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 AMICI CURIAE PUBLIC CITIZEN AND PUBLIC CITIZEN FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Public Citizen and Public Citizen Foundation (collectively, Public Citizen) are nonprofit consumer advocacy organizations with members and supporters nationwide. Public Citizen advocates before Congress, administrative agencies, and the courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen often represents its members' interests in litigation and as amicus curiae.

Public Citizen believes that class actions are an important tool for seeking justice where a defendant's wrongful conduct has harmed many people and resulted in injuries that are large in the aggregate, but not cost-effective to redress individually. In that situation, a class action offers the best means for both individual redress and deterrence, while also serving the defendant's interest in achieving a binding resolution of claims on a broad basis, consistent with due process. Public Citizen has often participated as amicus curiae or counsel for a party in cases involving arguments that, if accepted, would impair the utility of class actions. *See*, *e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Amgen, Inc. v. Conn. Retirement Plans & Trust Funds*, 568 U.S. 455 (2013). Public Citizen submits this brief to help clarify the proper application of standing principles in the context of class actions.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae made a monetary contribution to preparation or submission of the brief. Counsel for both parties have consented in writing to its filing.

SUMMARY OF ARGUMENT

The question on which this Court granted certiorari asks "[w]hether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury." Pet. i. Based on that question, a reader would assume that the court below held that a class action could provide monetary remedies to uninjured class members, and would expect the case to center on how, and at what stage in the proceedings, courts should apply standing principles to damages class actions comprising both injured and uninjured members. In fact, however, the court of appeals explicitly held that monetary relief in a class action tried to judgment must be limited to class members shown to have suffered injury. The court further held that *all* members of the class in this case had suffered injury.

Petitioner Trans Union's merits brief thus does not focus on the procedural issue of how to address standing questions in a class action. Rather, it concentrates on the fact-specific, antecedent question whether class members in this particular case—other than the named plaintiff, who all agree suffered Article III injury-in-fact ample to confer standing—were injured by Trans Union's violations of the Fair Credit Reporting Act (FCRA) with respect to information in the class members' credit files. The merits briefs of respondent Sergio Ramirez and the United States, in turn, explain how Trans Union's FCRA violations inflicted common injuries on all members of the class.

Some of Trans Union's amici, however, do address the question of how courts should consider issues of standing in class actions. An understanding of the proper answer to that question, moreover, is

necessary to supply the analytical framework that determines the consequences of this Court's resolution of the case-specific standing issues that the parties' briefs debate. This Court's standing and class-action decisions establish that the court of appeals' approach in this case was sound: Article III's requirements are fully satisfied if a court's judgment in a class action awards monetary relief only to class members who suffered injury in fact.

As this Court has held, certification of a damages class action requires a showing that the *class representatives* have standing and that the class satisfies the requirements set forth in Rule 23. Exclusion of uninjured class members, if there are any, need not occur until the end of the case. These holdings comport with Article III principles that permit a court to exercise jurisdiction over an action if any plaintiff has standing, while precluding courts from granting remedies to persons who have not suffered injury. This Court's holding in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), confirms that if, at the conclusion of a case, some members of the class as originally defined prove to be uninjured, their exclusion at that point satisfies the requirements of both Article III and Rule 23.

To be sure, a determination at the time of certification that a proposed class definition would include large numbers of uninjured members may, under some circumstances, support the conclusion that common issues do not predominate or that a class action would not be a superior method of adjudication, as required under Rule 23(b)(3); or it may indicate that the class definition should be narrowed. But the circumstances here would not justify any such conclusion. Rather, here, the named plaintiff presented evidence,

credited by the ultimate finder of fact, that was sufficient to support relief to the entirety of the class. Moreover, even if the class's evidence had not been fully credited, it would have been possible for any class members ultimately found to be uninjured to be excluded from the class and from the scope of relief, while still satisfying Rule 23(b)'s requirements of predominance and superiority. Certification under such circumstances was entirely proper, as was the judgment providing relief only to individuals who had suffered injury.

