No. 20-297

In the Supreme Court of the United States

TRANSUNION LLC, PETITIONER

v.

SERGIO L. RAMIREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTIONS PRESENTED

1. Whether all members of the plaintiff class in this case suffered an Article III injury-in-fact when petitioner willfully violated 15 U.S.C. 1681e(b) by producing consumer reports that erroneously designated the class members as individuals who are barred from engaging in transactions in the United States, without following reasonable procedures to ensure the accuracy of those designations.

2. Whether all class members suffered an Article III injury-in-fact when petitioner willfully failed to disclose upon request all information in each of their consumer files, in violation of 15 U.S.C. 1681g(a)(1), and willfully failed to provide a summary of each class member's rights with every written disclosure, in violation of 15 U.S.C. 1681g(c)(2)(A).

3. Whether the certification of a statutory-damages class under 15 U.S.C. 1681n(a) violated the typicality requirement of Federal Rule of Civil Procedure 23(a)(3) when the class representative incurred, and testified to the jury concerning, injuries that were different from the injuries suffered by other class members.

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INTEREST OF THE UNITED STATES

The Fair Credit Reporting Act (FCRA or Act), 15 U.S.C. 1681 *et seq.*, imposes various requirements on certain entities that regularly compile and disseminate personal information about individual consumers. FCRA provides those consumers with a cause of action to recover actual or statutory damages for certain violations of the Act. 15 U.S.C. 1681n, 1681*o*. FCRA's private right of action, and private suits seeking recovery under the Act, provide an important supplement to the federal government's enforcement efforts. Many federal laws contain similar provisions authorizing persons whose statutory rights have been violated to sue for statutory damages. In addition, the United States is often a defendant in both class and collective actions, and

the government has participated in prior cases involving class-action rules and practices. See, *e.g.*, *Frank* v. *Gaos*, 139 S. Ct. 1041 (2019) (per curiam); *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036 (2016). The United States therefore has a substantial interest in the questions presented.

STATEMENT

1. "FCRA seeks to ensure 'fair and accurate credit reporting.'" *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1545 (2016) (quoting 15 U.S.C. 1681(a)(1)). Congress enacted FCRA to address developments in "computer technology [that] facilitated the storage and interchange of information" and "open[ed] the possibility of a nationwide data bank covering every citizen." S. Rep. No. 517, 91st Cong., 1st Sess. 2 (1969) (Senate Report). Congress designed FCRA "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information," and "to prevent an undue invasion of the individual's right of privacy in the collection and dissemination of credit information." *Id.* at 1.

Under FCRA, a "consumer reporting agency" (CRA) includes an entity that, in exchange for monetary fees, "regularly engages * * * in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." 15 U.S.C. 1681a(f). With exceptions not relevant here, a "consumer report" is a CRA's "communication of any information * * * bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" if that communication "is used or expected to be used or collected in whole or in part" for "the purpose of serving as a factor in establishing the consumer's eligibility for" specified

benefits, including employment, credit, and insurance. 15 U.S.C. 1681a(d)(1); see 15 U.S.C. 1681b (listing "[p]ermissible purposes of consumer reports") (emphasis omitted).

FCRA subjects CRAs to a number of requirements, three of which are relevant here. First, FCRA requires that, "[w]henever a [CRA] prepares a consumer report," it "shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. 1681e(b) (reasonable-procedures requirement). Second, FCRA provides that every CRA "shall, upon request, * * * clearly and accurately disclose to the consumer * * * [a]ll information in the consumer's file." 15 U.S.C. 1681g(a)(1) (disclosure requirement). Third, FCRA requires a CRA to "provide to a consumer, with each written disclosure by the agency to the consumer," a "summary of rights" containing specified information. 15 U.S.C. 1681g(c)(2)(A) (summary-of-rights requirement); see 15 U.S.C. 1681g(c)(1).

"Any person who willfully fails to comply with any requirement imposed under [FCRA] with respect to any consumer is liable to that consumer" for "any actual damages sustained," or for statutory "damages of not less than $100 and not more than $1,000," in addition to "punitive damages as the court may allow." 15 U.S.C. 1681n(a)(1)(A) and (2).[1] "[W]illful" violations are "knowing violations" and reckless violations in which the defendant acts based on an "objectively unreasonable" reading of FCRA, creating an "'unjustifiably high risk' of violating the statute." *Safeco Ins. Co. of Am.* v. *Burr*,

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[1] For negligent violations, the defendant is liable for "actual damages." 15 U.S.C. 1681*o*(a)(1).

551 U.S. 47, 57, 70 (2007) (citation omitted); see *id.* at 68-70.

2. Petitioner TransUnion is one of the three largest CRAs in the United States. Pet. App. 2. Petitioner sells a service that purports to alert customers that a consumer's name appears on the list of Specially Designated Nationals (SDNs) maintained by the United States Department of the Treasury's Office of Foreign Assets Control (OFAC). See *ibid.* For national-security reasons, United States businesses and persons are prohibited from transacting with SDNs. See *ibid.*

Petitioner's service places an "OFAC alert[]" on a consumer report when the name of a consumer matches the name of an SDN. Pet. App. 9. During the time period relevant to this litigation, petitioner's matching process consisted solely of a "name-only" comparison between consumers' first and last names and the names on the OFAC list. *Ibid.* As a result, OFAC alerts were incorrectly placed on the credit reports of thousands of persons whose names were the same as or similar to the names of different individuals who were on the OFAC list. *Id.* at 2.

3. a. In February 2011, while attempting to purchase a vehicle, respondent Sergio Ramirez learned that petitioner had added an inaccurate OFAC alert to his consumer report. Pet. App. 4. The car dealership obtained a consumer report that had been prepared by petitioner and that included the OFAC alert. *Ibid.* Because of the OFAC alert, the dealership refused to sell the car to respondent. *Ibid.* Respondent later testified that he was "embarrassed, shocked, and scared" to learn that his name was on the OFAC list. *Id.* at 5.

