No. 20-297

IN THE
Supreme Court of the United States

TRANSUNION LLC., *Petitioner*,

v.

SERGIO L. RAMIREZ, *Respondent*.

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

BRIEF FOR *AMICI CURIAE* THE HOME DEPOT, INC., AND UNITEDHEALTH GROUP IN SUPPORT OF PETITIONER

JASON ZARROW
O'MELVENY & MYERS LLP
400 S. Hope St.
Los Angeles, CA 90071
(213) 430-6000

ANTON METLITSKY
(*Counsel of Record*)
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
(212) 326-2000
ametlitsky@omm.com

GRACE LEEPER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

(Continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(Continued)

Page(s)

RULES

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

The Home Depot, Inc. ("Home Depot") is the world's largest home improvement retailer, selling a wide assortment of building materials, home improvement products, and more. The company provides a range of services such as installation and equipment rental. Home Depot operates nearly 2,000 retail stores throughout the United States, and also maintains a network of distribution and fulfillment centers linked—along with its retail stores—to a number of e-commerce websites. The company seeks to provide its customers with a seamless experience that includes physical and digital retail options as well as home-improvement services.

UnitedHealth Group ("UnitedHealth") is one of the largest healthcare companies in the United States. It offers or administers health benefits for over 45 million people in all 50 states and several U.S. territories. UnitedHealth's network of providers includes 1.3 million physicians and other healthcare professionals, and more than 6,000 hospitals and other facilities. Its programs include employer-sponsored plans, plans for veterans, Medicare (for older and disabled individuals), and Medicaid (for low-income individuals) in most states. UnitedHealth also partners with Optum, Inc., an affiliated company, to coordinate patient care, manage pharmacy benefits,

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties' letters of consent to the filing of amicus curiae briefs are on file with the Clerk.

use technology and data analytics, and improve the affordability of care.

Amici have a strong interest in reversal of the ruling below because that decision contradicts (among other legal principles) this Court's longstanding precedent and undermines American businesses' fundamental due-process rights, as reflected in Federal Rule of Civil Procedure 23. By allowing plaintiffs to litigate a class action with a named plaintiff whose claim is substantially stronger than that of most absent class members, the Ninth Circuit deprived petitioner of two related, fundamental due-process rights: the right to present a defense against every claim, and the right to be free of arbitrary liability. If allowed to stand, the decision below has the potential to transform dramatically class action litigation and improperly expose *amici* and other similarly situated businesses to precisely the due-process harms Rule 23 is designed to prevent.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When properly employed, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quotations omitted). Aggregate treatment is only appropriate, however, if the class proceedings are fairly representative of the class's claims. It is obvious that if the named plaintiff's claims are peculiarly weak, or are subject to unique defenses, then it would be patently unfair to allow classwide adjudication, lest absent class members with viable or valuable claims

be bound by an adverse judgment. Crucially, though, the same rule precludes class certification when the named plaintiff's claims are atypically *strong*. Forcing a defendant to defend against the strongest version of the class's claims and then binding it to a classwide judgment threatens to subject it to liability without the opportunity to defend all the claims against it, and to pay damages that are not reflective of its conduct or the harm it caused. The risk of an unlawful deprivation of property in these circumstances is intolerably high.

These fundamental principles lie at the core of Rule 23(a)(3)'s typicality requirement, which like all of the Rule 23(a) prerequisites is grounded in due process. *See Taylor v. Sturgell*, 553 U.S. 880, 900-01 (2008). A court cannot simply "presume that [the named plaintiff's] claim [i]s typical of other claims," *Falcon*, 457 U.S. at 158, because a defendant's due-process right to litigate the issues raised necessarily includes the right to defend itself in a proceeding that is reflective of its overall liability. A contrary rule would bind defendants to judgments against absent class members with substantially weaker claims than the named plaintiff's—claims that the defendant could well have successfully defended against (either as to liability or damages, or both) if given the opportunity. Rule 23, which must be read to protect defendants' due-process rights, does not permit that result.

Yet that is what happened below. There is no dispute that respondent Sergio Ramirez's injuries were far more severe than the average class member's. Ramirez was humiliated in front of his wife and father-in-law when, because of a false credit report, his local Nissan dealership refused to sell him a car after

discovering that he was a match with a name on the terrorist watch list. *See* Pet'r Br. 1. Ramirez was so distraught, in fact, that he "cancelled a planned family vacation to Mexico." Pet. App. 53a (McKeown, J., dissenting).

