No. 20-297

IN THE

Supreme Court of the United States

TRANS UNION LLC,

Petitioner,

v.

SERGIO L. RAMIREZ,

Respondent.

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

BRIEF OF COMPLEX LITIGATION LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The *amici* are law professors who teach and write in the field of federal civil procedure and complex litigation. *Amici* share an interest in presenting this Court with an impartial view on the function of the class action and its relationship to the law of Article III justiciability to inform the question presented in this case.[1] The complete list of signatories is as follows:

Christine P. Bartholomew, Professor of Law, University of Buffalo School of Law;

Sergio J. Campos, Professor of Law, University of Miami School of Law;

Maureen Carroll, Assistant Professor of Law, The University of Michigan Law School;

Brooke Coleman, Professor of Law & Associate Dean of Research & Faculty Development, Seattle University School of Law;

Myriam E. Gilles, Paul R. Verkuil Chair in Public Law, Benjamin N. Cardozo School of Law;

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties' letters of consent to the filing of this brief are on file with the Clerk.

Amici listed herein file in their individual capacity as scholars. *Amici* provide their institutional affiliation solely for purposes of identification.

Suzette Malveaux, Provost Professor of Law for Civil Rights, Director, Byron R. White Center for the Study of American Constitutional Law, University of Colorado Law School;

David Marcus, Professor of Law, University of California, Los Angeles School of Law;

Elizabeth Porter, Associate Dean for Academic Administration, Associate Professor and Charles I. Stone Professor of Law, University of Washington School of Law; and

Adam S. Zimmerman, Professor of Law, Loyola Law School, Los Angeles.

SUMMARY OF ARGUMENT

As interested professors of the law of complex litigation, we submit this *amici curiae* brief to make clear that issues concerning the law of justiciability under Article III presented by this case do not implicate or concern Federal Rule of Civil Procedure 23, the rule that governs class actions in federal court. In short, we write to assure the Court that this case raises no class action issues.

Respondent Sergio L. Ramirez brought this action against Petitioner Trans Union LLC (TransUnion), one of the largest credit reporting agencies in the United States, on behalf of 8,184 class members, each of whom (1) was falsely identified as a potential terrorist, drug trafficker, or other threat to national security on his or her credit report, and (2) did not receive guidance mandated by the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, on how to remove such a false and patently harmful accusation from his or her report. Based on the evidence presented at trial, the jury found that TransUnion's credit reports placed each class member at severe risk of being falsely identified as a terrorist, drug trafficker, or other threat to national security. The jury also found that TransUnion withheld from class members the information necessary to correct this error and remove the accusation from their credit reports. Ultimately, the jury found for the class members because it recognized that TransUnion had willfully interfered with their potential ability to participate in credit, employment, and retail markets.

Displeased with the outcome of the jury trial, TransUnion seeks to convert its challenges to each

class member's Article III standing into a case involving the proper application of Rule 23. But Rule 23 does not change the requirements of Article III standing. The same requirements of Article III standing that apply to non-class actions apply, and were in fact applied, to the class action here. The district court below treated each class member the same as it would have treated a plaintiff in a non-class action. TransUnion's attempt to minimize the harm it caused to each of the class members, at best, raises hollow issues concerning Article III. But its arguments absolutely do not raise any actual class action issues for this Court to resolve.

The only possible class action issue TransUnion raised can be easily disposed. TransUnion argues that class representative Ramirez does not satisfy the typicality requirement of Rule 23 because he testified at trial regarding his individual experiences underlying his claims. But TransUnion miscomprehends the "typicality" requirement. The typicality requirement requires only that a class representative bring a claim that does not deviate substantially from the claims of the remaining class members. As the courts below found, and as explained herein, Ramirez's claims were typical of the claims of the other class members.

Accordingly, we urge this Court to refrain from reaching class action issues that are simply not present in this case. Instead, we ask the Court to affirm the judgment below.