The brief of the United States, while agreeing that the judgment below is consistent with Article III's requirements, wrongly argues that the certification of the class and the judgment may have to be set aside because the class representative's claims were not typical of those of the class. According to the United States, the typicality problem is that the class representative testified to injuries that go beyond those suffered by other class members. The United States' standing argument, though, demonstrates the fallacy of its typicality argument. As the United States explains, the class representative's testimony about his experiences illustrated the precise material risk of harm that was common to all class members and constituted an Article III injury. The testimony thus directly supported the standing of every other member of the class. Far from rendering his claims atypical, the class representative's testimony emphasized his fitness as a representative of the class's interests.

ARGUMENT

I. A class action that provides monetary relief only to class members who suffered injury does not violate Article III.

A. The Ninth Circuit did not endorse the award of monetary relief to uninjured class members.

The Ninth Circuit did *not* hold that a class action may award monetary relief to class members who suffer no Article III injury. The court explained that, under its precedents, "only the representative plaintiff need allege standing *at the motion to dismiss and class certification stages*." Pet. App. 16 (emphasis added).

As to the distinct "question of who must have standing at the final stage of a money damages suit when class members are to be awarded individual monetary damages," the court supplied an equally unambiguous answer: "[E]ach 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 recover monetary damages in federal court." *Id*. at 17.

The court held that the latter principle "clearly follows from Supreme Court precedent, as well as the fundamental nature of our judicial system." *Id*. It cited this Court's holding in *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017), that a party must have standing to obtain a money judgment. Pet. App. 18. And it adopted the view expressed by Chief Justice Roberts, concurring in *Tyson Foods*:

> Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not. The Judiciary's role is limited "to

> provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm."

136 S. Ct. at 1053 (quoting *Lewis v. Casey*, 518 U.S. 343, 349 (1996)), *quoted in* Pet. App. 18. Indeed, the court of appeals stated that "[t]o hold otherwise would directly contravene the Rules Enabling Act, because it would transform the class action—a mere procedural device—into a vehicle for individuals to obtain money judgments in federal court even though they could not show sufficient injury to recover those judgments individually." Pet. App. 17 (citing 28 U.S.C. § 2072(b)).

Applying these principles, the court of appeals affirmed the judgment for the class because all of the class members who would receive monetary relief (which included the entire membership of the class) had suffered an Article III injury and had standing to pursue their claims. The court's determination in no way rested on the proposition that a court may award damages to a class member who lacks standing.

Because, as the briefs of respondent Ramirez and the United States explain, the court of appeals was correct in concluding that each class member suffered an injury in fact, the court of appeals' judgment must be sustained. Regarding the proven violations of 15 U.S.C. § 1681e(b), Ramirez showed below that all members' credit reports identified them as potential terrorists because of Trans Union's failure to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates," as that section requires. Whether the resulting injury is conceived of as a "material risk of harm," *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1550 (2016), *see* U.S. Br. 9–10, 15–21, as

a deprivation of the valuable, personal entitlement to maintenance of accurate credit files by regulated credit-reporting entities, *see Spokeo*, 136 S. Ct. at 1553–54 (Thomas, J., concurring), as publication of false information to third parties, *see* Resp. Br. 27–31, or as all of the above, every class member suffered that injury—not just those that, according to Trans Union's incomplete records, had their reports disseminated to potential credit providers during one seven-month period.

Similarly, as to the proven violations of 15 U.S.C. §§ 1681g(a)(1) and 1681g(c)(2)(A), Ramirez showed that all members suffered informational injury when they requested their credit files and received responses that failed to disclose that the *credit files* designated them as terrorists and that did not provide a summary of their rights with respect to the accuracy of *that information* in the files. These informational injuries alone are sufficient to sustain the judgments with respect to every class member because, at Trans Union's request, the jury was instructed to provide a remedy for only one violation per class member, and every class member showed *two* violations for which they had clear informational standing, irrespective of their standing for the reasonable procedures claim.

B. This Court's decisions recognize that classes including uninjured members may be certified, if relief is limited to members who suffered injury.

