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 AMICI CURIAE IMPACT FUND, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AND 24 CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The Impact Fund, the NAACP Legal Defense and Educational Fund, Inc., and 24 civil rights organizations submit this brief in support of Respondent Sergio Ramirez.

The **Impact Fund** is a non-profit legal foundation that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as party or amicus counsel in a number of major civil rights class actions before this Court and the Courts of Appeals, including cases challenging employment discrimination, lack of access for persons with disabilities, and limitations on access to justice.

The **NAACP Legal Defense and Educational Fund, Inc.** (LDF) is the nation's first and foremost civil rights organization. Since its founding in 1940, LDF has fought to secure the promise of equality for all people. In this Court and other federal and state courts, LDF has litigated numerous class actions, which are particularly effective in facilitating concerted action to secure systemic change. *See, e.g.*, *Lewis*

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

v. City of Chicago, 560 U.S. 205 (2010); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968).

Additional amici are listed in the Appendix. Amici share an interest in the certified question because the outcome will impact the communities they serve as legal advocates and allies, as well as the continued viability of Federal Rule of Civil Procedure 23 as a mechanism to vindicate the rights of vulnerable populations.

* * *

The crux of the dispute in this case is whether the certified class suffered harm, or a material risk of harm, within the meaning of Article III. Amici leave this central question to the parties and write separately to address why Mr. Ramirez's claims were typical of the class and why this Court should reject TransUnion's invitation to rewrite the Rule 23(a)(3) typicality requirement.

SUMMARY OF ARGUMENT

Typicality protects the rights of class members by ensuring that the interests of their representatives are aligned with their own. The plain language of Rule 23(a)(3) requires that the class representative possess "claims or defenses" that are typical of those of the

class. When the representative and the class challenge a common pattern of conduct, typicality is satisfied even if the effects of that conduct vary. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982).

Mr. Ramirez indisputably satisfied the Rule 23(a)(3) typicality requirement. Every class member in this lawsuit presented the *same* claim: they each had an alert placed on their credit file misidentifying them as a potential match with a name on the U.S. Treasury's economic sanctions list, requested a copy of their file from TransUnion, and received the same two letters. Mr. Ramirez and the other class members were subjected to precisely the *same* pattern of conduct by TransUnion, alleged the *same* causes of action, and sought the *same* relief. As such, the narrow and specific purpose of the typicality requirement was satisfied: Mr. Ramirez's personal interest aligned with that of the class such that the district court could be assured that he would work to benefit the entire class.

TransUnion does not dispute that Mr. Ramirez's "claims or defenses" were typical of those of the class, nor does it suggest that, as the appointed class representative, he failed to act in the best interests of the class. Ignoring the plain language of Rule 23(a)(3) and decades of case law, TransUnion argues that Mr. Ramirez presented an entirely different problem for *defendants*: he was a so-called "perfect plaintiff." Pet.Br.45. TransUnion's true concern is that Mr. Ramirez presented a strong claim with sympathetic facts, including that TransUnion's conduct prevented him from purchasing a vehicle and taking a vacation, which resulted

in a sizeable award of statutory damages. In other words, TransUnion is attempting to shoehorn a challenge to the jury's statutory damages award into the typicality rubric.[2]

TransUnion had numerous litigation tools at its disposal to address its concern that Mr. Ramirez's story would unduly influence the jury: a motion in limine to limit testimony about the factual narrative underlying his injuries, evidence of the varied experiences of other class members, or a cautionary jury instruction that the jury should not presume that Mr. Ramirez's experiences precisely mirrored those of the class. TransUnion had the opportunity to litigate its position that the class was not entitled to statutory damages. This Court should not let policy concerns about class actions seeking statutory damages unmoor the typicality requirement from its language and well-understood purpose.

TransUnion's suggested approach is also unworkable. It asks courts to assess not only whether a class representative shares the claims or defenses of the class—which courts already do—but also whether the class representative could be too compelling. It would substitute the well-defined and rigorous requirements of Rule 23 for a standardless quagmire.

