No. 20-297

IN THE
Supreme Court of the United States

TRANSUNION LLC,
Petitioner,

v.

SERGIO L. RAMIREZ,
Respondent.

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

BRIEF OF AMICUS CURIAE PUBLIC JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

Public Justice is a nonprofit legal advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct.[1] The organization maintains an Access to Justice Project that pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of workers, consumers, and people whose civil rights have been violated to seek redress for their injuries in the civil court system. As part of its Access to Justice Project, Public Justice has appeared before this Court as amicus curiae in previous cases presenting important issues regarding Article III standing and Rule 23 class actions, including *Spokeo, Inc. v. Robins* and *Tyson Foods, Inc. v. Bouaphakeo*.

SUMMARY OF ARGUMENT

TransUnion seeks to trivialize the harm it caused by falsely labeling 8,185 innocent people as potential terrorists or criminals with an old-fashioned analogy about leaving a defamatory letter in a desk drawer. Pet. Br. 36. But the information TransUnion collected about potential matches to the Office of Foreign Assets Control (OFAC) database and sold to its customers through its OFAC Advisor product was never intended to remain dormant in a desk drawer, nor is that how the information was used.

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[1] Pursuant to Rule 37.6, Amicus affirms that no counsel for any party authored this brief in whole or in part, and no person or entity other than Amicus, its members and its counsel has made a monetary contribution to support the brief's preparation or submission. Both parties have granted blanket consent to merits-stage amicus briefs.

To the contrary, that information was part of a booming information economy in which data about consumers is bundled into "products" like OFAC Advisor and sold and resold to companies who rely on that information to make decisions about loaning money, hiring workers, renting apartments, or offering insurance. TransUnion earns money from bundling and selling these information products, and the more sold, the more TransUnion profits.

But when the information contained in these products is inaccurate—as it was with respect to OFAC Advisor for all 8,185 members of the class—it is less like a dormant letter in a desk drawer and more like a ticking time bomb. The question is not *whether* the inaccurate information about the class members in OFAC Advisor will be shared with a TransUnion customer, for sharing the information is the entire purpose of the product. It is merely a question of *when*.

This omnipresent risk of dissemination is an ongoing actual injury to every member of the class that was both concrete and particularized, for it is precisely the sort of risk that Congress intended to mitigate when it passed the Fair Credit Reporting Act (FCRA) in general and 15 U.S.C. § 1681e(b)'s maximum possible accuracy requirement in particular. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016). The fact that TransUnion continued using name-only matching for OFAC Advisor without any additional safeguards to improve accuracy until at least December of 2013 made it all but a mathematical certainty that every class member's ticking time bomb would detonate during the damages period for the § 1681e(b) claim—which, as

Respondent points out, spanned nearly four years, not just the seven months in 2011 when TransUnion sent the two separate mailings to class members. JA464-65; Resp. Br. 8-9. And while waiting for those time bombs to explode, the class members suffered other types of injuries on top of the risk of false information spread recognized in *Spokeo*: from emotional harm to forgoing economic opportunities and delaying life transitions that would entail a credit inquiry.

TransUnion continued using a name-only matching procedure to trigger "hits" in its OFAC Advisor product long after a jury in *Cortez* found that name-only matching procedure to violate the FCRA, and long after that jury verdict was upheld on appeal, *Cortez v. Trans Union, LLC*, 617 F.3d 688 (3d Cir. 2010). TransUnion even continued using a name-only matching procedure after the Treasury Department, who manages OFAC, wrote TransUnion a letter expressing its concern about the rate of false positives in TransUnion's product. JA66-67. This willful violation of the FCRA's accuracy-promoting provisions injured every member of the class in multiple concrete and particularized ways, conferring Article III standing upon them.

ARGUMENT

I. Buying and Selling Consumer Data Is a Multi-Billion-Dollar Industry that Permeates Every Corner of Modern Commercial Life.