ARGUMENT

I. NO CLASS ACTION ISSUES ARE PRESENTED.

A. Rule 23 cannot, does not, and *did not* alter the requirements of Article III in this case.

Federal Rule of Civil Procedure 23 governs class actions in federal courts, permitting "[o]ne or more members of a class [to] sue or be sued as representative parties on behalf of all members." Fed. R. Civ. P. 23(a). A party seeking class certification must first show that:

(1) the class is "numerous" (the numerosity requirement);

(2) "there are questions of law or fact common to the class" (the commonality requirement);

(3) the representative party's claims or defenses are "typical" of those of the class (the typicality requirement); and

(4) the representative party "will fairly and adequately protect the interests of the class."

See Fed. R. Civ. P. 23(a)(1)–(4). After satisfying these prerequisites, a class representative "must satisfy at least one of the three requirements listed in Rule 23(b)." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011); *see also* Fed. R. Civ. P. 23(b)(1)–(3).

Ramirez brought this case under the third category of class actions defined in Rule 23(b). That category permits a party to maintain a class action if common issues of law and fact "predominate" the litigation and

the class action is "superior" to alternatives. Fed. R. Civ. P. 23(b)(3); *Wal-Mart*, 564 U.S. at 362.

The Rule 23(b)(3) category is designed to enable the litigation of numerous claims against a common defendant, even if some (or all) of those claims are too small to be brought individually. Rule 23(b)(3) does so because it "aggregat[es] many individual claims into a single suit and distribut[es] the costs of representation across the entire claimant group." 1 William B. Rubenstein, *Newberg on Class Actions* § 1:7 (5th ed. 2020). As this Court has continually recognized in the context of Rule 23(b)(3) class actions:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *see also Amgen, Inc.* v. *Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 478 (2013) (quoting *Amchem*, 521 U.S. at 617); *cf. Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (noting "only a lunatic or a fanatic sues for $30"); *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) ("Only when all or almost all of the claims are likely to be large enough to justify individual litigation is it wise to reject class treatment altogether."). By allowing these types of claims to proceed in a representative fashion, Rule 23 also serves to promote "efficiency and economy of litigation," *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974), by avoiding the need for repetitious

filings, and "by preventing inconsistent adjudications," Rubenstein, *supra*, § 1:9.

Although Rule 23 enables the litigation of claims too small to be brought separately, Rule 23 cannot, and does not, change the requirements of Article III. *See* Fed. R. Civ. P. 82 (stating the principle that the rules of civil procedure shall not be construed "to extend . . . the jurisdiction of the district courts"); *see also* 28 U.S.C. § 2072(b) (providing that the rules of civil procedure "shall not abridge, enlarge or modify any substantive right"). Class action plaintiffs, like all litigants in federal court, must have standing to sue. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

This Court has previously addressed standing issues connected to the "unique significance of certification decisions in class-action proceedings," *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 78 (2013) (citing another source), but this case involves none of those circumstances. This is not a case, for example, where the defendant argues that the plaintiff's claim was mooted. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980). Nor is this a case where the plaintiff voluntarily dismissed his claim to create a final judgment for purposes of appealing the denial of class certification. *See Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017).

Instead, this case presented a straightforward application of Article III, and accordingly, the Ninth Circuit treated this case like any other non-class action case. Ramirez's claim and the claims of the

other 8,184 class members were tried before a jury, and evidence was presented as to the injuries sustained by each one of the class members. The parties, in fact, stipulated that TransUnion had improperly identified each class member as a terrorist, drug trafficker, or similar national security threat on their individual credit reports, and that all members received the same defective mailings as Ramirez. *See* Pet.App. at 14.[2]

Indeed, the Ninth Circuit expressly did *not* apply a special rule of standing in this case. It specifically "h[e]ld that *each* member of a class certified under Rule 23 must satisfy the bare minimum of Article III standing at the final judgment stage of a class action in order to receive monetary damages in federal court." Pet.App. at 17 (emphasis added). This is the same rule that applies to non-class litigation. Given this Court's view that "[r]esolution of the standing question should take place in the District Court or the Ninth Circuit in the first instance," there is no basis for remand. *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (vacating cy pres-only settlement, and "conclud[ing] that the case should be remanded for the courts below to address the plaintiffs' standing in light of *Spokeo*").