TransUnion's approach further threatens to undermine Rule 23 itself, which is a key procedural

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[2] TransUnion did not raise the statutory damages issue in its petition for certiorari, and this Court did not accept review of the punitive damages issue. *TransUnion LLC v. Ramirez*, 2020 WL 7366280 (U.S. Dec. 16, 2020) (No. 20-297). *See infra* Section III.

vehicle in advancing civil rights. The drafters intended Rule 23 to enhance civil rights enforcement. For decades, plaintiffs have successfully obtained class-wide injunctive relief and money damages despite factual variations between the claims of the representatives and those of the class. Amici urge the Court not to accept TransUnion's invitation to distort the typicality requirement far beyond what Rule 23(a)(3) requires.

ARGUMENT

I. The Typicality Inquiry Protects Class Members by Ensuring that the Interests of the Class Representative and the Class Are Aligned.

Rule 23(a)(3) typicality requires an affirmative showing that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." As this Court has explained, typicality is a "guidepost[] for determining . . . 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." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n.5 (2011) (quoting *Falcon*, 457 U.S. at 157-58 n.13). When the interests of the class representative and the class are aligned, the named plaintiff's pursuit of claims will simultaneously advance the interests of the class members. *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 598 (3d Cir. 2009).

With this singular purpose, the typicality inquiry is generally straightforward. The class representative must be a member of the class. *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 404 (1977) (class representatives, who were not class members, were "hardly in a position to mount a classwide attack" on the practices challenged by the class). The representative must raise the same legal claims and theories as the class. *Gen. Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 330 (1980) (typicality "limit[s] the class claims to those fairly encompassed by the named plaintiffs' claims"). The representative should also seek the same relief as is sought for the class. This symmetry avoids the danger that the representative will "maximize one type of relief that redounds to her benefit while minimizing another" form of relief that would favor the class. 1 William B. Rubenstein, *Newberg on Class Actions* § 3:44 (5th ed. 2020) [hereinafter *Newberg*]. *Cf. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997) (representatives with current injuries would favor "generous immediate payments," while exposure-only class members would want "an ample, inflation-protected fund for the future").

Defendants can challenge typicality by identifying "unique defenses" or counterclaims that it would assert against the class representative, which would divert the representative's attention away from the interests of the class. But a unique defense will only defeat typicality if it is likely to become a "major focus" of the litigation. *Beck v. Maximus, Inc.*, 457 F.3d 291, 300-01 (3d Cir. 2006). This standard "strikes the proper

balance between protecting class members from a representative who is not focused on common concerns of the class, and protecting a class representative from a defendant seeking to disqualify the representative based on a speculative defense." *Id.* at 301.

Typicality may also be challenged, as TransUnion did below, on the grounds that factual variations exist between the claims of the named representative and those of the class. But courts have consistently held that a "plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and [is] based on the same legal theory." *See, e.g.*, *Lacy v. Cook Cty.*, 897 F.3d 847, 866 (7th Cir. 2018) (alteration in original) (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)); *accord Postawko v. Mo. Dep't of Corr.*, 910 F.3d 1030, 1039 (8th Cir. 2018) (same). "Even relatively pronounced factual differences" do not defeat typicality so long as "there is a strong similarity of legal theories." *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 428 (3d Cir. 2016) (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 311 (3d Cir. 1998)). This principle extends to factual differences between injuries to the representative and the class members because these variations do not hinder the representative's ability to protect the interests of the class. *Prudential*, 148 F.3d at 312.

While class representatives must share a similar injury to other class members, their injuries need not be identical. *See, e.g.*, *Parsons v. Ryan*, 754 F.3d 657,

685 (9th Cir. 2014) ("We do not insist that the named plaintiffs' injuries be identical with those of the other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct." (quoting *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001))). "[E]ven relatively pronounced factual differences" in the characteristics of the injuries suffered do not defeat typicality so long as they derive from the same legal violation. *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994); *see, e.g.*, *id.* at 63 (typicality met even if representatives "d[id] not suffer from precisely the same deficiency" as class members because they all faced harm or the risk of future harm from systemic violations by foster care system).

