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

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BRIEF *AMICUS CURIAE* OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., IN SUPPORT OF PETITIONER

JOHN M. THOMAS
Counsel of Record
DYKEMA GOSSETT PLLC
2723 South State Street,
Suite 400
Ann Arbor, MI 48104
(734) 214-7613
jthomas@dykema.com

Counsel for Amicus Curiae

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STATEMENT OF INTEREST[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[2] PLAC seeks to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as amicus curiae in both state and federal courts, including this court, on behalf of its members, while presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

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[1] Pursuant to this Court's Rule 37(2), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of Court. In accordance with Supreme Court Rule 37.6, *amicus* states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus* or its counsel.

[2] PLAC's corporate members are identified on its website. https://plac.com/PLAC/Membership/Corporate_Membership.aspx.

PLAC members are routinely subject to class actions filed by purchasers of products who claim to have experienced a product malfunction caused by a defect, resulting in economic injury and, sometimes, personal injury or property damage. The Ninth Circuit's approach to Rule 23's typicality requirement—and to the related predominance requirement—would permit these purchasers to represent a class consisting of all purchasers of the same or similar products, most of whom have not, and never will, experience such a malfunction. This distortion of class action doctrine leads to results that conflict with the Rules Enabling Act and the premise said to justify class actions in the first place: that resolution of the representative plaintiff's claims will "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

SUMMARY OF ARGUMENT

1. The Ninth Circuit's approach to standing is inconsistent with this Court's decisions. A material risk of harm can sometimes be sufficient to constitute an injury in fact for purposes of standing. But this Court's decisions establish that allegations of possible future injury are not sufficient. Rather, the threatened injury must be "certainly impending" to constitute an injury in fact. Therefore, the mere existence of embarrassing and inaccurate information in a credit report is not sufficient to constitute an injury in fact just because it might (or might not) one day be disclosed to third parties before the information is corrected.

2. The Ninth Circuit's approach to class certification pursuant to Fed. R. Civ. App. 23 violates established law with respect to at least two of Rule 23's requirements: typicality and predominance.

To meet Rule 23(a)'s typicality requirement, the named plaintiff must have suffered the same or similar injuries as the class he or she purports to represent. The Ninth Circuit distorted this requirement by adopting a "least common denominator" approach under which the typicality requirement is satisfied if at least one injury common to the class can be identified, in this case the mere existence of inaccurate information in a credit report. (Pet. App. at 38-40.) This approach either denies due process to the defendant (because it is denied the opportunity to litigate the damage claims of less severely injured class members) or to class members (who are denied the opportunity to show they are more severely injured than the class representative). In many cases, the due process rights of both defendants and class members will be violated, and class members will recover either more or less than they would be entitled to had they sued individually—thus violating the Rules Enabling Act.

Even if Plaintiff in this case could be deemed to have claims typical of the rest of the class, the unique facts of his claim established that the issue of damages was not common to the class, because no reasonable jury could conclude that every class member was entitled to the same award of damages as Plaintiff. If the absence of a classwide measure of damages did not preclude class certification because

common issues did not predominate, it at least required that damages be tried separately.

ARGUMENT

I. PLAINTIFF FAILED TO ESTABLISH ARTICLE III STANDING FOR ABSENT CLASS MEMBERS.

1. In PLAC's view, the Article III standing issue is fairly straightforward and requires little discussion beyond what Petitioner presents. It is true, as the Ninth Circuit held, that a "material risk" of injury can sometimes constitute an injury in fact for purposes of Article III standing. But this Court has "repeatedly reiterated that 'threatened injury must be certainly impending to constitute injury in fact,' and that '[a]llegations of possible future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

2. Ramirez himself might have suffered an injury as a result of Petitioner's alleged failure to follow reasonable procedures to assure maximum accuracy. His report *was* disclosed to third parties, he was *actually* denied credit in a pubic setting based on the inaccurate information suggesting he was a terrorist, he testified to his humiliation and embarrassment, and he cancelled a vacation to Mexico out of concern he would be considered a terrorist, But there is no evidence than anyone else suffered injuries like this, let alone evidence that the entire class did. In fact, Ramirez stipulated that 75% of the class never had a credit report with the inaccurate information dis-

tributed to a third party. (JA at 48; Pet. App. at 14-15.)[3]

3. The Ninth Circuit believed that the mere existence of the "highly sensitive" information in the credit report, and the fact that it was "available to numerous potential creditors and employers" was "sufficient to show a material risk of harm to the concrete interests of all class members." (Pet. App. at 26-27.) But the Ninth Circuit never found that such disclosure was "certainly impending" as to any member of the class; in fact, it never even addressed that question.

This error alone is sufficient to require reversal.