Before any American in the 21st century rents an apartment, purchases insurance, or opens a bank account, she can expect the other party to that business transaction to have done its homework about her. Often this homework entails requesting a copy of

the consumer's credit report from one or more of the "big three" consumer reporting agencies—Experian, TransUnion, and Equifax—which maintain files on over 200 million American consumers based on data furnished by 30,000 lenders, other companies, and government agencies.[2] *See also* JA376 (TransUnion witness testifying to banks and insurance companies typically requesting credit reports). More than one *billion* credit reports are issued every year, an average of five reports for every consumer.[3]

Lenders conduct these credit inquiries to determine whether, and on what terms, to offer a mortgage, car loan, credit card, or private student loan. Such "hard" credit inquiries are also routinely made by cell phone and internet providers and utility companies as part of the account initiation process.[4]

While consumers must give permission for lenders to conduct hard inquiries, a variety of so-called "soft inquiries" are also conducted on a regular basis about which the consumer would generally remain unaware unless they happened to request a copy of their own

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[2] Fed. Trade Comm'n, Section 319 of the Fair and Accurate Credit Transactions Act of 2003: Sixth Interim and Final Report Federal Trade Commission Report to Congress Concerning the Accuracy of Information in Credit Reports (2015), https://www.ftc.gov/system/files/documents/reports/section-319-fair-accurate-credit-transactions-act-2003-sixth-interim-final-report-federal-trade/150121factareport.pdf.

[3] Experian, *Experian Consumer Alert*, https://www.experian.com/consumer/ca_accuracy_report.html (last visited Mar. 8, 2021).

[4] John Ganotis, *Credit Report Inquiries*, Credit Card Insider (Apr. 16, 2020), https://www.creditcardinsider.com/learn/credit-inquiries/.

credit report during the relevant time period. Soft inquiries include pre-screened promotional offers for new loans or credit cards, as well as maintenance inquiries from creditors with whom the consumer already has an account; these maintenance inquiries, which can occur as frequently as once a month, can result in changes to the consumer's existing credit limits or interest rates. Ganotis, *supra* note 4. But soft inquiries arise in other more surprising contexts as well, including an increasing number of hospitals that run soft inquiries before providing medical services.[5]

In addition to the three main credit reporting agencies, a number of specialty consumer reporting agencies gather more specific consumer data relevant to particular types of transactions. The information collected by these niche players in the information economy can affect the premiums a consumer is offered for life, long-term care, or homeowners insurance, as well as whether a bank will allow that consumer to open a checking account or whether an employer will hire them.[6] For example, companies specializing in medical information gather data about consumers' prescription drug purchases and medical conditions and share it with insurance companies considering whether to issue a life insurance policy

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[5] PJ Randhawa & Erin Richey, *Here's Why Some Hospitals Run Credit Checks on Patients*, KSDK (Nov. 16, 2020), https://www.ksdk.com/article/news/investigations/hospitals-want-your-credit-score-for-what/63-b360768d-a138-40f6-b572-e3fa0bc95526.

[6] Jay Fleischman, *What You Need to Know About the Hidden Consumer Reporting Agencies*, Shaev & Fleischman, P.C. (Apr. 6, 2018), https://www.consumerhelpcentral.com/specialty-consumer-reporting-agencies/.

and what premium to charge.[7] Other specialty companies gather and sell data about retail product return and exchange, bank account closures, and personal property ownership; some of the reports generated by these companies are marketed to landlords for screening tenants, to employers for screening job applicants, or to companies that market subprime loans to low-income or credit-impaired consumers.[8]

All in all, the buying and selling of consumer information is a large and growing sector of the modern economy, which was profiled by 60 Minutes in a 2014 feature with an emphasis on how data on purchase histories and internet searches has become a valuable commodity.[9] By November 2019, the data broker industry was estimated to be worth approximately $200 billion.[10]

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[7] Consumer Fin. Protection Bureau, *How Can I Find Out What's in My Medical Payment History?* (Jan. 31, 2019), https://www.consumerfinance.gov/ask-cfpb/how-can-i-find-out-whats-in-my-medical-payment-history-en-1837.