But the vast majority of the class suffered no real-world injury at all. The "hallmark of the trial," Judge McKeown explained, "was the absence of evidence about absent class members, or any evidence that they were in the same boat as Ramirez." *Id.* at 54a. "The trial featured no evidence that absent class members received, opened, or read the mailings [from TransUnion], nor that they were confused, distressed, or relied on the information in any way." *Id.* at 53a. Nor was there any evidence "that absent class members were denied credit, or expended any time or energy attempting to clear their name." *Id.* at 54a. Instead, the jury was presented Ramirez's story—his humiliation and embarrassment—as if it were representative of the class. It is no surprise that the jury awarded damages—$984.22 in statutory damages and $6,353.08 (later reduced to $3,936.88) in punitive damages *per class member*—that clearly do not reflect TransUnion's actual liability. That award may well have been warranted as to Ramirez, but TransUnion never had any opportunity to test absent class members' substantially less compelling claims, and the damages award here is almost by definition wildly disproportionate to the aggregate harm TransUnion caused. This case thus should never have made it past the class-certification stage: this Court has made clear that the named plaintiff seeking to lead a class must *prove* at class certification that he has satisfied Rule 23(a)'s preconditions, *Wal-Mart Stores, Inc. v. Dukes*,

564 U.S. 338, 350 (2011), and Ramirez could not have carried that burden to show that his claims were typical of the class's.

Amici agree with TransUnion that these uninjured absent class members do not have Article III standing. Pet'r Br. 25-28. But *amici* write here to emphasize a different but equally important problem—*viz.*, that the court below sanctioned a trial in which the named plaintiff's claims looked nothing at all like the average class member's. That result violated Rule 23(a)(3) and TransUnion's due-process rights. Unless corrected, the decision below threatens precisely the sorts of abusive class actions that the Due Process Clause forbids, and that Rule 23 was designed to prevent.

The decision below should be reversed.

ARGUMENT

I. RULE 23 AND DUE PROCESS PRECLUDE CLASS ACTIONS LED BY NAMED PLAINTIFFS WITH UNIQUELY STRONG CLAIMS RELATIVE TO THE CLASS

If this case had been a series of individual actions, the proof at each trial would necessarily have been tethered to the harm that each individual plaintiff did or did not suffer—and so would any damages. Ramirez's own individual claim would have been litigated much like his class action. TransUnion would have had to respond to "the story of Mr. Ramirez" and his shock and humiliation when he was precluded from buying a car because his name was flagged as a match to a name of individuals with whom U.S. businesses are prohibited from transacting, Pet. App. 58a (McKeown, J., dissenting), and it may indeed have

been required to pay damages similar to those the jury assessed for Ramirez here. But for thousands of other individual plaintiffs who could not tell that story—plaintiffs who could show only bare procedural violations untethered to any real-world harm—the jury would have had to consider *those* far weaker claims if awarding statutory and punitive damages. It would obviously violate due process to award a judgment in favor of one of those plaintiffs based on Ramirez's story rather than her own.

The due-process protections inherent in Rule 23 do not permit using a class action to alter that result. The class action is a procedural mechanism that authorizes classwide representative litigation but leaves every party's rights and liabilities unchanged. But by allowing the named plaintiff to litigate his atypically strong claim on behalf of a class composed largely of uninjured class members, the Ninth Circuit virtually assured a jury verdict that is in no way reflective of TransUnion's actual liability, or of absent class members' claims. That result—and the Ninth Circuit's approach to typicality—violates Rule 23(a)(3) and due process. The class here should never have been certified, and the decision below should be reversed.

A. Rule 23(a)(3)'s Typicality Requirement Safeguards Defendants' Due-Process Rights To Defend Against Adverse Claims And To Avoid Liability That Does Not Accurately Reflect The Defendant's Conduct Or The Harm Caused

1. "The class action is an exception to the usual rule that litigation is conducted by and on behalf of

the individual named parties only," and to justify a departure from this ordinary rule, the named plaintiff bears the burden of proving through evidence that classwide adjudication is appropriate. *Dukes*, 564 U.S. at 348 (quotations omitted); *see also Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Classwide treatment is appropriate only where the key questions can be resolved "in the same manner [as] to each member of the class," *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979), "[f]or in such cases, 'the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion.'" *Falcon*, 457 U.S. at 155 (quoting *Yamasaki*, 442 U.S. at 701).