Respondent contacted petitioner and requested a copy of his consumer-report file. See Pet. App. 5. In

response, and in accordance with its practice at the time, petitioner sent respondent two separate mailings. See *id.* at 13-14. The first mailing contained respondent's credit report and included a summary of consumer rights under FCRA. *Id.* at 5-6. This mailing did not mention the OFAC alert. *Id.* at 6. The second mailing (OFAC Letter) informed respondent that his name was "considered a potential match" with two names appearing on the OFAC list, and "that this information may be provided to" third parties. *Id.* at 7. This mailing did not include a summary of consumer rights. *Ibid.* Respondent later testified that he was confused by these separate mailings and unsure how to have the OFAC alert removed. *Id.* at 7-8. He also canceled a planned international vacation due to concerns about the possible consequences of the OFAC alert. *Id.* at 8.

b. In February 2012, respondent filed this lawsuit, alleging that petitioner had violated various FCRA provisions. See Pet. App. 14. Over petitioner's objection, the district court certified a class consisting of "all natural persons in the United States and its Territories to whom [petitioner] sent a letter similar in form to the [OFAC Letter] [petitioner] sent to [respondent] * * * from January 1, 2011-July 26, 2011." J.A. 294. The court determined, *inter alia*, that respondent's claims were "typical of the claims * * * of the class." Fed. R. Civ. P. 23(a)(3). The court found that, although respondent's claims involved "potentially unique" facts, J.A. 276, Rule 23's typicality requirement was satisfied because respondent's legal theory was common to all class members, and because both respondent and the remaining class members sought statutory damages, J.A. 275-278. Petitioner again challenged respondent's

typicality in a later motion to decertify the class, C.A. E.R. 452, which the district court denied, J.A. 299-311.

The parties stipulated that the class contained 8185 consumers. Pet. App. 14. Of those plaintiffs, 1853 had their credit reports sold to potential creditors during the six-month class period, while the remaining 6332 class members did not have their credit reports sold to potential creditors during that period. See *id.* at 14-15; J.A. 48.

c. The case proceeded to trial, where the class focused a significant portion of its presentation on respondent's own experience related to the OFAC alert. Class counsel emphasized respondent's story in both their opening and closing arguments. See C.A. Supp. E.R. 639-647, 653-655, 1406-1407, 1411-1413. Respondent was the sole class member who was called as a witness at trial, where he provided testimony about his experience and the harms he had suffered as a result of petitioner's conduct. See Pet. App. 5-8, 53-54. Petitioner did not seek to preclude respondent from testifying about his unique circumstances in any of its five pretrial motions in limine. Cf. D. Ct. Doc. 271, at 3-5 (May 25, 2017). Petitioner also did not object to the directive, incorporated into both the jury instructions and the verdict form, that if the jury found petitioner liable, it should select a single statutory-damages amount to "award [to] each member of the [c]lass." J.A. 579; see J.A. 583-584, 691.

The jury returned a verdict in favor of the class on three FCRA claims. It found that petitioner had failed to (1) "follow reasonable procedures to assure maximum possible accuracy of the information" contained in its credit reports, in violation of 15 U.S.C. 1681e(b); (2) disclose that it had identified class members as potential

OFAC matches when they requested their credit files, in violation of 15 U.S.C. 1681g(a)(1); and (3) include a summary-of-rights form when it mailed class members letters disclosing that an OFAC alert had been placed on their credit files, in violation of 15 U.S.C. 1681g(c)(2). See Pet. App. 15, 72. The jury also found that petitioner's violations were willful, so that each class member was entitled to recover statutory "damages of not less than $100 and not more than $1,000," 15 U.S.C. 1681n(a)(1)(A), and it awarded each class member $984.22 in statutory damages, Pet. App. 15.

d. A divided panel of the court of appeals affirmed the jury's verdict and its statutory-damages award. Pet. App. 1-58.

i. The court of appeals held that each class member had standing to bring all three FCRA claims. Pet. App. 16-33. The court found that Congress had enacted the reasonable-procedures requirement "to protect consumers' concrete interests" in ensuring that their credit reports contain accurate information. *Id.* at 22. The court explained that, because "the nature of [an OFAC alert] inaccuracy is severe," and because petitioner had "made all class members' reports available to potential creditors or employers at a moment's notice," petitioner's name-only matching process had created a "material risk of harm to the concrete interests of all class members." *Id.* at 23, 25, 27. The court concluded that all class members had suffered injury-in-fact sufficient to bring the reasonable-procedures claim, whether or not their reports had been disseminated to third parties. *Id.* at 26-27.

Turning to the disclosure and summary-of-rights claims, the court of appeals found that 15 U.S.C.

1681g(a)(1) and (c)(2) work together to "protect consumers' concrete interest in accessing important information about themselves and understanding how to dispute inaccurate information before it reaches potential creditors." Pet. App. 31. The court explained that, although these requirements "may seem 'procedural' in nature, Congress enacted them because they are the only practical way to protect consumers' interests in fair and accurate credit reporting." *Ibid.* The court found that petitioner's violations of those requirements had "exposed all class members to a material risk of harm to their concrete informational interests," *ibid.*, and that all class members therefore had suffered injury-in-fact, *id.* at 31-33.

The court of appeals also held that respondent's claims were sufficiently typical of the class's claims to satisfy Federal Rule of Civil Procedure 23(a)(3). Pet. App. 38-40. The court found that, because "[t]he typicality inquiry focuses on the nature of the claim . . . of the class representative and not . . . the specific facts from which it arose," it did not matter that respondent had suffered more severe injuries than the remaining class members. *Id.* at 39 (citations and internal quotation marks omitted). The court also concluded that respondent's "injuries were not so unique, unusual, or severe to make him an atypical representative of the class." *Id.* at 40.[2]

ii. Judge McKeown concurred in part and dissented in part. Pet. App. 51-58. She concluded that "no one but [respondent] and the class members whose information was disclosed to a third party had standing to

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[2] The court of appeals also reduced a punitive-damages award that the jury had separately awarded to the class. Pet. App. 44-48.

assert a reasonable procedures claim, and only [respondent] had standing to bring the disclosure and summary of rights claims." *Id.* at 52. She stated that "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 [respondent]." *Id.* at 54.

SUMMARY OF ARGUMENT

I. A. Petitioner's violation of FCRA's reasonable-procedures requirement caused all class members to suffer a concrete and particularized Article III injury-in-fact. In enacting FCRA, Congress expressed a judgment that persons suffering the harms the class experienced here should have a right to sue. See *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016). Petitioner's placement of incorrect OFAC alerts on the class members' consumer reports exposed class members to significant risk of suffering the same sort of harm that has traditionally provided a basis for common-law defamation claims. And all class members have demonstrated a significant risk of material harm from petitioner's conduct.