No one disputes that if, as the court of appeals correctly held, all class members have standing, Article III permits them to receive their share of a money judgment if the class prevails on the merits of its claims. Thus, this Court can affirm the court of

appeals' ruling on class members' standing, and the judgment in favor of the class, without addressing the details of how courts should deal with the possible inclusion in a class definition of persons who may ultimately be found *not* to have suffered injury. Nonetheless, to provide guidance to the lower courts on a recurring issue, the Court should place its resolution of the fact-specific FCRA standing issues within a broader procedural framework defining when and how standing issues should be addressed in the context of class actions under Rule 23.

The Article III and Rule 23 principles articulated in this Court's decisions demonstrate that the Ninth Circuit correctly approached the standing issues posed by class actions. This Court's precedents make clear that the possibility—or even likelihood—that a class may comprise uninjured members does not preclude certification and maintenance of a class action under Rule 23. The critical point by which uninjured class members (if any) must be excluded from the class and from receiving a share of a judgment for damages (or from the binding effect of an adverse judgment) is when the class action is resolved on the merits.

At the certification stage, if many uninjured members seem to be included in a class definition, the district court should consider their presence in its determination under Rule 23(b)(3) of whether common questions predominate and whether a class action is superior to individual litigation for resolving them. *See*, *e.g.*, *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136–38 (9th Cir. 2016). Courts should also, however, be careful not to confuse standing questions with merits issues (such as whether liability and damages have been proved for all members of the class) and must remain mindful that the existence of individual

questions concerning class members' entitlement to damages is generally not a bar to certification. *See Tyson Foods*, 136 S. Ct. at 1045 ("When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.' " (quoting 7AA Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 1778, at 123–24 (3d ed. 2005) (footnotes omitted))).

1. This Court's decision in *Tyson Foods* illustrates that the possible inclusion of uninjured class members at the time of certification is not impermissible, let alone a defect that goes to a court's Article III jurisdiction. In that case, defendant Tyson argued in its petition for certiorari that a class may not be certified it if contains uninjured members. Its merits brief, however, "concede[d] that '[t]he fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured.'" 136 S. Ct. at 1049. This Court held that because Tyson had abandoned the argument, "the Court need not, and does not address it." *Id.* Had the possible presence of uninjured class members presented a jurisdictional barrier to adjudication under Article III, however, Tyson's concession would not have obviated the need to address the point, because a party's failure to contest standing does not eliminate a federal court's "obligation to assure [itself] of litigants' standing under Article III." *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (citations omitted). The Court's statement in *Tyson Foods* that

it need not address the argument that a class may not contain uninjured members indicates that the question does not go to Article III jurisdiction, as does the Court's disposition: affirming the judgment but remanding for proceedings in which uninjured class members (if there were any) could be identified so they did not share in the damages award. *See Tyson Foods*, 136 S. Ct. at 1050.

That the possible inclusion of uninjured class members does not go to whether a class action presents a justiciable case or controversy is consistent with longstanding Article III principles. This Court has held time and again that an Article III "case or controversy" exists when one plaintiff has standing. *See Horne v. Flores*, 557 U.S. 433, 446–47 (2009) ("[W]e have at least one individual plaintiff who has demonstrated standing .... Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977))); *see*, *e.g.*, *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

Although the Court has announced this principle most clearly in cases involving injunctive relief, it applies irrespective of the relief sought: If a single class member's injury suffices to create a justiciable controversy over her entitlement to redress, the controversy exists whether the *form* of redress is compensatory or prospective. Standing principles apply to actions aimed at either "obtaining compensation for, or preventing, the violation of a legally protected right." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772–73 (2000). If a single plaintiff

"demonstrate[s] standing … for *each form* of relief sought," the court has jurisdiction to resolve the plaintiff's claims. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (emphasis added); *see generally* 13B Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 3531.15 (3d ed. updated 2020). Accordingly, "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009) (Posner, J.); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 31 (1st Cir. 2015); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 359–60 (3d Cir. 2015); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1197 (10th Cir. 2010). Jurisdiction to entertain a class action depends on whether "any named plaintiff has alleged [injuries] that are sufficiently concrete and particularized to support standing." *Frank*, 139 S. Ct. at 1046.