II. THE NINTH CIRCUIT'S "LEAST COMMON DENOMINATOR" APPROACH TO CLASS CERTIFICATION VIOLATES RULE 23 AND THE RULES ENABLING ACT.

The Ninth Circuit's approach to class certification pursuant to Fed. R. Civ. App. 23 is at least equally flawed; in fact, it violates established law with respect to at least two of Rule 23's requirements: typicality and predominance.

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[3] Similarly, there is no evidence that anyone other than Ramirez himself was confused because there were two mailings. And the mere fact that Petitioner disclosed the contents of his credit report to Ramirez cannot constitute an injury in fact because the Fair Credit Reporting Act requires such disclosure, precisely so consumers can take action to correct inaccurate information. (*See* Brief of Petitioner at 31-32.) The fact that the disclosure came in two letters instead of one is a technocal violation that cannot permit a presumption of a concrete injury. (*See id*. at 29-31.)

1. In order to justify a departure from the general rule that litigation is conducted by and on behalf of individual parties, "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 Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011). Rule 23(a)(3)'s requirement that the claims of the class representative be typical of the claims of the class is intended to ensure these requirements are met. The Ninth Circuit itself has recognized that "[t]he test of typicality is 'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *B.K. v. Snyder*, 922 F.3d 957, 970 (9th Cir. 2019). In this very case, it recognized that unnamed class members must at least have "injuries similar to those of the named plaintiffs." (Pet. App. at 40, quoting *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014).)

And yet, the Ninth Circuit did not find that the injuries suffered by Ramirez were the same or even similar to the injuries suffered by the class. The Ninth Circuit could not have made such a finding, because the injuries suffered by Ramirez—being publicly humiliated and cancelling a vacation, for example—were unique to him. Instead, the Ninth Circuit held that typicality requirement could be satisfied even if Ramirez's claims were "slightly" more severe or "somewhat more colorful." (Pet. App. at 39.) In effect, the court adopted a "least common denominator" approach under which the typicality

requirement is satisfied if at least one injury common to the class can be identified, in this case the mere existence of inaccurate information in a credit report (and disclosing that information to a consumer who might or might not have read it).

This was error. A plaintiff who suffers injuries that are significantly different from the rest of the class has not suffered the same injury as the class. For example, a Plaintiff who suffers a cut on his leg has not suffered the same injury as a class member who has suffered a cut on his leg combined with a broken leg. Ramirez's injuries were more than just "slightly" more severe than other class members. But the problem goes beyond that. His injuries were not just significantly more severe, they were also significantly different in kind. For example, the emotional shame and distress he suffered when he was publicly denied credit because he was a suspected terrorist bears no relationship to any injury suffered by class members who never read their credit reports and never even became aware of the inaccurate information. Even if the theoretical injury suffered by those class members is sufficient to confer standing, it is not similar in any respect to the actual injury suffered by Ramirez.

"The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 340 (4th Cir. 1998), *quoting Sprague v. GMC,* 133 F.3d 388, 399 (6th Cir. 1998). "That premise is not valid here." *Id.* The claims of all class members would not go as did the claims of Ramirez; rather, the appropriate

damages award would vary from class member to class member, depending on the severity of their injuries. No reasonable jury, if given the choice, would award the same amount to Ramirez as it would to consumers who never read their credit reports, consumers whose credit reports were never disclosed to third parties, consumers who were never denied credit, consumers who were never denied credit because they were identified as potential terrorists, people who were never *publicly* denied credit because they were suspected terrorists, etc.[4]

But the jury here was denied that choice. It was expressly instructed that its verdict "must be the same for every class member." (JA at 576.) Ramirez's counsel made full use of this instruction. He recounted at length all of the shock, embarrassment, fear, and confusion suffered by Ramirez. (JA at 626-628.) He told the jury that this was a class action and that this meant "[Ramirez is] not unusual. He's not atypical. He is typical. And the claims are com-

[4] Ramirez sought only statutory damages, not actual damages. However, "because statutory damages are intended to address harms that are small or difficult to quantify, evidence about particular class members is highly relevant to a jury charged with [awarding statutory damages]." *Soutter v. Equifax Info. Servs., LLC,* 498 Fed. Appx. 260, 265 (4th Cir. 2012), *quoting Stillmock v. Weis Mkts., Inc.*, 385 Fed. Appx. 267, 277 (4th Cir. 2010) (Wilkinson, J., concurring). And, as noted in the text, Ramirez used his own actual injuries, combined with the court's instruction that the verdict must be the same for all class members, to support his demand for $1,000 in statutory damages for the entire class. (JA at 626-628.)

mon." (District Ct. Dkt. No. 310, Trial Tr. Vol. 5 at 865-866.) And he reminded the jury that "[t]he judge told you at the beginning and she told you again that your verdict must be the same for every class member." (JA at 628.)