Both the class members whose credit reports were sold to potential creditors during the class period, and those who showed only that they had received their own credit reports, were exposed to a material risk of harm. That risk stems from three features of petitioner's OFAC alerts. *First*, those alerts were inaccurate as to a material issue—whether third parties may legally transact with a particular consumer. *Second*, even for class members whose reports were not shown to have been disseminated to third parties, there was a significant likelihood of eventual dissemination, given the frequency with which such reports are distributed, petitioner's ability to provide consumer reports to third

parties at a moment's notice, and the fact that petitioner's sole purpose in preparing the reports was to disseminate them to others. *Third*, consumer reports are expected and intended to be used by third-party recipients in deciding whether to provide tangible benefits like credit or employment.

B. In certain circumstances, when a statute provides an individual with a right to receive information and such information is not provided, that deprivation constitutes an Article III injury-in-fact. See, *e.g.*, *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440 (1989). Congress enacted FCRA's summary-of-rights and disclosure requirements to give consumers the information needed to identify and correct any inaccurate information in their consumer-report files. The class members' injuries were sufficiently particularized because FCRA gives each consumer a right to receive *his own* complete credit file and information about *his* rights related to that file. And under this Court's precedents regarding informational standing, which the Court cited in *Spokeo*, such injuries are sufficiently concrete to satisfy Article III.

II. A. Rule 23 authorizes class certification only if a class representative's claims or defenses are typical of those of the class. Typicality may be lacking if a class representative has experienced injuries that are different from those suffered by absent class members. In such cases, courts must carefully consider whether proof of the putative representative's claim will substantially advance the absent class members' claims; whether the claim requires individualized proof to establish liability; and whether individualized proof will be necessary to determine the amount of damages to be awarded. A court may need to take such considerations into account

not only in compensatory-damages cases, but also when plaintiffs invoke statutory-damages provisions like FCRA's, under which a number of considerations, including plaintiff-specific facts, may bear on the proper damages award.

B. While the courts below largely applied the correct framework when conducting the class-certification inquiry, they did not properly consider the nature and significance of respondent's atypical injuries. This Court should vacate the judgment below and remand the case to permit the court of appeals to reconsider whether respondent's particularly severe injuries defeat typicality. On remand, that court can also consider whether petitioner forfeited its Rule 23 challenge by failing to object to respondent's submission of evidence and arguments concerning his unique experience.

ARGUMENT

I. ALL MEMBERS OF THE CERTIFIED CLASS IN THIS CASE HAVE ARTICLE III STANDING TO BRING REASONABLE-PROCEDURES, DISCLOSURE, AND SUMMARY-OF-RIGHTS CLAIMS UNDER FCRA

To satisfy the "irreducible constitutional minimum" for standing under Article III, a plaintiff must establish three elements: (1) a concrete and particularized injury-in-fact that is actual or imminent; (2) a fairly traceable causal connection between the injury and the defendant's challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); see *id.* at 560-561. A plaintiff "must demonstrate standing for each claim he seeks to press." *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citation omitted). The harms that the class members suffered in this

case constitute concrete and particularized injuries-in-fact that support standing for all three FCRA claims.

Under this Court's analysis in *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016), all class members have suffered injuries-in-fact sufficient to support a claim that petitioner failed to "follow reasonable procedures to assure maximum possible accuracy" of the information in their credit files. 15 U.S.C. 1681e(b). And under this Court's decisions in suits brought by plaintiffs who alleged a denial of information to which they had a statutory right, all class members suffered injuries-in-fact as a result of petitioner's failure to provide them with all the information in their credit files, 15 U.S.C. 1681g(a)(1), and with a summary-of-rights form, 15 U.S.C. 1681g(c)(2)(A).[3]

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[3] A plaintiff who satisfies the general Article III rules that govern statutory standing may be required to satisfy additional requirements as well. For instance, a plaintiff who has Article III standing nevertheless will lack a judicial remedy against the United States unless Congress has enacted a statutory waiver of sovereign immunity. See, *e.g.*, *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 260-261 (1999). Congress is also free, when creating new statutory rights, to limit private judicial enforcement to plaintiffs who have suffered some specified type or amount of consequential harm. See, *e.g.*, 5 U.S.C. 552a(g)(4)(A) (requiring that a plaintiff sustain "actual damages" as a result of certain intentional or willful violations of the Privacy Act, 5 U.S.C. 552a, in order for the plaintiff to recover against the United States). In addition, where the statutory language permitting a plaintiff to seek damages to enforce a statutory right is unclear, doctrines such as sovereign immunity may impact a court's interpretation of the damages provision. Cf. *FAA* v. *Cooper*, 566 U.S. 284, 291 (2012) (applying the principle that courts must "construe any ambiguities in the scope of a waiver in favor of the sovereign" when interpreting the Privacy Act's damages provision, 5 U.S.C. 552a(g)(4)(A), in a case brought against the government). Even in such contexts, however, the determination

A. All Class Members Have Standing To Assert Reasonable-Procedures Claims Under 15 U.S.C. 1681e(b)

1. This Court has stated that an Article III injury "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (citations and internal quotation marks omitted). The Court has also observed, however, that "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009); see *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997) ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.").

In *Spokeo*, the Court sought to harmonize these principles in addressing a reasonable-procedures claim under FCRA. The plaintiff in *Spokeo* alleged that a CRA had violated 15 U.S.C. 1681e(b) by disseminating inaccurate information about him, including information related to his marital status, his age, and whether he held a graduate degree. 136 S. Ct. at 1546. The Ninth Circuit held that the plaintiff had alleged a sufficiently "'concrete and particularized'" injury because "the violation of a statutory right is usually a sufficient injury in fact to confer standing." *Robins* v. *Spokeo, Inc.*, 742 F.3d 409, 412 (2014) (citation omitted), vacated and remanded, 136 S. Ct. 1540 (2016).

This Court vacated the Ninth Circuit's decision, clarifying that a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute

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whether particular suits can go forward is subject to the control of Congress.

grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 136 S. Ct. at 1549. The Court explained that, although the plaintiff might have alleged a *particularized* harm, Article III also "requires a *concrete* injury even in the context of a statutory violation." *Ibid.* (emphasis added).