In short, the Rule 23(b)(3) class action at issue here cannot, does not, and *did not* alter the requirements of Article III that apply to all litigation. There is

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[2] Briefs are identified as Br. accompanied with the party name. Pet.App. is the Appendix to the Petition for Certiorari.

simply no class action issue for the Court to address here.

B. Each class member satisfied the requirements of Article III.

Standing is an "essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, (1) "the plaintiff must have suffered an 'injury in fact' that is "concrete and particularized" and "actual or imminent," (2) "there must be a causal connection between the injury and the conduct complained of," and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable or decision." *Id.* at 560–61 (citations omitted).

Although a plaintiff may recover damages for a statutory violation without a showing of tangible harm, this Court in *Spokeo, Inc. v. Robins* made clear that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." 136 S. Ct. at 1547–48. Accordingly, this Court concluded that "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1543.

But this Court went on in *Spokeo* to state that "[t]his does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness." *Id.* With respect to the FCRA, this Court in *Spokeo* specifically pointed out that "Congress plainly sought to curb the dissemination of false information by adopting procedures designed *to decrease that risk*."

Id. at 1550 (emphasis added). Thus, where, as here, a credit reporting agency knows of and fails to retract false information on a credit report that would disadvantage that consumer's ability to contract with a third party, that consumer suffers a sufficiently concrete injury. This injury arises even before the consumer contracts with a third party, as the false information contained in the credit reporting agency's credit report is a complete rupture of the consumer's ability to form contracts. In sum, the specter of economic harm is present and real.

Accordingly, once TransUnion falsely labeled each class member as a terrorist, a drug trafficker, or a threat to the nation, each class member suffered a sufficiently concrete injury for purposes of Article III standing. Each class member was falsely identified as a terrorist, drug trafficker, or other national security threat. Pet.App. at 88. Each class member was so falsely labeled because, as TransUnion admits, it only matched each class member's name to the Office of Foreign Asset Control's (OFAC) database of terrorists or other national security threats, without verifying whether this information was correct. *See* Pet. Br. at 9–10. And class members, many of whom contacted TransUnion about removing this damaging information, received two vague and confusing letters that failed to notify them of their rights to challenge the OFAC designation. *See* Resp. Br. at 13–14. Each of these actions separately violated the FCRA with respect to all class members. And TransUnion does not contest the evidence or facts supporting the jury's findings of these violations.

But under the guise of Article III, TransUnion hangs its hat on the proposition that about 75% of the 8,185 class members never had their credit report disseminated to a third party.[3] Pet. Br. at 19. TransUnion even suggests that the "constitutional minimum" may require each class member to prove that they suffered a complete denial of credit as the result of this false information. *Id.* at 25. In TransUnion's view, a class member's injury is only sufficiently concrete if he or she "suffered a[] credit denial or other adverse consequence from the dissemination of the materials to third parties." *Id.* at 19. But "a plaintiff . . . need not allege any *additional* harm beyond the one Congress has identified." *Spokeo*, 136 S. Ct. at 1549 (emphasis in original) (citing cases). And, as this Court already recognized, Congress enacted the FCRA to reduce the risk of real harm caused by false information in credit reports. *See id.* at 1550.

Far from policing the boundaries of federal courts, TransUnion asks this Court to abandon the "risk of real harm" standard recognized in *Spokeo*. But the lower courts have had no difficulty applying the risk-of-harm standard and drawing common-sense, straightforward distinctions between procedural violations that create no material risk of harm and those that do. *See Fox v. Dakkota Integrated Sys., LLC*, 980 F.3d 1146, 1154–55 (7th Cir. 2020)

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[3] While TransUnion repeats this argument throughout its brief as if it were fact, Ramirez explains that third party publication of all class members' credit report can be reasonably inferred from the evidence heard at the trial court. *See* Resp. Br. at 30–31.

