative experience of a single plaintiff" (*id.* at 58)—a result that should have been avoided with proper application of Rule 23 at the certification stage.

Indeed, cases of extreme atypicality like this one present the very problem the Court warned against in *Dukes*: they effectively deprive the defendant of its

right under due process and the Rules Enabling Act, 28 U.S.C. § 2072(b), to "litigate its * * * defenses to individual claims" of the class members. *Dukes*, 564 U.S. at 367. The trial's singular focus on Ramirez's unique experiences obscured that the vast majority of class members suffered no or at most marginal actual harm—which would have featured prominently in any individual trial of one of those class member's claims. Proper application of the typicality requirement ensures that the result does not change just because the claims are brought in a class action instead.

Moreover, the Ninth Circuit's approach to typicality invites problems far beyond this case. The statute invoked by the plaintiff class here—the Fair Credit Reporting Act—is only one of many federal statutes that authorize both statutory damages and punitive damages. See Pet. 34. Many other statutes authorize minimum statutory damages for each violation, which "can add up quickly in a class action." *Barr* v. *Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2345 (2020) (plurality op.) (discussing the Telephone Consumer Protection Act); see also, *e.g.*, *Stillmock* v. *Weis Markets, Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring specially) (noting that "the exponential expansion of statutory damages through the aggressive use of the class action device is a real jobs killer that Congress has not sanctioned"). And class-action plaintiffs' lawyers will seek out—and often find—an especially sympathetic named plaintiff to serve as the representative plaintiff who will agree to recover damages authorized by statute for the broadest possible class—even when the vast majority or even all of the absent class members were not harmed at all, or were marginally harmed in a way that is (at most) superficially similar to the harm suffered by the named plaintiff.

B. The Decision Below Is Emblematic Of The Ninth Circuit's Broader Failures To Rigorously Enforce The Requirements For Class Certification.

Unfortunately, the decision below is merely the latest in a series of Ninth Circuit decisions that improperly ease the path to class certification.

1. In another recent case involving Rule 23 typicality, the Ninth Circuit expressly broke ranks with other circuits in holding that evidence need not be admissible in order to support class certification. See *Sali* v. *Corona Reg'l Med. Ctr.*, 909 F.3d 996 (9th Cir. 2018). In an attempt to satisfy Rule 23(a)(3)'s typicality requirement, the plaintiffs offered a declaration from a paralegal at their counsel's law firm, who opined about his review of the defendant's time and payroll records. *Id.* at 1003. The district court denied certification, including for failure to satisfy typicality, because the declaration was inadmissible under several different provisions of the Federal Rules of Evidence. *Ibid.*

The Ninth Circuit reversed, holding that "a district court may not decline to consider evidence solely on the basis that the evidence is inadmissible at trial." 909 F.3d at 1003. The Ninth Circuit acknowledged that its holding squarely conflicted with the Fifth Circuit's holding "that admissible evidence is required to support class certification." *Id.* at 1005 (citing *Unger* v. *Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005)). The court further acknowledged that the Third and Seventh Circuits have held that "expert evidence submitted in support of class certification must be admissible" under the standards of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See 909 F.3d at 1005 (citing *In re Blood Reagents Antitrust*

Litig., 783 F.3d 183, 187 (3d Cir. 2015) and *Messner* v. *Northshore Univ. Health Sys.*, 669 F.3d 802, 812 (7th Cir. 2012)). Yet the Ninth Circuit parted ways with those circuits, allowing a district court to rely on any submissions, even plainly inadmissible evidence, "to form a reasonable judgment on each [Rule 23(a)] requirement." *Ibid.* (quotation marks omitted).[2]

2. As this case amply demonstrates, the combination of minimum statutory damages with the class-action mechanism can create potential liability that is wildly out of proportion to the actual harm allegedly caused by the defendant's conduct. The Second Circuit has noted, for example, that "the potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class, may raise due process issues." *Parker* v. *Time Warner Ent. Co.*, 331 F.3d 13, 22 (2d Cir. 2003). "Those issues arise from the effects of combining a statutory scheme that imposes minimum statutory damages awards on a per-consumer basis—usually in order to encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws—with the class action mechanism that aggregates many claims." *Ibid.*

Some courts have therefore considered the proportionality (or lack thereof) between the potential damages and the actual harm a relevant criterion in applying Rule 23, in particular Rule 23(b)(3)'s superiority requirement. See, *e.g.*, *Klay* v. *Humana, Inc.*, 382 F.3d 1241, 1271 (11th Cir. 2004), abrogated in part on other grounds by *Bridge* v. *Pheonix Bond & Indem.*

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[2] *Sali* settled while a petition for certiorari was pending, and the petition was dismissed pursuant to Rule 46.1. See *Corona Reg'l Med. Ctr.* v. *Sali*, No. 18-1262 (petition dismissed May 3, 2019).

Co., 553 U.S. 639 (2008); *Wilcox* v. *Commerce Bank of Kansas City*, 474 F.2d 336, 347 (10th Cir. 1973); *Stillmock*, 385 F. App'x at 278 (Wilkinson, J., concurring specially); cf. *Golan* v. *FreeEats.com, Inc.*, 930 F.3d 950, 962 (8th Cir. 2019) (affirming post-trial reduction of statutory damages in a class action, because the aggregate statutory damages were "wholly disproportioned to the offense and obviously unreasonable" and therefore violated the Due Process Clause) (quotation marks omitted).