Differences in the magnitude of injuries suffered also do not defeat typicality. *See, e.g.*, *NFL Concussion Injury Litig.*, 821 F.3d at 428 (typicality satisfied despite differences in severity of head trauma sustained because the central claims of representatives and class members remained the "same"). Nor do differences in the amount of damages undermine typicality. *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984). Critical to this case, courts have held that a class representative with a claim that is *stronger* than those of other class members is not atypical. *See, e.g.*, *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198-99 (10th Cir. 2010) (named plaintiffs who endured abuse and neglect were typical of all class members, the majority of whom did not suffer abuse,

"because all foster children are subject to [defendants'] challenged, agency-wide monitoring policies"); *Kornberg*, 741 F.2d at 1334, 1337 ("severity" of the class representatives' "particularly troublesome" toilet did not render their claims atypical of those of other cruise passengers with shipboard plumbing problems).

TransUnion ignores existing case law, including this Court's guidance, which inextricably links the typicality requirement to the interests of absent class members by ensuring that the representative's interests are aligned. *See Falcon*, 457 U.S. at 158 n.13.

II. The District Court and Ninth Circuit Correctly Rejected TransUnion's Arguments that the Claims of Mr. Ramirez Were Not Typical of the Class Claims.

The district court accurately applied the long-established Rule 23(a)(3) standard to assess the typicality of Mr. Ramirez's claims by focusing on the "nature of the claim or defense . . . and not [on] the specific facts from which it arose[.]" *Ramirez v. Trans Union, LLC*, 301 F.R.D. 408, 419 (N.D. Cal. 2014) (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011)). TransUnion did not dispute below that Mr. Ramirez and the class alleged the same legal claims and sought the same relief. *See id.* at 419-20. TransUnion instead asserted that Mr. Ramirez was atypical because of factual differences and unique defenses arising from his personal experience.

The court carefully analyzed each of the "potentially unique" facts identified by TransUnion, but concluded they were not "material" to Mr. Ramirez's claims. *Id.* at 419. The court noted that Mr. Ramirez "would have the same claims even if he had never visited the Nissan Dealer or been denied credit," as his claims arose from the two communications that he received from TransUnion, "just as every other class member" did. *Id.* He also sought the same statutory damages under the Fair Credit Reporting Act as did the class, meaning that his particular circumstances—"whether he was actually denied credit or received inferior credit terms"—did not affect his claims or relief sought. *Id.* TransUnion's contention that Mr. Ramirez's Spanish surname made him atypical also failed to persuade the court. *Id.*

The court further evaluated and rejected TransUnion's proffered "unique defenses" to Mr. Ramirez's claims. *Id.* TransUnion alleged that Mr. Ramirez had made a misrepresentation on his credit application yet failed to explain how that would serve as a defense to its own failure to comply with the Act. *Id.* A difference in the wording of the alert—Mr. Ramirez's letter referred to him as a "match" to the Treasury database while other class members were referred to as a "potential match"—was similarly inconsequential, as either would violate the Act. *Id.* at 420. The court concluded that Mr. Ramirez and the class alleged the same critical central fact—"Trans Union utilized the exact same name-only matching [search] logic to

identify plaintiff and the class members"—satisfying typicality. *Id.*

The Ninth Circuit reviewed the district court's typicality determination and found no abuse of discretion. *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1033 (9th Cir. 2020); *see Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) (class certification is "committed in the first instance to the discretion of the district court"). It concluded that "[e]ven if Ramirez's injuries were slightly more severe than some class members' injuries," they were not "so unique, unusual, or severe" as to render his claims atypical, nor would they distract from the litigation. *Ramirez*, 951 F.3d at 1033. Any differences in injuries were "a matter of degree." *Id.* at 1033 n.14.

Both the district and appellate courts properly applied existing case law to conclude that differences in the magnitude of injury alone do not defeat typicality.

III. This Court Should Not Rewrite the Typicality Standard to Protect Defendants from Class Representatives with Compelling Facts.