(maintaining "inherently sensitive" biometric data in an unlawful way does create a real risk of harm); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 934–36 (11th Cir. 2020) (printing a few digits of credit card number on a receipt does not create a material risk of theft); *Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1066 (D.C. Cir. 2019) (printing all digits of a credit card in and of itself creates a material risk of theft, even if the receipt never falls into someone else's hands); *Sayles v. Advanced Recovery Sys., Inc.*, 865 F.3d 246, 250 (5th Cir. 2017) (recording invalid debts on a credit report, even without dissemination, exposes that person "to a real risk of financial harm"); *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 1000, 1003 (11th Cir. 2016) (failing to record the satisfaction of a mortgage within a required time period, if nothing happens to the person and he sues the bank after the mortgage's satisfaction is indeed recorded, results in no real risk of harm); *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016) (indefinite retention of a customer's information, without more, does not create any real risk of harm).[4] The legislature provided for liability in each of the foregoing instances, and the federal courts of appeals have honored this legislative determination while affirming the core logic of Article III.

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[4] The Ninth Circuit's decision below fits this pattern of sensible decision-making perfectly. The fact that TransUnion needed only seven months to disseminate highly damaging, false information about 25% of the class members confirms that it exposed all of them to "a realistic danger of sustaining a direct injury." *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988).

TransUnion further argues that the Ninth Circuit and Ramirez fail to account for this Court's opinion in *Clapper v. Amnesty International, USA*, 568 U.S. 398, 409 (2013). But *Clapper* does not apply when Congress has enacted a statute to protect against what it has identified as a "risk of real harm." Indeed, a number of courts post-*Clapper* have applied this "risk of real harm" standard and found concrete injuries based on risks of harm similar to those suffered here without asking whether they are "certainly impending." *See, e.g.*, *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 696 (7th Cir. 2015) (victims of a data breach at a department store had established injury-in-fact by alleging a "substantial risk of harm" from the theft of their data); *see also Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App'x 384, 388 (6th Cir. 2016) (finding standing, and noting that "although it might not be 'literally certain' that Plaintiffs' data will be misused, . . . there is a sufficiently substantial risk of harm that incurring mitigation costs is reasonable" (citation omitted)).

Ultimately, TransUnion claims that the credit reports containing false information about class members are "no different from [ ] defamatory letter[s] left in a desk drawer." Pet. Br. at 36. But this metaphor fails to capture the reality of credit reports and their significance in economic markets. A credit report that falsely labels a consumer as a terrorist, drug-trafficker, or other national security threat is not a defamatory letter tucked away in a desk drawer, hidden from external view. Credit reports are critical for consumers in the process of purchasing consumer goods, obtaining credit, and gaining employment. TransUnion's reductive analogy falls flat because

credit reports are actively disseminated to third parties by the class members' unknowing conduct, as any attempt to be an active economic participant requires a consumer's consent to disclose the information contained in their individual credit reports.

In this case, the credit report is more akin to a letter of recommendation that has been prepared and uploaded into the Online System for Clerkship Application and Review (OSCAR). Like a letter of recommendation that is only shared with a third party at the request of the party that seeks to benefit from a glowing recommendation for his or her clerkship application, consumers consent to the release of their individual credit reports to third parties each time they try to buy a car, qualify for a mortgage, or apply for student loans, with the reasonable expectation that they will be able to do so successfully based on accurate information.

Accordingly, false and damaging information contained in credit reports is not only easily conveyed to prospective employers and loan underwriters, but is *inevitably* shared with the very people the consumer would least want to see such damaging information. Indeed, only a hermit living in a cave, completely isolated from the realities of the economic world, would be shielded from the damaging effects of TransUnion's actions. TransUnion *never* leaves a defamatory letter in a desk drawer. Rather, much like a false and damaging letter of recommendation uploaded and readily available in OSCAR, the letter here—which calls the individual a terrorist, trafficker,

or threat—is already out in public and brandishing each class member with a scarlet T.

One example of an appropriate analogy for this situation is a claim for tortious interference with prospective relations. And the prospective contractual relationships that Congress has protected under the FCRA mirror those protected by the common law. *See* Restatement (Second) of Torts § 766B cmt. c (1979) (recognizing that the tort protects "the prospect of obtaining employment or employees, the opportunity of selling or buying land or chattels or services, and any other relations leading to potentially profitable contracts"). As Congress recognized, in order to protect these interests for consumers in our modern economy, consumers must be able to access accurate credit profiles. Today, expedience in doing so is the difference between a worker who transitions to a new job and one who misses out. Expedience is the difference between the family that qualifies for a mortgage to purchase a home and another family that would have bought that home but for errors on its credit report. In this competitive economic marketplace, 8,185 individuals cannot scrutinize their credit reports for false information every time that opportunity knocks or they try to participate in the American economy. With a civil suit under the FCRA, Congress has attempted to avoid an economic pitfall because credit reporting agencies possess outcome-determinative power over consumers' ability to acquire property and transact business.