[8] Consumer Fin. Protection Bureau, *List of Consumer Reporting Companies*, https://www.consumerfinance.gov/consumer-tools/credit-reports-and-scores/consumer-reporting-companies/companies-list/ (last visited Mar. 8, 2021).

[9] Steve Croft, *The Data Brokers: Selling Your Personal Information*, CBS News (Mar. 9, 2014), https://www.cbsnews.com/news/the-data-brokers-selling-your-personal-information/.

[10] David Lazarus, *Shadowy Data Brokers Make the Most of Their Invisibility Cloak*, L.A. Times (Nov. 5, 2019), https://www.latimes.com/business/story/2019-11-05/column-data-brokers.

II. TransUnion Is a Major Player in this Information Economy.

As the Ninth Circuit noted in its opinion in this case, TransUnion recognized a business opportunity in 2002 after Congress passed the PATRIOT Act and created the list of Specially Designated Nationals maintained by OFAC. Pet. App. 2 (describing TransUnion's creation of the OFAC Advisor product). Individuals on the OFAC list are prohibited from doing business in the United States, and any company that engages in transactions with those on the list is subject to substantial fines. *Id.* TransUnion's OFAC Advisor product purports to assist businesses in complying with the OFAC prohibitions by alerting them to individuals on the OFAC list. *See* Pet. Br. 9.

OFAC Advisor is not the only specialty product TransUnion has created to monetize and market the vast quantities of consumer information it possesses. It also offers TrueRisk, a product it markets to homeowner and auto insurance providers with the assurance that it will allow them to "price policies more accurately and competitively."[11] Another separate, but related, offering is Driver Risk, which uses court records along with other data to create detailed reports of driving history.[12] And while these proprietary TransUnion products may contain data from a consumer's credit file, unlike the raw data in

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[11] TransUnion, *TrueRisk Insurance Underwriting Solutions*, https://www.transunion.com/product/truerisk (last visited Mar. 8, 2021).

[12] TransUnion, *Driver Risk Insurance Risk Assessment Tools*, https://www.transunion.com/product/driverrisk (last visited Mar. 8, 2021).

the file itself, consumers do not have a right to access the contents of reports compiled through these specialty "products," until they become the basis of an adverse action taken against that consumer. 15 U.S.C. § 1681m(a).

That's not the end of the list. For landlords TransUnion offers SmartMove tenant screening[13]; for employers, it offers ShareAble for Hires.[14] And it even offers a suite of "non-FCRA alternative data options" which it markets as "an aggregated, networked view of public and private non-FCRA regulated information."[15] All of these products are marketed directly to end users like landlords, employers, insurance companies, and auto financing companies.

A separate component of TransUnion's business is its relationship with credit report resellers like Open Dealer Exchange, to whom TransUnion sells credit reports and add-on products like OFAC Advisor and who in turn sell that information to car dealerships and others making lending and sales decisions. JA62-64. In total, TransUnion's sale of consumer data

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[13] TransUnion, *Independent Landlord Survey Insights* (Aug. 7, 2017), https://www.mysmartmove.com/SmartMove/blog/landlord-rental-market-survey-insights-infographic.page.

[14] TransUnion, *The New Pre-Employment Screening Tool Helping Small Businesses Make Big Decisions Faster* (Apr. 28, 2020), https://www.transunion.com/blog/shareable-for-hires-the-new-pre-employment-screening-tool-helping-small-businesses-make-big-decisions-faster.

[15] TransUnion, *Alternative Data*, https://www.transunion.com/product/alternative-data (last visited Mar. 8, 2021).

directly and through resellers contributed to revenue of $2.7 billion in 2020, a 2.28% increase from the previous year.[16]

III. Congress Enacted the FCRA's Maximum Possible Accuracy Requirements Precisely Because Inaccurate Information Poses a Material Risk of Harm.