The Court further explained that, "[i]n determining whether an intangible harm constitutes an injury in fact, both history and the judgment of Congress play important roles." *Spokeo*, 136 S. Ct. at 1549. As to history, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Ibid.* "In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive." *Ibid.* The Court also emphasized that "the risk of real harm" can in some circumstances "satisfy the requirement of concreteness." *Ibid.* Thus, plaintiffs alleging "violation[s] of a procedural right granted by statute" may be able to establish a concrete injury without alleging "any additional harm." *Ibid.* (emphasis omitted). For example, the common law "has long permitted" recovery for libel and slander per se without any additional showing. *Ibid.*

The *Spokeo* Court observed that, in enacting Section 1681e(b), "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk," but that a plaintiff cannot establish standing under this section by alleging "a bare procedural violation." 136 S. Ct. at 1550. As an example of a FCRA violation that "may result in no harm" and

no "material risk of harm," the Court explained that it "is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm." *Ibid.* Because the Ninth Circuit "did not address * * * whether the particular procedural violations alleged in [*Spokeo*] entail[ed] a degree of risk sufficient to meet the concreteness requirement," the Court vacated the Ninth Circuit's judgment and remanded for further proceedings. *Ibid.*

2. Under the principles articulated in *Spokeo*, all class members here satisfied Article III's requirements with respect to their reasonable-procedures claims. The class members suffered *particularized* injuries because the placement of an OFAC alert on a consumer's credit report affects that individual "in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (citation omitted). The class members' injuries were also sufficiently *concrete* to satisfy Article III. FCRA reflects Congress's judgment that, in a suit between private parties, persons suffering the harms that the class experienced here should have a right to sue; the class members' injuries have a close relationship to harms that have traditionally been redressable through common-law defamation claims; and the class demonstrated a significant risk of further consequential harm from petitioner's placement of inaccurate OFAC alerts on their credit reports.

a. FCRA's reasonable-procedures requirement, 15 U.S.C. 1681e(b), reflects Congress's recognition of the harms that consumers may suffer if inaccurate information is placed in their consumer files. And under FCRA, any person who commits a willful violation "with respect to any consumer is liable to that consumer."

15 U.S.C. 1681n(a). Those provisions taken together reflect Congress's judgment that a violation of the reasonable-procedures requirement injures the individual with respect to whom the violation occurs. Such a congressional judgment is "instructive" in determining whether the alleged statutory violation is sufficiently "concrete" to satisfy Article III. *Spokeo*, 136 S. Ct. at 1549.

b. The "intangible harm" that the class members suffered—the dissemination or intended dissemination of credit reports incorrectly designating them as possible SDNs—"has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit," *Spokeo*, 136 S. Ct. at 1549, namely the harm on which a common-law defamation claim is premised.

By the early 1700s, common-law courts had developed a firm distinction between written defamation (libel) and oral defamation (slander), and had sustained actions for libelous statements even though the same "words, if merely spoken[,] would not [have been] of themselves sufficient to support an action." *Thorley* v. *Kerry*, (1812) 128 Eng. Rep. 367 (C.P.) 371; see W.S. Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 41 L.Q. Rev. 13, 16-18 (1925). Written defamation was actionable per se without "evidence of actual loss" because "injury [wa]s presumed from the fact of publication." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). But courts permitted plaintiffs to recover even if harm could not be presumed, as when the defendant proved that "no loss" or any reputational harm had "actually occurred." *Ibid.*; see Restatement (Second) of Torts § 621 caveat, at 319 (1977) (noting the "traditional common law rule allowing recovery [for defamation] in the absence of proof of actual harm"); *id.*

§ 620 & cmt. b, at 317-318 (all written and certain oral defamations are actionable for at least nominal damages). Courts viewed that recovery as "perform[ing] a vindicatory function," Restatement (First) of Torts § 569 cmt. b, at 166 (1938), and as "a way of recognizing" that such publications "in themselves really are 'damage' or harm," 2 Dan B. Dobbs, *Dobbs Law of Remedies* § 7.3(2), at 308 (2d ed. 1993). That history is "well nigh conclusive" proof that a FCRA claim arising from the publication of harmful and incorrect information in a consumer report about the plaintiff satisfies Article III's requirements. See *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 777 (2000).

c. Respondent himself suffered a number of actual injuries as a result of petitioner's failure to verify the accuracy of the OFAC alert it placed in his file. See pp. 4-5, *supra*. And at a minimum, petitioner's violations of FCRA's reasonable-procedures provision placed the remaining class members—both the 1853 members whose credit reports were sold to potential creditors during the class period, and the 6332 class members who demonstrated only that they had received their own credit reports—at a "material risk of harm," which "satisf[ies] the requirement of concreteness." *Spokeo*, 136 S. Ct. at 1549-1550. That risk of harm stemmed from three features of the OFAC alerts here: (1) the alerts were inaccurate as to a material issue; (2) there was a substantial likelihood that they would be disseminated to third parties; and (3) the intended third-party recipients were expected to use the reports to decide whether to provide class members tangible benefits like credit or employment.

i. Because petitioner's OFAC alerts were inaccurate as to a material issue—whether third parties could

legally transact with particular consumers—they naturally tended to injure the consumers referenced in the reports. "[T]he nature of the inaccuracy is severe" because petitioner "inaccurately identified and labeled all class members as potential terrorists, drug traffickers, and other threats to national security." Pet. App. 23. And a third party that receives such an alert must take it seriously, as an entity or individual who transacts with a SDN can be subjected to significant civil and criminal penalties. See 31 C.F.R. Pt. 501, App. A; see also, *e.g.*, 31 C.F.R. 501.701. The misinformation in petitioner's OFAC alerts is thus of an entirely different character than the "incorrect zip code" that the *Spokeo* Court identified as a type of error that was unlikely to "work any concrete harm." 136 S. Ct. at 1550.

ii. Petitioner is likely to transmit OFAC alerts to third parties because its entire business model depends on third-party dissemination. As a CRA, petitioner is by definition engaged in the business of "furnishing consumer reports to third parties." 15 U.S.C. 1681a(f). And petitioner developed its OFAC-alert product for the purpose of helping third parties to comply with their legal obligation to decline transactions with SDNs. See Pet. App. 8-9.

Petitioner "made all class members' reports," including the incorrect OFAC alerts, "available to potential creditors or employers at a moment's notice, even without the consumers' knowledge in some instances." Pet. App. 25. In the month that the car dealership purchased respondent's consumer report (February 2011), petitioner sold 1.5 million credit reports for which it had conducted its OFAC-alert matching analysis. See C.A. Supp. E.R. 1494. In light of this frequent dissemination,

some (if not most) of the 6332 class members whose consumer reports were not disseminated to creditors during the six-month class period (which was adopted solely for purposes of defining the class, see J.A. 48) likely had their consumer reports transmitted to third parties before or after that period. The likelihood of dissemination is particularly high because the certified class was limited to consumers who had requested their own consumer reports from petitioner, and persons who make such requests often do so because they have recently taken or are about to take an action (such as applying for employment or a mortgage) that will prompt a third party to request a credit report. See C.A. Supp. E.R. 1240-1242.