By contrast, a binding adjudication yielding a judgment on the merits presupposes a case or controversy between the parties to be bound by that judgment. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–104 (1998). Article III jurisdiction "is vital … if the court proposes to issue a judgment on the merits." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (citation omitted). "[N]o federal court has jurisdiction to enter a judgment unless it provides a remedy that can redress the plaintiff's injury." *Uzuegbunam v. Preczewski*, No. 19-968, slip op. 10 (U.S. Mar. 8, 2021). To obtain a merits judgment awarding monetary relief to members of a class, a plaintiff must establish by a preponderance of the evidence that they are entitled to that relief, including that they have the necessary standing. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)

(holding that plaintiffs have the burden of establishing "each element" of the case on which they bear the burden of proof "with the manner and degree of evidence required at the successive stages of the litigation").

2. In applying these principles, courts must take care to distinguish between failure to establish standing and failure to prove the merits of a claim. In particular, where actual damages are required for recovery, failure to prove them is not a defect in Article III standing, but a failure of proof on an element of the claim. *See Uzuegbunam*, slip op. 11–12 (distinguishing between particularized injury necessary to satisfy Article III and damages as an element of a claim). The failure to establish that all class members have proved compensable damages forecloses neither certification nor the entry of a judgment binding on all class members.

Indeed, given that the possibility that some class members may not have suffered an Article III *injury* does not bar certification, the arguable presence in the defined class of members who may be unable to demonstrate elements of a cause of action (such as actual damages, where that is an element of the claim) also cannot pose an insuperable obstacle to maintenance of a class action and its prosecution to judgment. Where the presence of class members properly alleging injury presents a justiciable case, the *merits* question of whether any or all of them can demonstrate entitlement to relief does not affect a court's authority to entertain their claims and issue a merits judgment, favorable or unfavorable. *See Bouaphakeo v. Tyson Foods, Inc.*, 593 F. App'x 578, 585 (8th Cir. 2014) (opinion of Benton, J., respecting the denial of rehearing en banc) ("The failure of some employees to

demonstrate damages goes to the merits, not jurisdiction."), *aff'd*, 136 S. Ct. 1036 (2016).

Stated succinctly, jurisdiction "is not defeated" by a plaintiff's inability to demonstrate he can "actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946); *see also Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depend on the merits of the plaintiff's contention that particular conduct is illegal."); *see*, *e.g.*, *Stuart v. State Farm Fire & Cas. Co.*, 910 F.3d 371, 377 (8th Cir. 2018) (holding that when a party asserts a "legal injury" such as breach of contract, inability to prove damages is a merits question).

To hold otherwise would require *every* damages plaintiff—in both individual and class-action cases—to prove her case to avoid a jurisdictional dismissal under Federal Rule of Civil Procedure 12(b)(1). If a plaintiff who failed to establish damages at trial lacked standing, the proper resolution would not be judgment in defendant's favor but a jurisdictional dismissal without res judicata effect. *See Steel Co.*, 523 U.S. at 94. Such a novel rule would waste judicial resources, benefit neither plaintiffs nor defendants, and contradict the longstanding recognition that failure to prove entitlement to relief requires a merits judgment. *See Gen. Inv. Co. v. N.Y. Cent. R.R.*, 271 U.S. 228, 230–31 (1926); *Bell*, 327 U.S. at 682; *Kohen*, 571 F.3d at 677 ("[W]hen a plaintiff loses a [damages] case [at trial] because he cannot prove injury the suit is not dismissed for lack of jurisdiction.").[2]

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[2] This Court's statement in *Uzuegbunam* that "[a]s soon as a plea for compensatory damages fails at the factfinding stage of litigation, that plea can no longer support jurisdiction for a favorable judgment," Slip op. 10, cannot reasonably be understood as

(*Footnote continued*)

Likewise, Rule 23 does not require a showing that all class members can succeed on the merits in showing their entitlement to compensatory, statutory, or nominal damages for the statutory or common-law claims asserted. Such a requirement would "put the cart before the horse" by conditioning certification on the plaintiffs' "first establish[ing] that [they] will win the fray." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 460 (2013). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 466. "[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the method best suited to adjudication of the controversy fairly and efficiently." *Id.* at 460 (alterations omitted). Thus, "[h]ow many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014); *see also Nexium*, 777 F.3d at 21–22; *Kohen*, 571 F.3d at 677.