Although the information economy was not the multi-billion-dollar behemoth it is now when Congress passed the FCRA in 1970, Congress was already seeing the economic and reputational harms that high-volume communication of consumer information without accuracy safeguards causes. Indeed, Congress enacted the FCRA's maximum possible accuracy requirements to protect consumers from exactly what happened to the class here: the risk that "tragic results" will occur when credit reporting agencies inaccurately confuse individuals with similar names. 115 Cong. Rec. 2410, 2411 (1969). In other words, Congress identified that there is a material risk of real harm that stems from inaccurate credit reporting—including *specifically* with regard to inaccurate name-matching—and sought to prevent that risk by enabling consumers to bring maximum-accuracy suits for statutory damages.

Prior to the FCRA's 1970 enactment, increasing quantities of personal information were exchanged electronically with virtually no regulation. This resulted in frequent inaccuracies in consumer reports.

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[16] Macrotrends, *TransUnion Revenue 2011-2020*, https://www.macrotrends.net/stocks/charts/TRU/transunion/revenue (last visited Mar. 8, 2021).

Id. at 2411. And though the FCRA was also motivated by other concerns, such as confidentiality, inaccurate information was "the most serious problem in the credit reporting industry." *Id.* And the very first category of inaccurate information Congress identified as problematic was credit reporting agencies' confusing the credit information of individuals with similar names. *Id.*

These inaccuracies troubled Congress because they put consumers at risk of suffering monumental harms: loss of credit, employment, housing, and reputation. "As Representative Sullivan remarked, 'with the trend toward . . . the establishment of all sorts of computerized data banks, the individual is in great danger of having his life and character reduced to impersonal 'blips' and key-punch holes in a stolid and unthinking machine which can literally ruin his reputation without cause, and make him unemployable.'" *Dalton v. Cap. Associated Indus., Inc.*, 257 F.3d 409, 414 (4th Cir. 2001) (quoting 116 Cong. Rec. 36570 (1970)).[17]

Given the ubiquity and impact of the credit reporting agencies' information on the daily lives of Americans, even a small rate of inaccuracy was unacceptable to Congress because of the risks any material inaccuracies posed to consumers. Supporters of the bill explained that, because the composition of those whose reports are inaccurate "is constantly

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[17] *See also* Hearing on S. 823 Before the Subcomm. on Fin. Institutions of the S. Comm. on Banking and Currency, 91st Cong. 2 (1969) ("In a free society there is no place for protected character assassination masquerading under the guise of a credit report." (statement of Sen. William Proxmire)).

shifting," "[e]veryone is a potential victim of an inaccurate credit report. If not today, then perhaps tomorrow." 115 Cong. Rec. at 2411.[18]

At the heart of the new statute's focus on accuracy was its requirement that consumer reporting agencies "follow reasonable procedures to assure maximum possible accuracy." 15 U.S.C. § 1681e(b); *see* U.S. Br. 15 ("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."). In order to ensure consumers are able to police the accuracy of their reports, the FCRA also contains a variety of provisions requiring notice and disclosures. *E.g.,* 15 U.S.C. § 1681b(b)(3)(A) (establishing pre-adverse employment action notice requirement); § 1681b(b)(4)(B) (requiring notification upon conclusion of national security investigation); § 1681g (requiring full file disclosure to consumers along with a summary of rights); § 1681m(a) (requiring notice of adverse action based on consumer report).

And yet, between 1970 and 1996, the legislative objective of accuracy remained unfulfilled. At least in part, that was because consumers could only seek actual damages, making the maximum-accuracy provision difficult to enforce. Lawrence D. Frenzel,

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[18] One senator explained that even a one percent rate of inaccuracy was unacceptable because a 99 percent rate of accuracy would be "small comfort to the 1 million citizens whose reputations are unjustly maligned." 115 Cong. Rec. at 2411. Here, of course, TransUnion's product has a *100 percent* rate of inaccuracy. JA484.