TransUnion asserts that typicality did not exist in this case because Mr. Ramirez's story was too compelling. "It is problematic to have a home-run plaintiff represent a class of single hitters." Pet.Br.45. While TransUnion repeatedly refers to Mr. Ramirez as "atypical," its rhetoric is not grounded in the language or purpose of Rule 23(a)(3). TransUnion does not rely on the extensive body of typicality case law applying the

"claims or defenses" requirement, nor does it explain how the district court's typicality analysis was flawed. *See supra* Sections I & II. It never suggests that Mr. Ramirez, as a class representative, failed to act in the best interests of the class. Instead, it asks this Court to turn Rule 23(a)(3) on its head and create an entirely new requirement that classes be represented by average—that is, not overly sympathetic—representatives. Such a reading places the interests of the defendant at the center of a court's typicality analysis, rather than those of the class as Rule 23(a)(3) requires.

To support its novel reading of typicality, TransUnion cites only to a general description of the characteristics of a class representative articulated decades ago in *Rodriguez*. *See* Pet.Br.43-44 (citing *Dukes*, 564 U.S. at 348-49 ("[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." (quoting *Rodriguez*, 431 U.S. at 403))). While this proposition is routinely recited in this Court's class action jurisprudence, no decision has interpreted it to alter or expand the plain language of Rule 23(a)(3), including this Court's opinion in *Dukes*.[3] And, as this Court has explained, the requirements of Rule 23 are the *only* prerequisites to class certification. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (Rule 23 "creates a categorical rule entitling a plaintiff whose

[3] This Court did not address typicality in *Dukes* and certainly did not impose any additional requirement on Rule 23(a)(3) not found in its plain language. 564 U.S. at 349 n.5 (declining to reach typicality or adequacy of representation requirements).

suit meets the specified criteria to pursue his claim as a class action"); *Amchem*, 521 U.S. at 620 (Rule 23 "sets the requirements [courts] are bound to enforce" and its "text . . . limits judicial inventiveness").[4]

TransUnion cites no supporting authority because its proposal is not consistent with the *purpose* of Rule 23(a)(3). Typicality is intended to ensure that absent class members are represented by a named plaintiff who shares their interests. *Falcon*, 457 U.S. at 158 n.13. A potential class representative who has been sufficiently motivated by their experience to seek out and retain counsel is ideally suited to assume the role of representative. Presenting the strongest case to the jury on behalf of the class is indisputably the class representative's responsibility. The desire of a defendant to avoid a sympathetic class representative plays no role in the class certification inquiry.

Finally, TransUnion fails to explain how a district court might undertake the puzzling and counterintuitive determination of identifying the "just right" plaintiff at class certification. How good is too good? Is a plaintiff with a compelling story but poor skills as a witness acceptable? How should emotional weight

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[4] TransUnion contends that typicality requires that a representative have the same injury as class members, or else it will be "entirely duplicative of commonality." Pet.Br.44. Not so. Commonality probes the similarities and differences among class member claims, while typicality compares the claims of the named plaintiff to those of the class members to ensure the representative will act in the interests of the class. *Newberg*, *supra*, at § 3:31 ("Each [requirement] proceeds from a different perspective[.]").

balance against legal significance? Must an appointed class representative be removed from service if discovery reveals stronger facts than those previously known? TransUnion can provide no answers because its proposed inquiry is not tethered to the language of Rule 23(a)(3) and is unworkable.

TransUnion had multiple avenues to address its concern that Mr. Ramirez's story would unfairly influence the jury in awarding class-wide statutory damages. Before trial, TransUnion could have filed a motion in limine to limit or exclude portions of Mr. Ramirez's testimony as unduly prejudicial or misleading. *See* Fed. R. Evid. 403. As part of its trial plan, it could have subpoenaed other class members who suffered fewer adverse consequences from its conduct—but it "chose not to call other class members." Resp.Br.10-11 n.3; *see also*, *e.g.*, *Barnes v. District of Columbia*, 924 F. Supp. 2d 74, 92 (D.D.C. 2013) (defendants may investigate "whether the class witnesses are reasonably representative of the class"). It also could have requested an instruction that the jury not presume that Mr. Ramirez's experiences were identical to those of other class members. In fact, after receiving the jury verdict, TransUnion pursued yet another method of minimizing the effect of Mr. Ramirez's narrative by filing a post-trial motion to reduce the statutory damages award. *Ramirez*, 951 F.3d at 1035; *see, e.g.*, *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 963 (8th Cir. 2019) (affirming the reduction of class statutory damages from $1.6 billion to $32.4 million). TransUnion's failure to

prevail in that post-trial motion should not lead to upending established law on typicality.