If the ultimate resolution of a case on the merits may be that some class members are entitled to damages and others are not, the proper course is not to deny class certification but to ensure that, at the end of the day, any award of damages to the class is allocated so that class members with meritorious damages claims receive their proper share and those

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suggesting that the failure of a claim for compensatory damages deprives a court of jurisdiction to enter *any* merits judgment (including one *adverse* to a plaintiff). Such a reading would convert a huge swath of merits judgments in favor of defendants into subject-matter-jurisdiction dismissals. The Court may wish to clarify this point.

without such claims take nothing. *See Tyson Foods*, 136 S. Ct. at 1050. Moreover, where the result of a class action is that some class members' claims fail on the merits while others prevail, the proper disposition is neither to decertify the class nor to exclude from it those members who lost on the merits, but to protect the defendant by binding all class members to the judgment, win or lose. *See*, *e.g.*, *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6h Cir. 2012).

Thus, in *Tyson Foods*, where the parties agreed that some class members had not shown an entitlement to damages, this Court rejected the assertion that the class must be decertified. Instead, the Court remanded for further proceedings to determine whether the award could be properly apportioned. *See* 136 S. Ct. at 1049–50. The Chief Justice's concurring opinion in *Tyson Foods*, while expressing doubt about the ultimate outcome, agreed that if there were a methodology for allocating damages only to those class members who suffered damages, both certification of the class and judgment in its favor could be sustained. *See id.* at 1051–53 (Roberts, C.J., concurring).

3. Conditioning certification on proof that all class members were injured—or requiring decertification whenever a subset of a class failed to prove injury at trial—would create practical conundrums at odds with Rule 23's structure and purpose. Although Rule 23(c)(1)(A) requires certification at an "early practicable time," assessing class members' injuries at certification is often infeasible because the members' identities are unknown. For a class to "include persons who have not been injured by the defendant's conduct … is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims

may be unknown." *Kohen*, 571 F.3d at 677. This phenomenon merely "highlights the possibility that an injurious course of conduct may sometimes fail to cause injury to certain class members." *Torres*, 835 F.3d at 1136. "Such a possibility or indeed inevitability does not preclude class certification." *Kohen*, 571 F.3d at 677. In addition, because class certification can be revisited, *see* Fed. R. Civ. P. 23(c)(1)(C), Rule 23's central efficiency goals would be thwarted by requiring complete decertification upon a showing, at any stage, that *any* members of a certified class were uninjured.

Limiting Rule 23 certification to classes where the plaintiffs could prove at the time of certification that all members were injured would have a particularly severe impact on the utility of class actions in consumer, securities, and antitrust cases. This Court has recognized that such cases are often appropriate for certification under Rule 23(b)(3) because "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (citing Fed. R. Civ. P. 23, advisory comm. notes to 1966 amendment). However, violations in cases that affect large numbers of victims in similar ways—those most suited to class actions—are also likely to involve some potential class members who at least arguably did not suffer injury for some reason. Precluding certification unless the plaintiffs could prove at the outset that the class definition did not include any uninjured members would sacrifice the efficiencies of class proceedings and their deterrent effects on unlawful conduct. And given the relative ease with which such class members, if they proved to exist, could be weeded out at the damages phase in many cases, such curtailment of the use of

class actions would serve little practical purpose, while protecting wrongdoers against the consequences of their actions.