At the same time, Rule 23 ensures that any efficiencies gained from the class vehicle do not override the parties' due-process rights. As this Court has explained, due-process "limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23." *Taylor*, 553 U.S. at 900-01. Rule 23 serves to protect the interests of unnamed class members, of course, but also the interests of defendants. *See Dukes*, 564 U.S. at 367; American Law Institute, Principles of the Law: Aggregate Litigation, § 2.02(a)(3) cmt. f, 2.07(d) cmt. j (2009) (aggregation "should not proceed if the court is unable to ... ensure[] due process for a defendant").

Each of the Rule 23(a) prerequisites, which a plaintiff must prove with evidence at the class-certification stage before a class can be certified, *Dukes*, 564 US. at 350, reflects this balance. Rule 23(a)(1)'s numerosity requirement ensures that the class mecha-

nism will achieve efficiencies sufficient to justify a departure from ordinary civil procedures; if the class is not numerous, no deviation is warranted. Rule 23(a)(2) ensures that the class proceeding is actually capable of resolving issues common to the class. *Dukes*, 564 U.S. at 349-50. And Rule 23(a)(4) ensures that the interests of absent class members are adequately represented by the named plaintiffs and their counsel, since those absent class members will be bound any judgment won or lost by their representatives. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (citing *Falcon*, 457 U.S. at 157 n.13).

Most crucial here is Rule 23(a)(3), which requires as a precondition to class certification that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). By "screen[ing] out class actions in which the legal or factual position of the representative is markedly different from that of other members of the class," Charles A. Wright, *et al.*, 7A *Federal Practice & Procedure* § 1764 (3d ed. 2020), Rule 23(a)(3)'s typicality requirement serves dual due-process purposes. First, it protects absent class members by ensuring that class representatives with significantly weaker claims do not represent their interests and bind them to adverse judgment. Second, and equally important, it protects defendants by ensuring that liability and damages are determined in class trials that allow defendants to actually confront the claims against them before being held liable, *Dukes*, 564 U.S. at 367, and whose results accurately reflect their conduct and any harm they caused, *see generally Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *see also In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997) ("due

process" requires that absent plaintiffs' claims be "determined in a proceeding that is reasonably calculated to reflect the results that would be obtained if those claims were actually tried"). It is this latter due-process protection that is at issue here.

2. There is no question that defendants have a fundamental due-process right 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)). "The right to be heard," this Court has explained, "must necessarily embody a right to … raise relevant issues," *Holt v. Virginia*, 381 U.S. 131, 136 (1965), and must allow the defendant to "test the sufficiency" of the plaintiff's case by offering "evidence in explanation or rebuttal," *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 93 (1913). This is no less true in a class action, *Dukes*, 564 U.S. at 367, which is but a procedural vehicle that must leave "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 opinion).

Closely related to the right to "litigate the issues raised," *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971), is a defendant's "substantive right to pay damages reflective of their actual liability." *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 669 (7th Cir. 2015) ("It is certainly true that a defendant has a due process right not to pay in excess of its liability and to present individualized defenses if those defenses affect its liability.").

These related rights are necessarily threatened when a class defendant is forced to litigate against claims that are atypically stronger than the claims of the class as a whole. Where the named plaintiff's claims are typical of the class's, the defendant can effectively defend against every class member's claims by defending against the named plaintiff's representative claim. Any aggregate damages award, moreover, will more likely be reflective of each absent class member's individual damages and thus the defendant's aggregate liability.

But where (as here) the named plaintiff brings a far stronger claim than the class he represents, two problems arise. The first is that while the defendant has an opportunity to answer the named plaintiff's (strong) claim, the defendant is never afforded any opportunity to answer the much weaker claims of the absent class members. Yet the defendant will be held liable as to those absent class members all the same if the named plaintiff prevails on his strong claim.