2. But lack of typicality was not the only problem with the certification of a class in this case. As dissenting Judge McKeown observed, the district court made compounding errors regarding class certification and standing." (Pet. App. at 51.) For example, one proposition cannot reasonably be disputed: the amount of damages to which class members are entitled is not a common question. "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). In this case, the same evidence will not suffice to show the amount of damages to which each class member is entitled. Plaintiffs produced no evidence "establishing that damages are capable of measurement on a classwide basis." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). Without such a methodology, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.* Thus, the proposed class in this case could not meet the predominance requirement of Rule 23(b)(3), and certification of the class in this case violated the holding in *Comcast*.

3. This Court in *Tyson Foods* appeared to partially retreat from the holding in *Comcast. See Tyson Foods,* 136 S. Ct. at 1056 (Thomas, J., dissenting, noting conflict with *Comcast).* In *Tyson* Foods, this Court observed that "[w]hen 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages." *Id.* at 1045, quoting 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1778, pp. 123-124 (3d ed. 2005). Even assuming that *Tyson Foods* (unlike *Comcast*) would allow certification notwithstanding the individual nature of the damages issues, *Tyson Foods* assumes that under these circumstances *damages will be tried separately*. Here, they were not tried separately.

4. The effect of these compounding errors, if allowed to persist, will inevitably be routine violations of the Rules Enabling Act and a denial of due process to either defendants or unnamed class members. In this case, for example, the Rules Enabling Act has been violated because Rule 23 has been used to allow countless unnamed class members to recover far more than they could have recovered in an individual action. And Petitioner has been denied its due process right to litigate the amount of damages for which it is liable to each class member. These same violations will occur any time the injury suffered by the class representative is more severe than that of other class members.

But the opposite problem occurs if the injuries of the class representative are less severe than the injuries suffered by other class members. *See, e.g., Wolin v. Jaguar Land Rover N. Am., LLC,* 617 F.3d 1168 (9th Cir. 2010) (class representatives who did not experience excessive tire wear caused by alleged defect allowed to represent class members who did experience excessive tire wear caused by the alleged defect). In that instance, the Rules Enabling Act is violated by allowing unnamed class members to recover less than what they are entitled to, and the due process rights of those class members are violated because notwithstanding the strength of their claims they are forced to rely on litigation by representatives with weaker claims.

As Petitioners observe, "[i]t is problematic to have a home-run plaintiff represent a class of single hitters, and vice versa." (Petitioner's Brief at 45.) But in many cases the class will consist of some home-run plaintiffs and some single hitters, i.e., the injuries suffered by class representatives will be less than some class members, greater than others, and different in kind from most. In those cases, the due process rights of *both* defendants and class members are violated.

5. The Ninth Circuit suggested that Petitioner could have requested a verdict form and accompanying jury instructions that allowed the jury to award different amounts to class members whose credit reports were not disclosed to third parties. (Pet. App. at 40 n. 14.) But this suggestion reveals additional doctrinal problems with the Ninth Circuit's approach to Rule 23. A verdict form that separates the claims

of class members whose reports were disclosed from the claims of class members whose reports were not disclosed is the functional equivalent of creating two subclasses. Rule 23(c)(5) allows the creation of subclasses provided that they are "each treated as a class under this rule." This means that each subclass must independently meet the requirements of Rule 23 for the maintenance of a class action—including an adequate and typical representative. *See, e.g., Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981) Here, there would have been no representative at all, let alone an adequate and typical one, for a class of people whose reports were not disclosed to third parties. And this is not a mere technical matter. Absent a separate representative for a subclass of people whose reports were not disclosed, Ramirez would in effect have remained the face of both subclasses and the only actual person whose experience the jury could evaluate, even though his experience was far from typical of the subclass.

But neither the verdict form nor subclasses would have solved the problem in this case. Both subclasses would still have consisted of people who suffered vastly different injuries. The subclass of people whose credit reports were not disclosed would have included, for example, people who never read the letters; people who read the letters but were not concerned enough to take any action; people who read the letters, suffered emotional distress (or little or no emotional distress) and immediately and successfully took action to correct the misinformation; people who read the letters, suffered emo-

tional distress, and were frustrated in their attempts to correct the information; and so on. The subclass of persons whose reports were disclosed to third parties would similarly include class members with vastly different experiences and vastly different injuries.

CONCLUSION

Petitioner is correct that this is a paradigmatic example of a class action that never should have been certified. The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

JOHN M. THOMAS
Counsel of Record
DYKEMA GOSSETT PLLC
2723 South State Street,
Suite 400
Ann Arbor, MI 48104
(734) 214-7613
jthomas@dykema.com

Counsel for Amicus Curiae

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