Limiting class actions to cases where the plaintiffs could prove at the certification stage that all class members suffered compensable injuries would also threaten legitimate use of class actions to pursue other types of substantive claims. *Tyson Foods* offers a prime example: The employer followed a uniform set of practices that denied payment of millions of dollars of wages required by law to hundreds of employees, but the evidence indicated that a small number of class members might not have suffered injuries entitling them to share in the damages award. *See* 136 S. Ct. at 1049–50. Had certification been precluded in such circumstances, the *injured* class members who had proved their entitlement to back wages would have gone uncompensated, and the employer would have retained substantial benefits from its violation of wage-and-hour laws.

Similarly, in Title VII cases using pattern-or-practice proof—generally available *only* in class actions or government enforcement actions, *see Chin v. Port Auth.*, 685 F.3d 135, 148–50 (2d Cir. 2012)—a court first adjudicates whether a discriminatory practice exists and then holds individualized hearings on each class member's injury and entitlement to a remedy. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360–61 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772–73 (1976). Limiting classes to plaintiffs who show injury at the outset would contradict *Franks*'s holding that such a showing is not necessary to class certification, but "become[s] material" only at the remedial stage. 424 U.S. at 772. As this Court has explained, "[a]t the initial, 'liability' stage of a pattern-

or-practice suit the [plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." *Int'l Bhd. of Teamsters*, 431 U.S. at 360.

Finally, adoption of a rule precluding maintenance of a class action if the class may include uninjured members—with the corollary that the class must be decertified, potentially years into the litigation, if any uninjured class members or members who have not suffered compensable damages are revealed—is unnecessary to prevent such class members from sharing in a money judgment. If the existence, or possible existence, of such members comes to light before or after trial, several procedural solutions are available: (1) narrowing the class; (2) summary judgment as to the uninjured members; (3) instructing the jury not to base any award of damages on uninjured individuals; and/or (4) requiring a process to identify such members (if any) and exclude them from sharing in a class-wide damages award. *See, e.g.*, *Tyson Foods*, 136 S. Ct. at 1049–50 (remanding for trial-court proceedings to determine whether class members who had no damages could be identified); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 617–18 (8th Cir. 2011) (noting that courts may amend class definitions or grant summary judgment to defendants on claims that turn out to be barred).

Again, in determining which of these courses to take, a district court should carefully determine whether the issue is truly one of lack of standing or failure of proof on the merits. Class members who were never *exposed* to the injurious conduct of the defendant may be excluded from the class and from the binding effect of the judgment, while those who properly claimed to suffer legal injury but cannot

prove damages should take nothing from the judgment but be subject to its binding effect. In any event, where a definable class has proved injury, liability, and entitlement to relief, the failure (for whatever reason) of claims of some class members should not deprive successful class members of the fruits of their victory. *See*, *e.g.*, *Bouaphakeo v. Tyson Foods, Inc.*, 214 F. Supp. 3d 748 (D. Iowa 2016) (remand proceedings).

4. Finally, although the possibility that some class members may not have suffered an injury common to members of the class is not by itself a reason to deny certification, it may in some cases be an indication that common issues do not predominate or that a class action is not a superior method of adjudication. For example, "the existence of large numbers of class members who were never exposed to the challenged conduct to begin with" can be "a flaw that may defeat predominance." *Torres*, 835 F.3d at 1136. The ultimate "need for a mechanism" to identify uninjured class members, if there is reason to believe they exist, *see* Pet. App. 11 n.6, may also be a consideration bearing on predominance and superiority.

At the same time, courts should not too readily conclude that arguments over the possible presence of uninjured class members defeat predominance and superiority. Where a "class as a whole was exposed" to a common course of unlawful conduct, *Torres*, 835 F.3d at 1137, common questions of liability may predominate and render a class action superior to individual adjudication even though an individualized damages phase will be required to determine which class members have suffered injuries that are compensable under governing substantive law. After all, Rule 23 "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to

classwide proof." *Amgen*, 568 U.S. at 469 (cleaned up). The need for an individualized damages phase is a common feature of class actions, not a bar to their certification. *See Tyson Foods*, 136 S. Ct. at 1045.