For all of the above reasons, the risk to which TransUnion subjected each class member is the

quintessential concrete injury for purposes of Article III standing.

II. A CLASS REPRESENTATIVE REMAINS TYPICAL EVEN IF, AS HERE, HE TESTIFIES TO HIS PARTICULAR CIRCUMSTANCES.

TransUnion also maintains the lower courts incorrectly found the typicality requirement of Rule 23 satisfied. Rule 23(a)(3) requires the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). There is no question that the claims Ramirez pursued were not just typical, but the very same as the claims of the class. Nor does TransUnion identify any atypical defenses involved in the case.

Boiled down, TransUnion asks this Court to use Rule 23(a)(3) as a backdoor for what is, at most, a weak Rule 403 challenge. *See* Fed. R. Evid. 403 (allowing a trial court to exclude evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."). TransUnion argues typicality is foreclosed because of the mere possibility that details regarding how Ramirez learned about his claim risked prejudicing the jury in the class' favor. *See* Pet. Br. at 43 (discussing Ramirez's testimony as to the embarrassment, hindrance obtaining credit, and vacation cancellation caused by the FCRA violations).

TransUnion waived this evidentiary issue. *See* Fed. R. Evid. 103(a). So instead, it seeks to convert

typicality into a super-evidence rule for its own benefit, one that protects defendants by requiring the class representative's trial testimony convey the "average" class member's experience. Whether the class representative's claims are typical of the class would no longer be the pivotal inquiry. This proposed reinterpretation is untethered the plain text of Rule 23(a)(3) and contrary to existing jurisprudence.

Like commonality, typicality serves as a guidepost for "determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). The goals of protection of the class and efficiency are best served by leaving the clear meaning of typicality intact. So long as there is a common course of conduct that leads to claims or defenses shared by the class and class representative, typicality exists. Factual variances as to how the named representative learned of the defendant's wrongdoing should not alter the typicality determination. Situated in standard typicality jurisprudence, the Ninth Circuit's holding that Ramirez's claims were typical of the class is ordinary and correct.

A. Defining typicality around the alleged wrongdoing protects the class.

Rule 23(a)(3)'s typicality requirement is a protective measure aimed at shielding absent class members. Typicality ensures "the named plaintiffs have incentives that align with those of absent class

members so as to assure that the absentees' interests will be fairly represented." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) (quoting *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994)). When a class representative's claims are typical of the class members, "then her pursuit of her own interest will necessarily benefit the class as well." 1 William B. Rubenstein, *Newberg on Class Actions* § 3:28 (5th ed. 2020).

All that is required is the named representative's claims and defenses be aligned. While Ramirez shares the same claims as the class, perfect overlap is not necessary for typicality. *See, e.g.*, *Deiter v. Microsoft Corp.*, 436 F.3d 461, 467 (4th Cir. 2006) (noting typicality does not require "that the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned"). Nor does the representative need to have suffered an identical injury to class members; distinct injuries do not preclude typicality. *See In re Cmty. Bank of N. Va.*, 418 F.3d 277, 303 (3d Cir. 2005) ("Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice." (quoting *Baby Neal*, 43 F.3d at 58)); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 184 (3d Cir. 2001) ("[A] violative practice can support a class action embracing a variety of injuries so long as those injuries can all be linked to the practice." (quoting *Baby Neal*, 43 F.3d at 63)). The real fear is that if a class representative is "preoccupied by defenses unique to [him]," absent class members may suffer. *Beck v. Maximus, Inc.*, 457 F.3d 291, 296–97 (3d Cir.

2006) (citation omitted) (collecting typicality cases with unique defenses).