The Ninth Circuit, by contrast, has held that both "the proportionality of the damages" and "the potential enormity of any damages award" are "irrelevant" to class certification in the absence of express statutory language limiting aggregate relief. *Bateman* v. *Am. Multi-Cinema, Inc.*, 623 F.3d 708, 720-22 (9th Cir. 2010). The court thus vacated the district court's denial of certification for a class seeking up to $290 million in statutory damages for the defendant's alleged technical misstep in printing movie ticket receipts containing extra credit card digits over a period of less than two months. See *id.* at 711.

3. The Ninth Circuit, joining the Sixth and Seventh Circuits, has held that the proponent of class certification need not demonstrate an administratively feasible method for identifying absent class members before a damages class may be certified. See *Briseno* v. *ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), cert. denied, 138 S. Ct. 313 (2017).

The *Briseno* court acknowledged that the Third Circuit has squarely held to the contrary. *Id.* at 1126-27 (citing *Byrd* v. *Aaron's Inc.*, 784 F.3d 154, 162-63 (3d Cir. 2015) and *Carrera* v. *Bayer Corp.*, 727 F.3d 300, 306-08 (3d Cir. 2013)); see also *EQT Prod. Co.* v.

Adair, 764 F.3d 347, 358 (4th Cir. 2014); *Karhu* v. *Vital Pharmaceuticals, Inc.*, 621 F. App'x 945, 949-50 (11th Cir. 2015) (applying administrative feasibility requirement). But it was unmoved by the justifications offered by the Third Circuit, including that such a requirement ensures that defendants will be able to exercise their due process right to challenge an individual's claim of membership in the class.

For example, the Ninth Circuit expressed concern that adopting an administrative feasibility requirement would be "outcome determinative for cases like this one"—*i.e.*, it would require reversal of the order certifying a class. *Briseno*, 844 F.3d at 1128. The court reasoned that defendants' due process rights must give way because otherwise "[c]lass actions involving inexpensive consumer goods in particular would likely fail at the outset if administrative feasibility were a freestanding prerequisite to certification." *Ibid.* But such policy concerns should not have trumped the rules governing class actions or a defendant's due process right to challenge the evidence used to prove class membership.

In short, the Ninth Circuit has repeatedly bent over backwards to save specious class allegations. Review and reversal here would send a strong message that lower courts must rigorously apply Rule 23 and police against abuses of the class-action device.

II. The Ninth Circuit's Lax Approach To Class Certification Harms Businesses And The Judicial System.

The Court's review is also urgently needed to prevent the substantial adverse potential consequences of the decision below. The Ninth Circuit's approach to

Rule 23 gives enterprising class action plaintiffs' lawyers a clear roadmap: find an atypically sympathetic plaintiff to secure massive statutory damages awards on behalf of individuals who were unharmed or only minimally harmed. That inevitably will result in a flood of shakedown class actions. The consequences for businesses; their owners, customers, and employees; and the judicial system as a whole will be extraordinarily troubling and far-reaching.

Class-action litigation costs in the United States are already substantial. They totaled a staggering $2.46 billion in 2018, continuing a rising trend that started in 2015. See 2019 Carlton Fields Class Action Survey, at 4 (Apr. 16, 2019), available at https://bit.ly/3ikRRT9.

Moreover, defendants in class actions already face tremendous pressure to capitulate to what Judge Friendly termed "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). This Court has long recognized the power of class-action lawsuits to induce settlement. See *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"); *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("[A] class action can result in 'potentially ruinous liability.'") (quoting Advisory Committee's Notes on Fed. R. Civ. P. 23). As the Court noted over 40 years ago, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978).

It therefore is not surprising that businesses often yield to the hydraulic pressure generated by class certification to settle even meritless claims. Indeed, the pressures today are even greater than they were then. In 2018, companies reported settling 73 percent of class actions, up from 71 percent in 2017 and 63 percent the year before. See 2019 Class Action Survey, *supra*, at 34. Just 2 percent of class actions go to trial, and most cases settle before a class is even certified—a reflection of the power of certification to extract settlement. *Ibid.*

The rare trial that occurred in this case only underscores why so many defendants choose to settle. The trial "compounded" the "certification error," "leading to a jury verdict of nearly $60 million based on the unenviable experience of a single, atypical class representative." Pet. App. 51-52 (McKeown, J.). If allowed to stand, that result will only ratchet up the coercive settlement pressure of future class actions. Settlement discussions will focus on the jury appeal of the named plaintiff's story rather than the experience of a proposed class as a whole—potentially forcing businesses to settle cases that are largely meritless in order to avoid the risks that a jury's passions will be inflamed through unjustified use of the class device.

In addition, class-action plaintiffs' lawyers will be emboldened to seek out unusually situated plaintiffs rather than legitimate class representatives and use them as the standard bearer for a class seeking millions or even billions of dollars in statutory damages. The allure of a class-wide payday, however unwarranted, is too great: "What makes these statutory damages class actions so attractive to plaintiffs' lawyers is simple mathematics: these suits multiply a minimum $100 statutory award (and potentially a

maximum $1,000 award) by the number of individuals in a nationwide or statewide class." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 (2009).

Defending and settling these lawsuits designed to extract lucrative settlements would require businesses to expend enormous resources. But the harmful consequences of this increase in costs would not be limited to businesses. Rather, the vast majority of the expenses likely would be passed along to innocent customers and employees (or to taxpayers) in the form of higher prices and lower wages and benefits; and much of the remainder of the burden would fall on innocent investors.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2020