Claims under "no injury" statutes like FCRA, meanwhile, exacerbate the second problem: aggregate damages awards that in no way reflect a defendant's true liability. Where the named plaintiff brings an atypically strong claim, it is virtually certain that the jury's damages findings will reflect the named plaintiff's harms rather than the harms to plaintiffs whose lesser or nonexistent injuries were not before the jury. Allowing such a plaintiff to nevertheless represent a class, as the Ninth Circuit did here, "is likely to result in an astronomical damages figure that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually

caused by defendants." *McLaughlin*, 522 F.3d at 231. This is precisely the "kind of disconnect [that] offends the Rules Enabling Act," *id.*, and violates due process.

A simple example illustrates the point. Surely no one would dispute that in an individual product-liability trial concerning the safety of an airbag, a plaintiff who suffered only minor cuts and bruises would not be permitted to put on evidence that another person was killed in a horrific crash where the airbag did not deploy. And, of course, the plaintiff could not recover punitive damages reflecting the injuries of deceased victims; any punitive damages award would have to reflect her own injuries. *See Philip Morris USA v. Williams*, 549 U.S. 346, 353-54 (2007). Yet the procedure sanctioned by the Ninth Circuit effectively permits the opposite—simply because the case was tried as a class action. The defendant is forced to litigate against the strongest version of the class's claims while absent class members with lesser injuries, or no injury at all, ride the named plaintiff's "coattails," Pet. App. 52a (McKeown, J., dissenting), and never have to meet the defendant's answer to their claims. This scenario undercuts Rule 23's protections for defendants: where a class is certified without rigorous application of the Rule 23 prerequisites, "a jury could impose a large award that supposedly compensates the alleged injuries of all the class members, even though important differences in the facts and/or law relevant to their individual cases might well have precluded many of them from any recovery if their cases had been tried individually." Walter Dellinger, *The Class*

Action Fairness Act: Curbing Unfairness and Restoring Faith in our Judicial System, Progressive Policy Institute (Mar. 2003).[2]

In this way, authorizing a class led by a plaintiff with uncommonly strong claims raises many of the same due-process problems as the so-called "composite plaintiff." Courts consistently recognize that it is unfair to force a defendant "to defend against" not the named plaintiff herself, but rather against a "fictional composite" plaintiff whose claim is "much stronger than any plaintiff's individual action would be." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998); *see also, e.g.*, 2 *McLaughlin on Class Actions* § 8:6 n.10 (17th ed. 2020) (collecting cases); *cf. Dukes*, 564 U.S. at 367 (unanimously rejecting trial by formula). Here, of course, the named plaintiff is a real person. But because he is a representative of a class composed largely of less injured (or uninjured) individuals, the class's aggregated case is "much stronger than any [given absent] plaintiff's individual action would be." *Broussard*, 155 F.3d at 345. The due-process problem is no less significant when counsel cherry-picks the "perfect plaintiff" for class litigation instead of "piec[ing] [him] together" from various class members. *Id.* at 344. Either way, the defendant must defend a case that is not reflective of its actual liability and defend against "selective allegations, which may or may

[2] *Available at* https://www.progressivepolicy.org/wp-content/uploads/2015/03/2003.03-Dellinger_The-Class-Action-Fairness-Act_Curbing-Unfairness-and-Restoring-Faith-in-Our-Judicial-System.pdf.

not have been available to individual" plaintiffs. *Id.* at 345.

This uncommonly-strong-plaintiff approach also exacerbates an unevenness in the playing field. Absent class members have a right to opt out of Rule 23(b)(3) class actions if they believe the class is represented by a named plaintiff with weak claims. Defendants have no corresponding opt-out right. Their only protections are those afforded by due process and embodied in Rule 23. But the decision below erodes those protections and further strengthens class counsel's incentives to find the strongest possible named plaintiff, especially if her injuries are atypically severe: absent class members can opt out when the named plaintiff's claims are weak, but defendants are forced into classwide litigation and attendant liability rulings even where the named plaintiff's claims are uncommonly strong.

B. The Decision Below Is Inconsistent With These Fundamental Principles

The decision below perfectly illustrates these problems. The Ninth Circuit held that typicality was satisfied because Ramirez's claims were not so "unique" that they "threatened to become the focus of the litigation." Pet. App. 40a (quotations omitted). That premise is clearly incorrect, as Petitioners have demonstrated. Pet'r Br. 49.