Here, TransUnion did not identify how its conduct toward Ramirez differed from its conduct towards the class. The embarrassment, hindrance obtaining credit, and vacation cancellation that TransUnion's common course of conduct caused did not trigger any unique defenses at trial. Nor has TransUnion identified in what way Ramirez's experience distorted the fact finding as to how its course of conduct affected the class. Rather, TransUnion contends that Ramirez's incentives to litigate this case exceeded those of the absent class members. *See, e.g.*, Pet. Br. at 43. To suggest that Ramirez was atypical because he did *too good* of a job for the class misapprehends typicality as the drafters originally intended it, and misapprehends typicality as it has been consistently applied for decades.[5] As Charles Alan Wright, a member of the committee that drafted the revised Rule 23 wrote, typicality "is probably no more than a

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[5] Congress demonstrated this same understanding of typicality through its enactment of the Private Securities Litigation Reform Act of 1995 (PSLRA), which "includes a presumption that the most adequate plaintiff is the one who moves first and has the *largest* financial interest in the case." *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1807 n.3 (2018) (emphasis added) (quoting 15 U.S.C. § 78u–4(a)(3)(B)(iii)(I)). The Conference Committee Report on the PSLRA noted that the claims of such investors "generally will be typical." *See* H.R. Rep. No. 104-369, at 34 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 730, 733 ("Institutional investors and other class members with large amounts at stake will represent the interests of the plaintiff class more effectively than class members with small amounts at stake. The claims of both types of class members generally will be typical.").

cryptic way of saying that the representative must not have interests that conflict with those he purports to represent." Charles Alan Wright, *Class Actions*, 47 F.R.D. 169, 171 n.14 (1969); Charles Donelan, *Prerequisites to a Class Action Under New Rule 23*, 10 B.C. Indus. & Com. L. Rev. 527, 534 (1969) (describing typicality as "a further effort to insure that the representative of the class will act for the best interests of absent class members"); *see also Amchem*, 521 U.S. at 626 n.20 ("The adequacy-of-representation requirement 'tend[s] to merge' with the commonality and typicality criteria of Rule 23(a), which 'serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" (alterations in original) (citation omitted)). Unsurprisingly, the Petitioner cites no case for the proposition that typicality functions as a protection for the defendant against sympathetic representatives.

To be clear, the "fear" that Ramirez would be distracted by unique defenses never materialized. *Cf. J. H. Cohn & Co. v. Am. Appraisal Assocs., Inc.*, 628 F.2d 994, 999 (7th Cir. 1980) ("The fear is that the named plaintiff will become distracted by the presence of a possible defense applicable only to him so that the representation of the rest of the class will suffer."). Rather than distracting Ramirez from his representative obligations, his added incentive ensured a vigorous and extensive protection of class interests. To the extent Ramirez was unique, he was uniquely positioned and motivated to protect class interests. This is not the sort of uniqueness that

typicality is intended to address. The facts that led Ramirez to learn of TransUnion's misconduct did not hinder the class members; the common course of conduct from the three shared claims instead led to a vindicating judgment for the entire class. The named representative protected the class at the district level, leading to a favorable judgment which the Circuit Court correctly affirmed.

Because the case at hand is post-trial, there is no need to speculate as to whether Ramirez was able to fulfill his representative responsibilities. TransUnion's claim is merely that Ramirez was too sympathetic a representative. TransUnion does not—and cannot—identify defenses that distracted Ramirez from fulfilling his role protecting the interests of the class.

B. Aligning typicality with the elements of the claim advances efficiency.

In addition to protecting the class, the lower courts' application of typicality advances Rule 23(a)(3)'s efficiency goals. Typicality exists when "each class member's claim arises from the same course of events, and a class member makes similar legal arguments to prove the defendant's liability." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (citation omitted); *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 643 (6th Cir. 2006). Consequently, typicality intersects with Rule 23(a)(2)'s commonality requirement. *Falcon*, 457 U.S. at 157 n.13. Whereas the claims of the class cannot be common without a uniting issue, typicality requires the class representative's claim be common with the class. When, as here, the claim involves a single course of

conduct, class certification allows the judiciary to efficiently resolve the collective claims.