Petitioner asserts (Br. 36-40) that, absent proof that a particular class member's OFAC alert was actually sent to a third party, that class member cannot satisfy Article III's requirements. That argument is unsound. The *Spokeo* Court explained that, in certain circumstances, "the risk of real harm" resulting from "violation[s] of a procedural right granted by statute" can "satisfy the requirement of concreteness" even if there is no proof of "any additional harm." 136 S. Ct. at 1549 (emphasis omitted). That principle applies here. That is particularly so because petitioner's *purpose* for compiling the information (including OFAC alerts) contained in consumer reports is to sell it to third parties; indeed, petitioner has no *other* evident use for the information.

iii. The likelihood of tangible harm from dissemination of an inaccurate consumer report is particularly great because the intended third-party recipients use the reports to decide whether to provide tangible benefits to the consumers involved. Third-party recipients

can include "any individual, partnership, corporation, trust, estate, cooperative, association, [or] government." 15 U.S.C. 1681a(b); see 15 U.S.C. 1681b(a)(3) (permitting the dissemination of consumer reports to such recipients). FCRA's definition of "consumer report" turns in part on whether a communication "is used or expected to be used or collected in whole or in part" for "the purpose of serving as a factor in establishing the consumer's eligibility for" specified benefits, including employment, credit, and insurance. 15 U.S.C. 1681a(d)(1); see 15 U.S.C. 1681b(a)(3)(F) (permitting a CRA to furnish a credit report to a third party that has "a legitimate business need for the information"). In this context, dissemination of false and derogatory information is especially likely to produce tangible harms going beyond reputational injury (which is itself sufficient for Article III standing). And with respect to inaccurate OFAC alerts in particular, a false suggestion that others cannot lawfully contract with an individual is especially harmful when transmitted to potential contracting partners.

iv. Given the reasons for which credit reports are routinely requested, and the damning nature of the OFAC alerts, any class members whose consumer reports were actually disseminated to third parties were exposed to an "almost inevitable risk" of adverse actions and reputational harm. Pet. App. 29 n.9.[4] To be sure,

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[4] Petitioner suggests (Br. 40-43) that the OFAC alerts it distributed to third parties were not actually false because they identified class members only as *potential* matches with SDNs. Petitioner does not dispute, however, that none of the class members were SDNs, or that additional identifiers (such as date of birth) could have been used to verify the accuracy of the OFAC alerts. See Pet. App. 35. That is sufficient to support standing here, particularly

the credit reports of many class members were not transmitted to creditors during the class period. But even those class members faced a sufficient likelihood of dissemination—and attendant adverse actions and reputational damage—to suffer the "material risk of harm" needed to satisfy Article III's "requirement of concreteness." *Spokeo*, 136 S. Ct. at 1549-1550.

B. All Class Members Have Standing To Assert Disclosure And Summary-Of-Rights Claims Under 15 U.S.C. 1681g(a)(1) And (c)(2)

FCRA's disclosure and summary-of-rights provisions require CRAs to furnish certain information to consumers, see 15 U.S.C. 1681g(a)(1) and (c)(2), and FCRA's statutory-damages provision applies to willful violations of these requirements, see 15 U.S.C. 1681n(a). Under this Court's informational-standing precedents, all class members suffered concrete and particularized injuries-in-fact from petitioner's violations of these provisions.

1. In *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440 (1989), the Court recognized that an individual can suffer an injury-in-fact "when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC* v. *Akins*, 524 U.S. 11, 21 (1998) (discussing *Public Citizen*). The *Public Citizen* Court found that plaintiffs who allege violations of the Federal Advisory Committee Act (FACA), 5 U.S.C. App., or the Freedom of Information Act (FOIA), 5 U.S.C. 552—both of which provide a right to the disclosure of records—can establish injury-in-fact simply by showing that they "sought and were denied

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given the likelihood that third parties would take adverse actions based on the communications.

specific agency records." *Public Citizen*, 491 U.S. at 449. The Court concluded that, although "other citizens * * * might make the same complaint after unsuccessfully demanding disclosure," the plaintiffs' injuries were sufficiently concrete and particularized to give them standing to sue. *Id.* at 449-450.

In *Akins*, the Court relied on *Public Citizen* in holding that plaintiffs seeking certain disclosures under the Federal Election Campaign Act of 1971 (FECA), 52 U.S.C. 30101 *et seq.*, had established an "injury in fact" that was "concrete and particular" solely by demonstrating an "inability to obtain information" that, on their view, FECA required to be made public. 524 U.S. at 21. The Court observed that FECA "seek[s] to protect individuals such as [the plaintiffs] from the kind of harm they say they have suffered, *i.e.*, failing to receive particular information about campaign-related activities." *Id.* at 22. The Court rejected the contention that the plaintiffs had only a "generalized grievance" shared by many or all citizens, and it distinguished cases involving "abstract" harms like "injury to the interest in seeing that the law is obeyed." *Id.* at 23-24. While acknowledging that the plaintiffs' injuries were "widely shared," the Court concluded that the alleged violation of FECA's disclosure requirements injured plaintiffs in a way that was "sufficiently concrete" to satisfy Article III. *Id.* at 24-25.

2. The conclusion that class members here suffered cognizable injuries follows *a fortiori* from the decisions described above. Cf. *Spokeo*, 136 S. Ct. at 1549 (citing *Akins* and *Public Citizen* for the propositions that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact" and that in "such a case [a plaintiff] need not allege

any *additional* harm beyond the one Congress has identified"). The statutes at issue in *Public Citizen* and *Akins* authorized plaintiffs to bring suit if they were denied information about a third party or the government. See *Akins*, 524 U.S. at 23-25; *Public Citizen*, 491 U.S. at 449-450. Here, the denial of information produces an even more particularized and concrete injury: under the FCRA provisions at issue, each consumer is entitled to receive only the information in *his own* credit file and information about *his own* rights.

