No. 20-297

IN THE

Supreme Court of the United States

TRANSUNION LLC,

Petitioner,

v.

SERGIO L. RAMIREZ,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Consumer Advocates ("NACA") is a non-profit corporation formed in 1994 whose members are lawyers, law professors, and students whose practice or area of study involves consumer protection. NACA's mission is to promote justice for consumers by maintaining a forum for information sharing among consumer advocates and to serve as a voice for its members and consumers in the struggle to curb unfair and oppressive business practices.

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[1] Counsel for all parties filed blanket consents to the filing of amicus briefs. Pursuant to this Court's Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In passing the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, *et seq.*, Congress recognized that a consumer's information is a highly valuable asset, requiring protection from harms caused by false reporting. The potential for harm is even more prevalent today than when Congress passed the FCRA—with myriad consumer reporting agencies acting as brokers of all kinds of information including, as in this case, whether a person poses a national security threat and is thus barred from participating in the U.S. financial system.

When Congress passed the FCRA, it provided (like it has with certain other statutes) that consumers may seek statutory damages when the harms caused by a defendant's willful conduct are difficult or hard to measure. And the class action device—codified by Rule 23 of the Federal Rules of Civil Procedure—provides consumers with a valuable mechanism to hold defendants accountable for willful, systematic violations of the FCRA.

That is what happened in the trial court below, where Respondent Sergio Ramirez sued Petitioner TransUnion for labeling himself and thousands of others as terrorists. After a jury trial in which both sides were able to present evidence, the jury returned a verdict for Ramirez and the others he sought to represent.

This case is hardly the first class action trial to proceed to judgment. The verdict in this case, which provided identical statutory damages to all class members, was based upon TransUnion's uniform conduct as to the entire class. TransUnion, however,

blames the verdict on something else: the circumstances by which Ramirez discovered that TransUnion had labeled him as a terrorist. According to TransUnion, Ramirez's circumstances made him a potentially more sympathetic plaintiff than thousands of other class members and, even though TransUnion elected not to present evidence of other class members' circumstances, its rights were violated as a result. To be clear: it is unlikely that TransUnion would have taken any issue with Ramirez's ability to represent absent class members had the jury returned a defense verdict.

TransUnion thus asks this Court to impose an untenable approach to district courts below: allow only those named plaintiffs whose facts are identical to represent unnamed class members. But such an approach is contrary to Rule 23 and established precedent, and would serve no purpose other than to deter the vindication of meritorious consumer claims.

ARGUMENT

TransUnion takes the remarkable position that a named plaintiff does not satisfy Rule 23 when a jury would possibly find other, absent class members to be less sympathetic witnesses. *See* Pet.Br. 45. According to TransUnion, this "atypically sympathetic plaintiff" presented a case so strong that he violated Rule 23. Pet.Br. 45. Several other *amici* echo TransUnion's argument.

But TransUnion's typicality argument is problematic for at least two reasons. First, it would require that the parties agree on who should represent the putative class members, when no such process is required. Second, it would allow defendants to raise

challenges based upon their own, ineffective trial strategy. The creation of this new typicality rule is unwarranted.

I. Rule 23's "typicality" requirement does not require that the parties agree on a "perfect plaintiff."

TransUnion and several *amici* take the position that the judgment below should be reversed because its affirmance could result in class members being bound "by a judgment procured by a plaintiff whose idiosyncratic experiences generated a less favorable outcome than a typical class member[] would have secured." Pet.Br. 45. Conversely, they argue, allowing a so-called "perfect plaintiff" to represent the class may "expose the jury to inflammatory evidence and arguments that could not be presented in the suits of absent class members if they sued individually." *Id.*

TransUnion believes that the named plaintiff in this case had "home-run" facts concerning his experiences with TransUnion which "infected" the class. Pet.Br. at 43-44. The crux of TransUnion's argument is that, of the 8,185 class members who were labeled terrorists by TransUnion's product, Ramirez should not have been the one to bring his case to trial because his experience was "distinctly unpleasant." Pet.Br. 47. TransUnion's argument ignores that the burden of establishing Rule 23's requirements rests firmly upon the plaintiffs' shoulders; accordingly, allowing a defendant to select a class representative based upon his or her experiences with the defendant contravenes applicable precedent.