Variances as to other aspects of the class representative's narrative should not defeat typicality. This understanding is shared by courts across the country. *See, e.g.*, *Custom Hair Designs by Sandy v. Cent. Payment Co.*, 984 F.3d 595, 604 (8th Cir. 2020) ("Factual variations in the individual claims will not normally preclude class certification . . . ." (citation omitted)); *Menocal v. GEO Group, Inc.*, 882 F.3d 905, 917 n.5 (10th Cir. 2018) ("The only factual differences among the class representatives' experiences pertain to their specific interactions with [detention facility] guards and whether they witnessed firsthand other individual detainees being sanctioned or threatened with solitary confinement for refusal to clean. But these factual differences do not defeat typicality . . . ."); *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 598 (3d Cir. 2009) ("[F]actual differences between the proposed representative and other members of the class do not render the representative atypical . . . ."); *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 65 (S.D. Ohio 1991) (finding typicality even though class members "like snowflakes, necessarily have different and unique characteristics").

This case does not justify deviating from this well-established understanding of typicality. The core of the class claim is TransUnion's common course of conduct, thus justifying the lower court's certification decision and the Ninth Circuit's affirmance. A jury specifically found that TransUnion engaged in class-wide wrongdoing: TransUnion placed false OFAC

alerts on class members' credit reports, marketed this information to third parties, then provided misleading and incomplete disclosures to class members. This common course of conduct led the jury to find three violations of the FCRA: 15 U.S.C. § 1681e(b); 15 U.S.C. § 1681g(a)(1); 15 U.S.C. § 1681g(c)(2). Pet.App. at 15.

Allowing individuals who experienced these three statutory violations to litigate collectively advanced judicial efficiency by avoiding a multiplicity of litigation and helped to frame the action. All class members: (1) had TransUnion falsely associate their names with an OFAC alert; (2) requested copies of their credit file from TransUnion; and (3) received accompanying materials from TransUnion that omitted statements as to their FCRA-related rights. Just like any other class member, the named class representative experienced all three dimensions of TransUnion's wrongful conduct.

Under TransUnion's reinterpretation of typicality, it would not be enough that the class representative's claim be "typical" of the class. Rather, factual differences as to how a class representative learned of a defendant's transgression would preclude typicality, even if irrelevant to a claim or a defense. TransUnion's reinterpretation of typicality would require the class representative's claim, *and the class representatives' individual experience*, to be "identical" of the class, a radical deviation from the plain "typical" text of Rule 23(a)(3).

TransUnion thus would propose a new meaning of typicality that permits a defendant to use irrelevant factual differences between the class representative

and the class to redefine the class. No longer would a plaintiff be the "master of his complaint." *Valencia v. Allstate Tex. Lloyd's*, 976 F.3d 593, 597 (5th Cir. 2020). Instead, a defendant could use typicality as a sword to gerrymander the class definition to defeat certification. A defendant could identify a fact from the class representative's circumstance or narrative, and then use that single incidental fact to effectively reshape or eliminate the class. In the case at hand, TransUnion has attempted to shift the focus from its wrongdoing to the class representative's response to its misconduct. To TransUnion, the only class for whom Ramirez would be typical would consist of those who suffered "a similarly embarrassing experience in being denied credit," Pet. Br. at 14—in other words, an uncertifiable class of one.

This reinterpretation of typicality would undermine the efficiency gains intended by class action procedures. *Am. Pipe*, 414 U.S. at 553 (basing its interpretation on "the efficiency and economy of litigation which is a principal purpose of [Fed. Rule Civ. Proc. 23 class actions]"). If TransUnion's interpretation of typicality controlled, separate classes, with separate class representatives, would be necessary for, say, a class member who became angry rather than embarrassed upon learning of defendant's wrongdoing—even though her idiosyncratic reaction is not an element of the claim. This would result in courts litigating the same elements in separate suits, forgoing the efficiency gains of the class device. *Cf. Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 562 (6th Cir. 2007) ("[Defendant's] argument that individual issues of liability predominate over common issues, and

thereby preclude a finding of typicality, is unavailing.").

In challenging typicality, TransUnion's primary grievance is that Ramirez defined a class for which he is representative. Defining a class to enhance typicality is hardly problematic. Particularly, when, as here, it advances efficiency and ensures absent class members interests are protected.

CONCLUSION

As set forth above, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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