Upon request, petitioner must send a consumer "[a]ll information in the consumer's file." 15 U.S.C. 1681g(a)(1). At trial, the class presented evidence that petitioner had willfully violated that requirement by sending class members mailings that purported to contain all the information in their files but omitted the OFAC alerts. See Pet. App. 35-37. FCRA also required petitioner to provide "with each written disclosure * * * [a] summary of rights," 15 U.S.C. 1681g(c)(2)(A), that included an explanation of "the right of a consumer to dispute information in [his] file," 15 U.S.C. 1681g(c)(1)(B)(iii). The class presented evidence that petitioner had willfully failed to include the required summary-of-rights form in the separate OFAC Letters sent to all class members. See Pet. App. 37-38. These violations caused all class members to suffer injury through their "fail[ure] to obtain information which must be * * * disclosed pursuant to a statute." *Akins*, 524 U.S. at 21.[5]

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[5] Petitioner emphasizes (Br. 29-31) that, if the two mailings it sent to each class member are considered together, each class member ultimately received all the information in his credit file as well as an explanation of his right to contest that information. In this Court, however, petitioner does not dispute that it willfully violated both 15

A consumer's interest in receiving the disclosures that FCRA requires is especially strong because credit reports, by their nature, are intended for use by third parties to make concrete decisions (regarding credit, employment, and the like) that directly and tangibly affect the consumer involved. See pp. 18-20, *supra*. FCRA's central purpose is to "prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report." Senate Report 1. To that end, the statute requires CRAs to inform a consumer upon request of (a) all of the information in his credit file, 15 U.S.C. 1681g(a)(1), and (b) his rights under the statute to contest inaccurate information, 15 U.S.C. 1681g(c)(1)(B)(iii).

FCRA's disclosure and summary-of-rights provisions "work together to protect consumers' interests in having access to the information in their credit reports upon request and understanding how to correct inaccurate information in their credit reports." Pet. App. 30. Those provisions focus on information that is specific to the consumer involved and that is especially likely to affect the individual's tangible interests. See *id.* at 31 ("Congress enacted [the disclosure and summary-of-rights provisions] because they are the only practical way to protect consumers' interests in fair and accurate credit reporting."). And in this case, the class members

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U.S.C. 1681g(a)(1) (by failing to include the OFAC alert in its initial mailing) and 15 U.S.C. 1681g(c)(2)(A) (by omitting from the OFAC Letter any summary of the right to contest the accuracy of the OFAC alert). And respondent testified at trial that he was confused by the separate mailings and unsure how to have the OFAC alert removed. See Pet. App. 7-8. Under these circumstances, the court of appeals appropriately considered each mailing individually to determine whether class members had established injury-in-fact from the distinct statutory violations.

had an especially strong interest in learning about the OFAC alerts in their files, and about the mechanisms available to contest those alerts, because the alerts were actually inaccurate. To be sure, neither the existence of a statutory violation, nor the availability of FCRA's private right of action, depends on case-specific proof that the defendant's failure to make required disclosures actually caused the consumer further consequential harm. But this Court's informational-standing precedents have not required such proof, and the likelihood of such harm is significantly greater under FCRA than under the disclosure provisions this Court has previously considered.

3. Informational-standing precedents do not suggest that a plaintiff automatically satisfies Article III requirements simply because an alleged statutory violation leads indirectly to a diminution in the information that is available to the public. In *Electronic Privacy Information Center* v. *Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371 (D.C. Cir. 2017) (*EPIC*), cert. denied, 139 S. Ct. 791 (2019), for example, the defendant advisory commission was alleged to have breached a statutory requirement that it produce and publish a "privacy impact assessment" before beginning to collect voter data. *Id.* at 377. The plaintiff organization's claimed informational injury was its lack of access to the assessment that the defendant had failed to create. *Ibid.* The court of appeals held that the organization lacked informational standing because "it ha[d] not suffered the type of harm that [the relevant statutory provision] seeks to prevent." *Id.* at 378. The court explained that the statutory provision the defendant allegedly violated "is intended to protect *individuals*—in the present context, voters—by requiring an agency to fully

consider their privacy before collecting their personal information. [The organization] is not a voter and is therefore not the type of plaintiff the Congress had in mind." *Ibid.*

Here, by contrast, the gravamen of the class members' claims is that petitioner failed to properly disclose information actually in its possession, not that it failed to generate information that might then have been disclosed. Denial of information to which the class members were statutorily entitled was thus the direct (rather than an indirect) consequence of the FCRA violations. And unlike the plaintiff in *EPIC*, the class members here are both (a) the intended beneficiaries of the statutory provisions that were allegedly violated and (b) the "plaintiff[s] the Congress had in mind," *EPIC*, 878 F.3d at 378, when it crafted FCRA's private right of action. As explained above, FCRA entitles a consumer to receive only his own consumer report, 15 U.S.C. 1681g(a)(1); FCRA confers that right in part to enable consumers to identify and contest inaccurate information that might otherwise be used to deny them credit or other tangible benefits, see pp. 24-25, *supra*; and the statute authorizes a consumer to sue only for violations of his own statutory rights, 15 U.S.C. 1681n(a); see 15 U.S.C. 1681*o*.

II. WHEN A PUTATIVE CLASS REPRESENTATIVE HAS SUFFERED INJURIES NOT BORNE BY OTHER CLASS MEMBERS, A COURT MUST CAREFULLY CONSIDER RULE 23'S TYPICALITY REQUIREMENT WHEN DETERMINING WHETHER TO CERTIFY A STATUTORY-DAMAGES CLASS

Under Federal Rule of Civil Procedure 23, an individual may serve as a class representative only if his "claims or defenses * * * are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). FCRA gave the jury in this case substantial discretion to select the amount of statutory damages that each class member should receive, yet the named plaintiff testified to injuries that were unique. Because the courts below did not sufficiently recognize or grapple with the Rule 23(a)(3) issues that respondent's atypical injuries created, the judgment below should be vacated and the case should be remanded for further consideration.

A. In A Case Where The Jury Will Have Significant Discretion To Consider Plaintiff-Specific Facts When Selecting An Appropriate Statutory-Damages Award, A Court Must Carefully Consider Whether The Typicality Requirement Is Satisfied

1. Rule 23's typicality requirement "serve[s] as [a] guidepost[] for determining * * * whether the named plaintiff's claim and the class claims" are appropriately "interrelated." *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 349 n.5 (2011) (quoting *General Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 157 n.13 (1982)). While "minor factual differences between the claim of the putative representative" and the claims of the class members "ordinarily will not defeat a finding of typicality," a "plaintiff's claims are atypical when his or her 'factual or legal stance is not characteristic of that of other class

members.'" 1 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 4:17 (17th ed. 2020) (*McLaughlin*) (citation omitted); see 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1764, at 275 (3d ed. 2005) ("Rule 23(a)(3) may * * * screen out class actions in which the * * * factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact are present.").