Here, moreover, under the plaintiff's theory of the case, injury, liability, and the proper amount of statutory damages for each class member were all issues capable of common proof. The plaintiff's evidence established that all members of the class suffered injury and provided a basis for class-wide damages calculations. Of course, that evidence was not incontestable—a triable issue of fact, by definition, never is—but it presented a common question that could be resolved for the class in its entirety. *See Amgen*, 568 U.S. at 465–67. For its part, Trans Union advances arguments that, if they were accepted at least partially, might suggest that one broad swath of the class lacked standing while another large segment (those whose false credit reports were concededly provided to potential creditors) had necessarily suffered injury. On that view of the issues, too, common issues would still predominate over individual ones, even if their resolution might point in different directions for different parts of the class.

Under such circumstances, certifying the class and proceeding to trial was proper. Even if the Court were to conclude that Trans Union's standing arguments had some merit, that conclusion would neither require wholesale decertification of the class, nor justify taking away the merits judgment in favor of class members who have standing even under Trans Union's theories. And, of course, *sustaining* the lower courts' class-wide determinations of injury will, necessarily, support affirmance of the judgment in favor of the class in its entirety. Either way, the court of appeals'

decision reflects the proper understanding of how standing issues should be resolved in the context of class-action proceedings.

II. The lower courts properly held that the class representative's claims were typical of the claims of the class.

The named plaintiff in this case sought the same relief, for the same violations, based on the same theory of injury as the rest of the class. Although he had arguably suffered additional injuries that other class members may not have suffered, he did not assert claims for actual damages based on those injuries, and the merits of his claim did not depend on those injuries. Thus, as respondent Ramirez's brief explains, the class satisfied the plain meaning of the sole textual requirement of Rule 23(a)(3)—that "the *claims or defenses* of the representative parties are typical of the *claims or defenses* of the class" (emphasis added). The case therefore met the "not demanding" test of typicality, which is intended to protect the class by ensuring that the representative's interests are aligned with those of other class members. 1 William B. Rubenstein, *Newberg on Class Actions* §§ 3:29, 3:28 (5th ed. updated 2020).

The brief of the United States, while persuasively arguing that all members of the class shared common injuries that support their standing to pursue all the class claims asserted by the class representative, asserts that the class representative may have failed the typicality test because, at trial, he testified to personal experiences that reflected additional injuries not shared by all class members. U.S. Br. 27–34. Again, Ramirez's brief explains that this argument reflects a misunderstanding of the purpose of the typicality

requirement. Resp. Br. 43. That purpose is not to protect defendants against a class representative who is too effective. *See id.* Rather, concerns about protection of defendants' rights are more properly served by the evidentiary and due process arguments that Trans Union waived in this case. *See id.* at 44–47 & nn. 11–13.

In any event, the argument of the United States makes no sense even on its own terms. As the United States explains at length, one way of describing the injury suffered by all class members in this case is that the members were subjected to the "material risk" that false information in their credit reports would harm them when used for its expected and intended purpose. U.S. Br. 15–21. Moreover, as the United States explains, the class representative's testimony about his experiences *illustrates* the material risk, recognized by Congress, of "harms that consumers may suffer if inaccurate information is placed in their consumer files." *Id.* at 15. As the United States further explains, the "actual injuries" to which the class representative testified, *id.* at 17, align precisely with the material risk of harm to which Trans Union exposed the entire class—a risk attributable to the nature of the inaccuracy in the reports, Trans Union's business model of supplying its terrorism alerts to third parties, and the intended use of the reports by those third parties. *Id.* The class representative's testimony about his experience exemplified each aspect of the risk to which Trans Union subjected every one of the more than 8,000 class members.

Where, as in this case, a class representative's testimony about the circumstances giving rise to his own claims directly supports the claims of each class member by illustrating how the defendant's illegal actions

posed a material risk to the entire class, the testimony cannot reasonably be deemed to render his claims atypical of the claims of the class. The United States' analysis of the common injury suffered by the class representative and the class confirms that his claims were typical.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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