But even if the court of appeals were right about that, the question it asked was far too narrow and one-sided. The court below focused on the manner in which the typicality requirement protects absent class members' due-process rights, but failed entirely

to recognize the typicality requirement's equally crucial role in protecting defendants. It is certainly true, as the Ninth Circuit has consistently held, that the typicality requirement "assure[s] that the interest of the named representative aligns with the interest of the class" and mitigates the "danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quotations omitted) (cited at Pet. App. 39a). But the typicality requirement also protects defendants by ensuring that the claims defendants are required to answer reflect not just the claims of the strongest plaintiff but the claims of all the plaintiffs to whom they may be liable, and that defendants' liability and damages accurately reflect their conduct and the harm they caused to the class as a whole, rather than just to the named plaintiff. *See supra* Part I.A. The risk of an erroneous deprivation of property in a case like this one is simply too high, which is why Ramirez could not have carried his burden to prove through evidence that typicality was satisfied in these circumstances.

What happened in this case illustrates that risk. The "hallmark" of this trial "was the absence of evidence about absent class members, or any evidence that they were in the same boat as Ramirez." Pet. App. 54a (McKeown, J., dissenting). While the jury heard, in plaintiffs' counsel's words, "the story of Mr. Ramirez" and his humiliation as he discovered that his name was a match to a name on the terrorist watch list, "[t]he trial featured no evidence that absent class members received, opened, or read the mailings, nor that they were confused, distressed, or relied on the information in any way." *Id.* at 53a. To

"bridge [the] gap" between Ramirez's experience and those of the absent class members, *Falcon*, 457 U.S. at 157-58, the jury would have to assume that these absent class members not only (i) had false credit information distributed to third parties, but also (ii) became aware of the false credit information (iii) in public, and (iv) in a particularly humiliating way. "These additional inferences demonstrate the tenuous character of any presumption that the class claims are 'fairly encompassed' within [Ramirez's] claim." *Id.*

Instead, the story of the absent, uninjured class members went largely untold. That is no surprise: "the strategy behind presenting Ramirez's unusually sympathetic case to the jury was self-evident," even though—if not precisely because—"the nature of his claims likely bore little resemblance to experiences of the absent class members." Pet. App. 58a (McKeown, J., dissenting). Nor is the jury's massive damages award surprising. Despite Ramirez's concession that more than 75% of class members suffered no real-world injury, TransUnion was forced to defend against the most extreme version of its alleged (largely technical) FCRA violations and thus was hit with the most extreme penalties possible: (near) maximum statutory penalties and a punitive damages award that itself violated due process.

It is exceedingly unlikely that, had the uninjured absent class members proceeded in individual trials, the jury would still have awarded $984.22 in statutory penalties and $6,353.08 (later reduced to $3,936.88) in punitive damages in each one. After all, TransUnion would have had the opportunity to answer each plaintiff's individual claim, and none of them would have been allowed to offer Ramirez's

story of humiliation and cancelled vacation. The result should be no different simply because the absent class members' claims were aggregated through the procedural mechanism of the class action. *Supra* at 9. In these circumstances, a class should never have been certified.

The Ninth Circuit, moreover, is hardly the only court to ignore the defendant-protective aspect of typicality. *See, e.g.*, *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996) ("Typicality under Rule 23(a)(3) should be determined with reference to the company's actions, not with respect to particularized defenses it might have against certain class members."); *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) ("That Carnival may have a stronger defense against many passengers does not render plaintiffs atypical." (citation omitted)). That approach is fundamentally misguided. This Court should make clear that the typicality requirement not only protects absent class members against lead plaintiffs with especially weak claims, but also protects defendants from having to defend against class actions led by plaintiffs with abnormally strong claims. The decision below should be reversed.

II. THE DECISION BELOW INVITES ABUSIVE "NO INJURY" CLASS ACTIONS

If left uncorrected, the decision below will ratchet up settlement pressure and invite abusive class actions, especially "no injury" class actions like this one. One way to ameliorate those adverse consequences, of course, is to enforce Article III's standing requirement and preclude class actions in which absent class members have no real injury. Pet'r Br. 25-28. But even

setting this standing problem aside, courts can go a long way to preventing the most abusive class actions by applying the typicality requirement rigorously at the class-certification stage.