The decision whether to certify a damages class raises distinct typicality issues. Neither differences in injury nor variances in damages automatically defeat typicality. See 1 William B. Rubenstein, *Newberg on Class Actions* § 3:43, at 293 (5th ed. 2011) ("[I]t is often the case that class members have suffered varying amounts of injury as a result of the defendant's actions."). But such disparities still "may weigh—sometimes dispositively—against certification." 1 *McLaughlin* § 4:19. This may particularly be so in cases where the class representative suffered injuries different from those of the other class members, but there is no straightforward or mechanical way to compute the damages that each class member should receive.

In such cases, the district court must carefully analyze both the named plaintiff's claims and the evidence that will likely be used to support them to determine whether idiosyncratic features of the class representative's injuries and attendant damages claims defeat typicality. See 1 *McLaughlin* § 4:16. A number of considerations should guide this analysis. A court should consider, based on all the relevant circumstances, whether "the proof of the proposed representative's claim will * * * simultaneously serve to advance in substantial respect the claims of absent class members." *Id.* § 4:17;

cf. *Stearns* v. *Ticketmaster Corp.*, 655 F.3d 1013, 1019-1020 (9th Cir. 2011) (finding, in a case involving state-law deceptive-trade-practices claims, that the proposed class representatives were not typical because they were not actually deceived), cert denied, 566 U.S. 962 (2012); *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998) (reversing a grant of class certification where "taken as a whole the class claims were based on widely divergent facts") (citation omitted). A court sometimes may need to determine whether "the claim requires individualized proof to establish liability." 1 *McLaughlin* § 4:16. And even if the class representative is typical for liability purposes, a court must consider whether calculation of damages will "require too much individualized proof to render the named representatives' claims typical of those of the class." *Doe* v. *Chao*, 306 F.3d 170, 183 (4th Cir. 2002), aff'd, 540 U.S. 614 (2004); see 1 *McLaughlin* § 4:19 (explaining that courts have declined to certify a class where the damages calculation "is dependent on the unique or complex circumstances of each class member").

2. A court should take the foregoing considerations into account not only when determining whether to certify a class seeking compensatory damages, but also when a putative class seeks statutory damages under a law like FCRA, which gives the jury substantial discretion to select an appropriate damages amount within a prescribed range.

a. For willful violations, FCRA authorizes statutory damages "of not less than $100 and not more than $1,000." 15 U.S.C. 1681n(a)(1)(A). Numerous other federal statutes likewise authorize awards of statutory damages within broad ranges without specifying the

criteria that a factfinder should consider in determining an appropriate award. See, *e.g.*, 17 U.S.C. 504(c)(1) (statutory damages for copyright infringement "of not less than $750 or more than $30,000 as the court considers just," with potential adjustments based on the infringer's conduct); 15 U.S.C. 1117(c)(1) (statutory damages for use of a counterfeit trademark of "not less than $1,000 or more than $200,000 per counterfeit mark * * * as the court considers just"); 17 U.S.C. 1203(c)(3) (statutory damages for violations of the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, "of not less than $200 or more than $2,500 per act * * * as the court considers just"); 47 U.S.C. 605(e)(3)(C)(i)(II) (statutory damages for unauthorized use of wire or radio communication "of not less than $1,000 or more than $10,000" for certain types of violations, and of "not less than $10,000, or more than $100,000" for other types of violations, "as the court considers just").

To obtain statutory damages under FCRA and many similar statutes, a plaintiff need not prove that consequential harms actually materialized in a particular case. Rather, statutory damages may properly be awarded to plaintiffs who establish a deprivation of the statutory right itself but do not prove any further consequential injury. 15 U.S.C. 1681n(a); see, *e.g.*, *Llewellyn* v. *Allstate Home Loans, Inc.*, 711 F.3d 1173, 1179 (10th Cir. 2013) (explaining that a consumer need not prove actual damages to obtain statutory damages under FCRA); *Beaudry* v. *TeleCheck Servs., Inc.*, 579 F.3d 702, 705-707 (6th Cir. 2009) (similar), cert denied, 559 U.S. 1092 (2010). But while such proof is not required, a factfinder may take into account the nature and extent of a plaintiff's injury when determining the appropriate

statutory-damages award. See *Stillmock* v. *Weis Markets, Inc.*, 385 Fed. Appx. 267, 276–277 (4th Cir. 2010) (Wilkinson, J., concurring specially) (indicating that the experiences of individual plaintiffs may be relevant in determining the amount of a FCRA statutory-damages award); cf. *Bryant* v. *Media Right Prods., Inc.*, 603 F.3d 135, 144 (2d Cir.) (jury determining the proper amount of statutory damages under the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, may consider "the revenue lost by the copyright holder"), cert. denied, 562 U.S. 1064 (2010); *Omega SA* v. *375 Canal, LLC,* 984 F.3d 244, 258 (2d Cir. 2021) (similar under the Lanham Act, 15 U.S.C. 1051 *et seq.*).

b. When a plaintiff seeks statutory damages under a law like FCRA, which permits an inquiry into plaintiff-specific facts in order to determine the appropriate award within a prescribed range, a court adjudicating a class-certification motion should carefully consider the factors laid out above to ensure that Rule 23's typicality requirement is met. Because such statutory damages "are not fixed" and "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 this task." *Stillmock*, 385 Fed. Appx. at 277 (Wilkinson, J., concurring specially). If a plaintiff who suffered atypical injuries is permitted to represent a class, a jury might over- or under-value the impact that a defendant's conduct had on other class members, and accordingly set statutory damages at too high or low an amount.

3. A court presented with a putative representative whose own experience appears to have been atypical need not always deny class certification. In a case like

this one, for example, a plaintiff who has suffered atypical harms may still be able to serve as an appropriate class representative if the evidence and arguments he presents at trial focus on aspects of his experience that are common to all class members. Cf. *Murray* v. *GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (Easterbrook, J.) (suggesting that a plaintiff in a FCRA case may "decide[] not to make the sort of person-specific arguments that render class treatment infeasible"). A district court might make class certification contingent on the named plaintiff's agreement to limit his evidence and arguments in that manner. Such an approach would help to obviate the risk that the jury might award excessive damages to unnamed class members based on harms they did not suffer, while ensuring that FCRA class actions can effectively vindicate the substantial public interest in the "[a]ccuracy and fairness of credit reporting," 15 U.S.C. 1681(a) (emphasis omitted), particularly in cases where each consumer's recovery would be too small for individual suits to be feasible.