> [I]t is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified. When it comes, for instance, to determining whether 'the representative parties will fairly and adequately protect the interests of the class,' . . . it is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house.

Eggleston v. Chicago Journeymen Plumbers' Loc. Union No. 130, U.A., 657 F.2d 890, 895 (7th Cir. 1981).

No case requires that the parties agree on a "perfect plaintiff" to satisfy the typicality requirement of Rule 23. Typicality does not require that a named plaintiff's claims and class members' claims be "perfectly identical or perfectly aligned"; rather, "the representative's pursuit of his own interests must simultaneously tend to advance the interests of the absent class members." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466-67 (4th Cir. 2006) (finding that a named plaintiff was not typical in an antitrust case because different markets were involved for other class members). The question is whether the named plaintiff is able to advance the claims of the absent class members.

> The inherent logic of the typicality requirement is that a class representative will adequately pursue her own claims, and if those claims are "typical" of those of the rest of the class, then her pursuit of her own interest will necessarily benefit the class as well. Via the typicality requirement, Rule 23 harnesses selfishness as a mean to accomplish altruistic ends.

William B. Rubenstein, Newberg on Class Actions §3:28 (5th ed. 2011 & supp. 2020). *See also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (noting that Rule 23(a) "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims" (internal quotations omitted)); *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 428 (3d Cir. 2016) (named plaintiffs "need not share identical claims" and can have "varying fact patterns" (cleaned up)), *cert. denied*, 146 S. Ct. 607 (2016). Typicality does not require identical facts.

TransUnion's demanded rule would result in the diminution or virtual elimination of certified class actions by prohibiting those with the most readily-identifiable claims from stepping forward to vindicate the rights of others who are similarly situated. It will also overwhelm the courts by allowing defendants multiple appeals on the same issue if they deem a plaintiff's trial testimony too "sympathetic" or "compelling." Rule 23 does not require that the Court give a party endless opportunities to make the same argument, nor does it counsel in favor of the inefficiencies created by TransUnion's proposed rule.

II. TransUnion's rights at trial were not violated simply because a sympathetic plaintiff was able to present testimony.

TransUnion argues that the jury rendered its verdict only because the trial focused on the plaintiff's unique facts. Pet. Br. 49. TransUnion further complains that "[t]he only evidence about absent class members came in the form of stipulations and concessions that their experiences were not like those of Ramirez." *Id.* But class certification, alone, does not

prevent a defendant from presenting evidence beyond the named plaintiffs' facts, and a review of the record demonstrates that TransUnion elected not to present such rebuttal evidence at its own peril. *See* Resp. Br. at 45-46.

In class action trials, plaintiffs typically rely upon representative evidence, which defendants have every opportunity to rebut with their own evidence. *See, e.g., Garcia v. Tyson Foods, Inc.*, 890 F. Supp. 2d 1273, 1284 (D. Kan. 2012), *aff'd*, 770 F.3d 1300 (10th Cir. 2014) (noting that plaintiffs had presented enough evidence to support a jury's verdict, and how defendants had not presented sufficient evidence to rebut plaintiffs' case). Setting aside a defendant's ability to present evidence concerning other class members' experiences, the record in this case does not demonstrate that TransUnion was prevented from presenting evidence—especially evidence concerning its own conduct that was the basis for the jury's liability verdict. There is simply no basis for creating a new typicality standard when precedent already protects defendants' rights.

CONCLUSION

TransUnion asks this Court to create a new typicality standard that would disrupt class actions because a defendant claims its rights at trial were violated by sympathetic testimony. The Court's creation of such a rule would deter the vindication of meritorious claims with no corresponding benefit when defendants already have tools at their disposal to protect their rights. The Court should not create a new rule simply because a party elected a trial strategy that resulted in an unfavorable result. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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