A. The Decision Below Increases Settlement Pressure By Exposing Defendants To Damages Not Reflective Of Their Liability

This case was litigated to judgment, which is why it so clearly illustrates the procedural unfairness of certifying a class action where the named plaintiff's claims are much stronger than the class's. But not all certified class actions make it this far—most end in settlement. As this Court has recognized on numerous occasions, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs" that even a surefooted defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of devastating loss, defendants will be pressured into settling questionable claims."). "[T]he certification decision," in other words, "is typically a game-changer, often the whole ballgame," for plaintiffs and defendants alike. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012).

The decision below increases this settlement pressure still further, for the two reasons described above. First, a defendant in a class proceeding like the one authorized by the Ninth Circuit may be held liable on every class member's claim by virtue of the named

plaintiff's, when in reality, if the class's claims were litigated individually, the defendant may win on some and lose on others. A defendant assessing its liability in the class proceeding thus faces increased exposure.

Second, and relatedly, instead of facing potential classwide damages that, in principle, should reflect the aggregate harm sustained by all class members, a defendant in the Ninth Circuit now faces the prospect of classwide liability pegged to the most-seriously injured plaintiff's harm. Consider, for example, a defendant that caused an average of $100 in harm to 1,000 would-be plaintiffs, some of whom sustained $500 in injuries and others of whom sustained $5. Under normal circumstances, the defendant weighing its settlement options could expect $100,000 in liability, and thus would settle for something less. But under the Ninth Circuit's rule, the defendant's potential exposure is closer to $500,000—the plaintiff with $500 in damages can represent the class, and by telling only her story at trial, there is a realistic probability that the jury will award all the absent class members (even the ones with only $5 in damages) an identical amount. The defendant would thus be well advised to settle for far more than the amount of harm it actually caused—a $300,000 settlement, for example, might seem reasonable, even though the defendant caused only $100,000 in harm.

B. These Problems Are Exacerbated In The Context Of "No Injury" Statutes

This problem is especially pronounced under statutes, like FCRA, that authorize statutory damages in the absence of any actual injury. After all, the point

of statutory damages provisions like FCRA's is to provide for greater awards when "individual losses" are "small." *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 718 (9th Cir. 2010). And plaintiffs' attorneys capitalize on statutory damages by focusing not on the plaintiff's harms—which are often de minimis if not conjectural—but on the defendant's conduct. Pet. App. 43a (authorizing near-maximum award because it was "proportionate to the offense"). Indeed, "no injury" statutes are a favorite of the class-action bar for this very reason. By eliminating the need to prove individualized issues like injury and reliance, courts have often allowed plaintiffs' attorneys to focus on the defendant's technical statutory violations and the experience of a single named plaintiff, and thus to avoid commonality and predominance problems that arise in cases in which elements such as injury or reliance must be shown. And when the ease of certifying a class increases, so too does the prospect of abusive class actions that are brought for the purpose of forcing an unwarranted settlement once the class is certified. *See, e.g.*, Brief of the Retail Litigation Center as *Amicus Curiae* in Support of Petitioner, Part II.

The typicality requirement is thus all the more important in cases under "no injury" statutes like FCRA because, in this context, it can be the only Rule 23 prerequisite that ensures that the class and its representative have "suffer[ed] the same injury." *Dukes*, 564 U.S. at 348 (quotations omitted); *see also id.* at 349 n.5 (noting that in many cases typicality and commonality "tend to merge" (quotations omitted)). Rule 23 must always be construed to ensure defendants a meaningful opportunity to defend themselves—either as to liability or damages, or both. *Id.* at 368; *see also,*

e.g., *McLaughlin*, 522 F.3d at 231; *supra* Part I.A. Here, Rule 23(a)(3)'s typicality requirement fills that role.

Nor is this analysis unique to FCRA—many statutes provide for significant statutory penalties without proof of actual harm or reliance, and thus often allow plaintiffs' attorneys an easier path to showing commonality and predominance. Indeed, similar penalty provisions dot the statute books, both state and federal. For example, the Telephone Consumer Protection Act—a favorite of the class-action bar—authorizes plaintiffs to recover "actual monetary loss … or to receive $500 in damages for each … violation, whichever is greater." 47 U.S.C. § 227(b)(3)(B). The Electronic Communications Privacy Act likewise allows plaintiffs to recover the greater of either "the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500" for first time offenses, and of either "the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000" for repeat offenses. 18 U.S.C. § 2520(c)(1)(B). The Cable Privacy Act, meanwhile, provides for the award of "actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher." 47 U.S.C. § 551(f)(2)(A). And the Fair and Accurate Credit Transactions Act authorizes plaintiffs to seek statutory "damages of not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A).