Fair Credit Reporting Act: The Case for Revision, 10 Loy. L.A. L. Rev. 409, 429-30 (1977). Though inaccuracies cause real harms, these harms proved difficult to prove in litigation, and litigation often resulted in only nominal monetary damages. *Id.*[19]

The result? Reporting agencies made a rational economic decision to flout the law because it was cheaper for them to pay nominal damage awards in litigation than to fully comply with the FCRA's accuracy requirements. Inaccuracies in credit reports were the top complaint to the Federal Trade Commission. 142 Cong. Rec. S11869 (daily ed. Sept. 30, 1996). Decades after the FCRA was enacted, studies showed that forty-eight percent of consumer credit reports contained errors, and twenty percent contained errors serious enough to cause denials of credit. Hearing before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance, and Urban Affairs, 102d Cong. 12 (1991) (Serial No. 102-45).

To address these deliberate violations of the FCRA, Congress added a provision allowing for statutory damages, but imposed the substantial limitation that it only be available in circumstances where consumers could prove that an FCRA violation was "willful." 15 U.S.C. § 1681n(a)(1)(A); Consumer Credit Reporting Reform Act of 1996 (Public Law 104-208, the Omnibus Consolidated Appropriations Act

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[19] Even Sergio Ramirez here seeks only statutory damages. Though he was undoubtedly injured when his credit report inaccurately stated he was listed as a terrorist, it would be difficult to determine actual damages for his embarrassment and for the car having to be in his wife's name only.

for Fiscal Year 1997, Title II, Subtitle D, Chapter 1).

In sum, Congress enacted the FCRA, including its statutory damages provisions, to protect consumers from the risk of the potentially "tragic" harms that result from materially inaccurate credit reports—particularly those inaccuracies that stem from similar-name mix-ups.

IV. Each Member of the Class Suffered Actual, Concrete, and Particularized Injury from TransUnion's Willful Violation of the FCRA's Maximum Possible Accuracy Requirements.

Where Congress has identified and sought to correct a particular concrete harm by creating a private right of action to address it, and where the defendant's conduct has caused that precise harm to every member of the class, as TransUnion has here, the injury-in-fact element of standing is satisfied. Nothing more is required. *Spokeo*, 136 S. Ct. at 1549.

TransUnion seeks to downplay the severity of the harm it has caused by misconstruing a stipulation about the number of class members whose inaccurate OFAC data was shared with "*potential credit grantors*" during a small subset of the damages period, JA48, repeatedly claiming this stipulation somehow proves that 75% of the class never suffered dissemination of the inaccurate information to *any* third party.

TransUnion also describes the class as underinclusive. Pet. Br. 36. TransUnion has a point: Its willful violations of § 1681e(b) actually injured far more than 8,185 people. *See* JA784 (TransUnion used name-only matching to place OFAC flags on more

than 200,000 consumers' credit reports in one year alone). But this ignores the additional, particularized injuries that members of the class here suffered, or that the jury could reasonably have inferred they suffered, based on the fact that they all requested their credit files from TransUnion and thus demonstrated a particular level of concern with the information those files contained.

A. The Material Risk that Harmful False Information Will Be Disseminated Is Sufficient, Without More, to Create an Actual Concrete Injury.

As Respondent persuasively explains (Resp. Br. 23-27), the claim here mirrors historic defamation causes of action. But while *Spokeo* noted that both history and the judgment of Congress are "instructive," 136 S. Ct. at 1543, nothing in *Spokeo requires* that there be a historic analogue for there to be standing to bring a statutory claim.

To the contrary, some concrete, intangible injuries that Congress has seen fit to protect against via statute have no "close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 1549; *see, e.g.*, 15 U.S.C. § 1691a(1) (Equal Credit Opportunity Act protecting credit applicants from discrimination in credit transactions based on race, sex, or marital status); 29 U.S.C. § 2102(a) (Worker Adjustment and Retraining Notification Act requires employers to provide 60 days' notice before mass layoffs).