B. The Court of Appeals' Typicality Analysis Was Incomplete

While much of the district court's class-certification analysis was correct, the court did not fully consider the implications of respondent's particularly severe injuries, see pp. 4-5, *supra*, for the typicality analysis. And the court of appeals summarily concluded that, because respondent's claims were based on the same legal theory as those of the other class members, and arose out of the same course of conduct by petitioner, Rule 23's typicality requirement was satisfied. See Pet. App. 39-40. That analysis was insufficient.

The court of appeals should have considered in addition whether proof of respondent's claim—which focused heavily on his experience of being denied credit to purchase a car, and on the embarrassment, confusion, and other difficulties that experience occasioned—would substantially and accurately advance the claims of the absent class members who did not demonstrate that they had suffered similar harms. The court also should have considered the extent to which the jury's choice of an appropriate statutory-damages award for each class member would depend on individualized proof. See *Stillmock*, 385 Fed. Appx. at 277 (Wilkinson, J., concurring specially). And because the courts below did not recognize the concerns that respondent's atypical injuries created, they did not consider whether other options short of denying class certification—such as limiting respondent's testimony—might be appropriate.

This Court therefore should vacate the judgment below and remand the case to permit the court of appeals to reconsider its typicality analysis in light of the principles discussed above. A remand will also permit the court of appeals to consider the forfeiture arguments that respondent has raised in this Court. See Br. in Opp. 3-4, 21-22 & n.3. Although petitioner opposed class certification and sought decertification based on respondent's atypical injuries, see pp. 5-6, *supra*, respondent has suggested that any typicality problems could have been cured if petitioner had objected to respondent's testimony or offered different jury instructions and a different verdict form. See Br. in Opp. 3-4, 21-22 & n.3. Respondent did not raise that argument in his court of appeals brief, however, see Resp. C.A. Br. 26-31, and petitioner disputes whether any forfeiture

occurred, see Pet. Cert. Reply Br. 8-9. Given the fact-intensive and case-specific nature of the parties' disagreement on this point, resolution of the issue would appropriately be left to the courts below on remand.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

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FEBRUARY 2021

APPENDIX

1. 15 U.S.C. 1681a(a)-(h) provides:

Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) CONSUMER REPORT.—

(1) IN GENERAL.—The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

(2) EXCLUSIONS.—Except as provided in paragraph (3), the term "consumer report" does not include—

(A) subject to section 1681s–3 of this title, any—

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person

makes the disclosures to the consumer required under section 1681m of this title; or

(D) a communication described in subsection (*o*) or (x).[1]

(3) RESTRICTION ON SHARING OF MEDICAL INFORMATION.—Except for information or any communication of information disclosed as provided in section 1681b(g)(3) of this title, the exclusions in paragraph (2) shall not apply with respect to information disclosed to any person related by common ownership or affiliated by corporate control, if the information is—

(A) medical information;

(B) an individualized list or description based on the payment transactions of the consumer for medical products or services; or

(C) an aggregate list of identified consumers based on payment transactions for medical products or services.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained

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[1] See References in Text note below.

directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

2. 15 U.S.C. 1681e(b) provides:

Compliance procedures

(b) Accuracy of report

Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information

concerning the individual about whom the report relates.

3. 15 U.S.C. 1681g provides in pertinent part:

Disclosures to consumers

(a) Information on file; sources; report recipients

Every consumer reporting agency shall, upon request, and subject to section 1681h(a)(1) of this title, clearly and accurately disclose to the consumer:

(1) All information in the consumer's file at the time of the request, except that—

(A) if the consumer to whom the file relates requests that the first 5 digits of the social security number (or similar identification number) of the consumer not be included in the disclosure and the consumer reporting agency has received appropriate proof of the identity of the requester, the consumer reporting agency shall so truncate such number in such disclosure; and

(B) nothing in this paragraph shall be construed to require a consumer reporting agency to disclose to a consumer any information concerning credit scores or any other risk scores or predictors relating to the consumer.

* * * * *

(c) Summary of rights to obtain and dispute information in consumer reports and to obtain credit scores

(1) Commission[2] summary of rights required

(A) In general

The Commission[2] shall prepare a model summary of the rights of consumers under this subchapter.

(B) Content of summary

The summary of rights prepared under subparagraph (A) shall include a description of—

(i) the right of a consumer to obtain a copy of a consumer report under subsection (a) from each consumer reporting agency;

(ii) the frequency and circumstances under which a consumer is entitled to receive a consumer report without charge under section 1681j of this title;

(iii) the right of a consumer to dispute information in the file of the consumer under section 1681i of this title;

(iv) the right of a consumer to obtain a credit score from a consumer reporting agency, and a description of how to obtain a credit score;

(v) the method by which a consumer can contact, and obtain a consumer report from, a consumer reporting agency without charge, as

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[2] So in original. Probably should be "Bureau".

provided in the regulations of the Bureau prescribed under section 211(c)[3] of the Fair and Accurate Credit Transactions Act of 2003; and

(vi) the method by which a consumer can contact, and obtain a consumer report from, a consumer reporting agency described in section 1681a(w)[3] of this title, as provided in the regulations of the Bureau prescribed under section 1681j(a)(1)(C) of this title.

(C) Availability of summary of rights

The Commission[4] shall—

(i) actively publicize the availability of the summary of rights prepared under this paragraph;

(ii) conspicuously post on its Internet website the availability of such summary of rights; and

(iii) promptly make such summary of rights available to consumers, on request.

(2) Summary of rights required to be included with agency disclosures

A consumer reporting agency shall provide to a consumer, with each written disclosure by the agency to the consumer under this section—

(A) the summary of rights prepared by the Bureau under paragraph (1);

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[3] See References in Text note below.

[4] So in original. Probably should be "Bureau".

(B) in the case of a consumer reporting agency described in section 1681a(p) of this title, a toll-free telephone number established by the agency, at which personnel are accessible to consumers during normal business hours;

(C) a list of all Federal agencies responsible for enforcing any provision of this subchapter, and the address and any appropriate phone number of each such agency, in a form that will assist the consumer in selecting the appropriate agency;

(D) a statement that the consumer may have additional rights under State law, and that the consumer may wish to contact a State or local consumer protection agency or a State attorney general (or the equivalent thereof) to learn of those rights; and

(E) a statement that a consumer reporting agency is not required to remove accurate derogatory information from the file of a consumer, unless the information is outdated under section 1681c of this title or cannot be verified.

4. 15 U.S.C. 1681n(a)-(b) provides:

Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

5. 15 U.S.C. 1681*o*(a) provides:

Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.