State statutes—often the subject of class actions in federal court, *see* 28 U.S.C. § 1332(d)—also fre-

quently authorize significant statutory penalties absent proof of actual harm. California alone has many such statutes. *See, e.g.*, Cal. Consumer Privacy Act, Cal. Civ. Code § 1798.150 ("damages in an amount not less than one hundred dollars ($100) and not greater than seven hundred and fifty ($750) per consumer per incident or actual damages, whichever is greater"); Cal. Unsolicited Commercial Email Law, Cal. Bus. & Prof. Code § 17529.8 ("[l]iquidated damages of one thousand dollars ($1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of [the law], up to one million dollars ($1,000,000) per incident"); Song-Beverly Act of 1971, Cal. Civ. Code § 1747.08(e) ("civil penalty not to exceed two hundred fifty dollars ($250) for the first violation and one thousand dollars ($1,000) for each subsequent violation" for businesses who request and record a credit card holder's personal identifying information); Cal. "Shine the Light" Law, Cal. Civ. Code § 1798.53 ("a minimum of two thousand five hundred dollars ($2,500) in exemplary damages as well as attorney's fees and other litigation costs reasonably incurred in the suit," in addition to "any special or general damages awarded," when businesses fail to disclose to customers that it has disclosed their personal information to a third party).

Nor is California an outlier. Similar statutes exist across states and issues, ranging from commonplace subjects like privacy,[3] consumer protection,[4] and end-of-life care,[5] to highly-particular penalty provisions for odometer tampering.[6]

The burdens that class actions under these statutes impose is far from theoretical, as *amici's* own experience makes clear. Home Depot has recently been sued in several class actions for alleged violations of

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[3] *See, e.g.*, Alaska Stat. Ann. § 18.13.020 ("In addition to the actual damages suffered by the person, a person violating this chapter shall be liable to the person for damages in the amount of $5,000 or, if the violation resulted in profit or monetary gain to the violator, $100,000."); 765 Ill. Comp. Stat. Ann. 1075/40(a) ("(1) actual damages, profits derived from the unauthorized use [of plaintiff's identity], or both; or (2) $1,000"); 740 Ill. Comp. Stat. Ann. 14/20 ("liquidated damages of $1,000 or actual damages, whichever is greater").

[4] *See, e.g.*, Fla. Stat. Ann. § 559.77(2) ("In a class action lawsuit brought under this section, the court may award additional statutory damages of up to $1,000 for each named plaintiff and an aggregate award of additional statutory damages up to the lesser of $500,000 or 1 percent of the defendant's net worth for all remaining class members"); La. Stat. Ann. § 51:1747(B) ("actual damages or two hundred dollars, whichever is greater"); Minn. Stat. Ann. § 332A.18 ("actual, incidental, and consequential damages sustained by the debtor" and "statutory damages of up to $1,000"); Minn. Stat. Ann. § 332B.13 ("actual, incidental, and consequential damages sustained by the debtor" and "statutory damages of up to $5,000").

[5] Haw. Rev. Stat. Ann. § 327E-10(a) (an individual or her estate can recover "damages of $500 or actual damages … whichever is greater, plus reasonable attorney's fees").

[6] Ohio Rev. Code Ann. § 4549.49(A)(1) (damages equal to "[t]hree times the amount of actual damages sustained or fifteen hundred dollars, whichever is greater").

federal "no injury" statutes. For example, it faced seven-figure liability in a "no injury" TCPA class action. *See Manopla v. Home Depot USA, Inc.* (D.N.J. No. 3:15-cv-01120). Much like this case, Home Depot was recently sued in a class action seeking the recovery of statutory penalties ($110 *per class member per day*) on behalf of a class that allegedly received defective notices about their rights under COBRA. *See Mendiola v. Home Depot U.S.A., Inc.* (N.D. Ga. No. 1:20-cv-04027). And Home Depot has been sued in still other class actions under state-law "no injury" statutes, including a meritless class action under the Illinois Biometric Information Privacy Act seeking $5,000 in per-violation statutory damages, *see Brunson v. The Home Depot, Inc.* (N.D. Ga. No. 1:19-cv-03970), and several cases seeking statutory damages under various state data privacy laws, *see Hayden v. The Retail Equation, Inc.* (C.D. Cal. No. 8:20-cv-01203); *In re: The Home Depot Inc. Customer Data Security Breach Litigation* (N.D. Ga. No. 1:14-md-02583-TWT).