As explained in Part III *supra*, one of the chief injuries Congress sought to protect consumers from when it passed the FCRA was the risk that inaccurate

information, particularly inaccurate, damaging information based on name confusion, would be included in their credit reports. While this Court observed that not all inaccuracies would "work any concrete harm," citing an inaccurate ZIP code as an example, *Spokeo*, 136 S. Ct. at 1550, inaccurately being labeled as a national security threat falls on the opposite end of the concreteness spectrum from this benign inaccuracy: In addition to the general reputational harm of being mislabeled a terrorist, businesses are flat-out prohibited from transacting with individuals on the OFAC list. U.S. Br. 4.

Every class member was placed at material risk of having highly damaging, false information about them disseminated because of TransUnion's actions. The judgment of Congress in passing the FCRA is enough to establish this material risk as a concrete, particularized harm that occurred as soon as TransUnion violated the FCRA's maximum accuracy requirements. Requiring additional proof of actual dissemination—or of additional harm traceable to that dissemination—to establish standing, as TransUnion and its amici ask this Court to do, would nullify the judgment Congress made in 1996 when it created a statutory damages remedy for those harmed by willful violations of the FCRA's accuracy-promoting provisions.

B. TransUnion Misconstrues the Stipulation to Underestimate the Number of Class Members Whose Inaccurate OFAC "Match" Information Was Disseminated.

The "material risk of harm" standard for concreteness established in *Spokeo* turns on the gravity of the harm based on the nature of the

inaccuracy; it does not turn on the likelihood of dissemination. *See Spokeo*, 136 S. Ct. at 1550 (no concrete harm would result if the information was accurate, or inaccurate but unlikely to lead to an adverse outcome). But even if the likelihood of dissemination is relevant to the Article III inquiry, TransUnion paints an extremely misleading picture of that likelihood when it cites the stipulation as evidence that for 6,332 class members the inaccurate OFAC information was never disseminated to "any third party," a claim it repeats some two dozen times in its brief.

But the words "third party" appear nowhere in the stipulation. That stipulation instead speaks to the number of times that OFAC name screen data was provided to a "potential credit grantor." JA48 This is a distinction with a difference. The category "potential credit grantor" would include credit card issuers, mortgage lenders, and the dealership that was considering whether to offer Mr. Ramirez financing for his car purchase. But it would *not* include insurance companies, landlords, or potential employers—all third parties to whom TransUnion provides credit report data and who use that data to make highly consequential decisions that affect consumers' lives. *See* Part II *supra*.

Nor would the stipulation capture "soft" credit inquiries that do not require consumer authorization, like pre-screened promotional credit offers or maintenance inquiries on consumers' existing accounts. *See* Part I, *supra*. Thus, class members could have repeatedly been denied credit opportunities because of the inaccurate OFAC "match" or had the terms of their existing credit

accounts become less favorable without appearing on the list of 1,853 class members for whom a "potential credit grantor" initiated a hard credit inquiry.

And of course as noted by Respondent (at 30), the stipulation only covers the seven-month period in 2011 when TransUnion sent separate OFAC letters in response to requests from consumers for their credit file. The fact that 1,853 class members had the inaccurate OFAC information included in reports sent to potential credit grantors during that seven-month period suggests, given a uniform rate of dissemination, that it would have taken approximately 30 months for a potential credit grantor to receive that information for every class member. And the relevant period for establishing damages was not limited to the seven months covered by the stipulation; rather, it extends back to February of 2010 based on the FCRA's statute of limitations and extends forward to December 2013, based on TransUnion's admission at trial that it continued using a name-only matching procedure for identifying potential OFAC "hits," without any additional cross-checks for accuracy, until December 2013. JA464-65; JA475-76.