Because such "no injury" claims are especially attractive to class action lawyers, courts must be careful to ensure that the Rule 23 preconditions—including typicality—are satisfied before allowing them to go forward.

C. Courts Must Engage In A Rigorous Analysis Of Typicality At The Class-Certification Stage To Avoid These Adverse Consequences

Particularly because of the massive expansion of "no injury" statutes under both federal and state law, it is all the more important that federal courts enforce

the typicality requirement no less than other Rule 23 requirements *at the class-certification stage*. Indeed, while this case proceeded all the way through trial, it should never have been certified for class treatment in the first place. Such rigorous certification-stage analysis is necessary to avoid abusive class actions targeted solely at creating undue settlement pressure on defendants unwilling to take the risk of ruinous classwide liability—liability that, in cases like this one, is grossly disproportionate to the actual harm caused.

This Court has long made clear that district courts must "conduct a 'rigorous analysis' to determine whether" the plaintiff has satisfied his burden to prove compliance with the Rule 23 preconditions, including in particular Rule 23(a)(3), *at the class-certification stage*. *Behrend*, 569 U.S. at 35 (quoting *Dukes*, 564 U.S. at 350-51). Any later is too late, because the unwarranted settlement pressure this "rigorous analysis" is designed to guard against will force many defendants to settle once a class is certified. That is especially so when the named plaintiff's claim is atypically strong. Because such claims are likely to result in liability far in excess of the harm caused on a classwide basis, the settlement pressure is likely to be even more excessive than in a normal class action. *Supra* Part II.A. Defendants should not be forced by the prospect of ruinous liability to settle class actions where the named plaintiff presents a strong sympathetic claim while absent class members were not really injured at all. The only way to avoid that result in most cases is to require the named plaintiff to prove that the typicality requirement is satisfied before certifying the class.

That is especially so in the context of class actions brought under "no injury" statutes. As explained earlier, other Rule 23 preconditions—such as commonality and predominance—lose some of their force in the context of "no injury" statutes like FCRA because these statutes focus the court on the defendant's conduct rather than the plaintiffs' harm. *See supra* at 19-20. Thus, a rigorous focus on typicality will often be the only way to prevent an abusive class action from going forward and resulting in an extortionate settlement out of proportion to the actual merits of the litigation.

The court below, however, failed to apply anything resembling a "rigorous analysis." *see* Pet. App. 39a (review "limited to whether the district court correctly selected and applied Rule 23's criteria" (quotations omitted)). And in so doing, it affirmed a class that did not satisfy the typicality requirement and thus endorsed a proceeding that violated TransUnion's due-process rights. This Court should reverse, and make clear that federal courts[7] faced with class

[7] The problem, moreover, is not limited to federal courts. Many of these cases will inevitably find their way to federal court, either because they arise under federal statutes or because they are state-law class actions removable under the Class Action Fairness Act, 28 U.S.C. § 1332(d). But some of these cases will remain in state courts, where defendants are not afforded the protections of Rule 23. State courts are, however, bound by the Fourteenth Amendment's Due Process Clause, and, for all the reasons just described, the principles underlying the federal typicality rule ultimately derive from due process. Those principles thus not only preclude the Ninth Circuit's approach to typicality under Rule 23, but also any court's (including a state court's) attempt to authorize a class action in which the named

actions like this one must faithfully enforce the typicality requirement that due process mandates.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

JASON ZARROW
O'MELVENY & MYERS LLP
400 S. Hope St.
Los Angeles, CA 90071
(213) 430-6000

ANTON METLITSKY
(*Counsel of Record*)
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 326-2000
ametlitsky@omm.com

GRACE LEEPER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

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plaintiff's claim is atypically strong relative to absent class members—especially when such a class action is brought under a "no injury" statute of the sort described in the text.