Respondent suggests that the risk of dissemination can be extrapolated by multiplication, describing the stipulation as covering one-sixth of the damages period. Resp. Br. 30. But this formulation likely *under*estimates the risk, for the seven-month period covered by the stipulation falls towards the beginning (months 12 through 18) of the 44-month damages period. Because class members likely asked TransUnion for their credit file data in anticipation of requesting a loan or some other action that would

trigger a credit inquiry, *see* U.S. Br. 17-21, the rate of hard credit inquiries likely increased in the months immediately following the period covered by the stipulation.[20] Further, the information in the record suggests that requests for credit reports with OFAC data were on the rise in the year following the class definition period: In February 2011, TransUnion sold 1.5 million credit reports that included its OFAC-match data, U.S. Br. 18, and in July 2012, that number was up 80 percent to 2.7 million, Resp. Br. 16.[21]

The only way that class members could mitigate the material risk that false and damaging information about them would continue being disseminated through the constantly flowing information economy would be to change their

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[20] Respondent correctly notes that *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013) is inapposite, for that case involves standing to seek an injunction and the test for when an injury is "imminent," as opposed to "actual." Resp. Br. 32-33. However, Respondent also uncritically repeats Petitioner's formulation of the test in *Clapper* as whether the injury is "certainly impending," ignoring the alternative formulation of "substantial risk of harm" articulated in *Clapper* and repeated by this Court thereafter. *Clapper*, 568 U.S. at 414 n.5; *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (treating the "certainly impending" and "substantial risk" standards as disjunctive). If these tests for imminent injury have any bearing on this damages case, this Court should also evaluate standing under the "substantial risk of harm" standard, which the evidence on this record easily satisfies.

[21] The substantial risk that each class member had the inaccurate OFAC "match" disseminated makes the class members here different from the plaintiff in *Casillas v. Madison Avenue Associates, Inc.*, 926 F.3d 329, 334 (2019) (Barrett, J.), who was not, in fact, personally at any risk of harm from the statutory violation in question.

behavior in ways that would constitute additional, concrete injuries for Article III purposes.

C. Though No Additional Injury Need Be Proven, the Facts the Jury Knew About the Class Supported Reasonable Inferences of Additional Concrete Injuries.

The only injury that the class needed to prove to establish standing was the risk that the inaccurate and damaging information about them would be disseminated. They have more than met that burden with the evidence of TransUnion's pattern of willful FCRA violations spanning at least 46 months, and the frequency with which TransUnion disseminates credit report data, including the OFAC Advisor add-on, directly and through resellers.

But it was eminently reasonable for the jury to infer that the class suffered other injuries as well. Because every member of the class requested their credit file from TransUnion, they demonstrated a level of interest in the data that file contained over and above that experienced by the population at large. TransUnion's suggestion that people with this elevated level of interest in the contents of their credit file would have no emotional reaction to learning their name was associated with a list of terrorists and drug traffickers, or that they might find this information helpful, strains credulity. Pet. Br. 31.

Similarly, the fact that most people request their credit files before making a large purchase, applying for a mortgage, or making other major life decisions raises the specter of how learning about the inaccurate OFAC "match" would affect those life plans. Class members may have been deterred from

seeking credit, applying for rental housing, or engaging in other market transactions they knew would likely trigger a credit inquiry. Or they may have delayed engaging in those transactions while seeking to learn from TransUnion or the Treasury Department whether their name in fact appeared on the OFAC list and, if so, what to do about it. Finally, even if they did not take time to investigate and dispute the erroneous OFAC designation, the jury could reasonably infer that class members would have made every subsequent job, rental, insurance, or credit application with a heightened level of anxiety and uncertainty, not knowing when or how the ticking time bomb in their credit file might unleash its destructive power.

These additional foreseeable injuries logically flowing from TransUnion's willful FCRA violations put the concrete harm identified by Congress in its real-world context. They demonstrate that having inaccurate, negative information about oneself circulating in the modern information economy, without knowing the full extent of how that information is being used or how to remove it, harms consumers in multiple ways, both tangible and intangible. Every member of the class suffered these harms when TransUnion refused to improve the accuracy of its OFAC name screen methodology despite repeated warnings from the jury and appellate court in *Cortez*, from hundreds of complaining consumers, and from the Treasury Department itself.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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March 9, 2021