The problem identified by TransUnion—the too-compelling plaintiff—is not one that can or should be addressed through the typicality analysis at class certification. Because myriad alternatives exist to address the ultimate award of statutory damages, Rule 23(a)(3) should not be recast to remedy TransUnion's strategic litigation choices.

IV. TransUnion's Proposed Approach to Typicality Would Undermine Rule 23 as a Tool for Vindicating Civil Rights.

TransUnion's novel vision for Rule 23 runs contrary to the Rule's text and purpose, which have facilitated decades of social justice class action litigation. The drafters of modern Rule 23 sought to create an instrument for broad, systemic change to efficiently remedy widespread legal violations. *Falcon*, 457 U.S. at 155. When Rule 23 was amended in 1966, Advisory Committee member John P. Frank observed that "the whole rule" was motivated by a "determination to create a class action system which could deal with civil rights and, explicitly, segregation."[5] Consistent with that aim, Rule 23 has played a powerful role in the

[5] John P. Frank, Response to 1996 Circulation of Proposed Rule 23 on Class Actions, *in* 2 *Working Papers of the Advisory Comm. on Civil Rules on Proposed Amendments to Civil Rule 23*, 260, 266 (Admin. Office of the U.S. Courts ed., 1997), http://www.uscourts.gov/sites/default/files/workingpapers-vol2.pdf.

private enforcement of civil rights laws in a range of areas, including employment, public accommodations, and housing.[6]

Rule 23's critical role in civil rights enforcement applies to classes certified under both Rule 23(b)(2) and (b)(3). As this Court has observed, civil rights suits are "prime examples" of cases certified under Rule 23(b)(2) for plaintiffs seeking injunctive relief. *Amchem*, 521 U.S. at 614; *see also Dukes*, 564 U.S. at 361 ("[T]he Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order.").[7] Similarly, the drafters of Rule 23(b)(3), which permits certification of classes seeking monetary damages, took into account the considerations of vulnerable communities "who individually would be without effective strength to bring their opponents into court at all." *Amchem*, 521 U.S. at 617. In fact, many civil rights cases, particularly those seeking to redress economic justice violations, seek

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[6] *See* Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. Kan. L. Rev. 325, 393-97 (2017).

[7] *See also* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286, 315 (2013) (explaining according to one drafter that the revisions were designed to "provide a useful procedural vehicle, particularly for civil rights cases"); Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Justice*, 39 Ariz. L. Rev. 575, 577 (1997) ("Civil rights and class actions have an historic partnership.").

monetary damages alone or in conjunction with injunctive or declaratory relief.[8]

Given the "special dependence" between civil rights litigation and class actions,[9] TransUnion's attempt to distort Rule 23 typicality risks undermining the ability of the class action vehicle to vindicate civil rights. Rule 23 allows for variations in injuries among class members where individual differences will not undercut the efficiency of having a claim heard in a class forum. This flexibility in allowing for some factual distinctions between the representative and other class members is especially key in civil rights cases, where serving as a class representative can present significant challenges, requiring the individual to repeatedly recall and reflect upon the injuries they experienced due to the defendant's discriminatory practices. Rule 23 typicality, under its current construction, permits a civil rights plaintiff who is well-suited to meet these challenges to represent a class even if their individual story is more compelling or is different from those of other class members, as long as they share the same "claims or defenses." This benefits the other class members, who may be unwilling or

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[8] *See* Malveaux, *supra* note 6, at 396 ("[S]ome contemporary class actions have been brought under both (b)(2) and (b)(3)."); *see, e.g.*, *Chi. Teachers Union, Local No. 1 v. Bd. of Educ.*, 797 F.3d 426, 445 (7th Cir. 2015) (ordering certification of injunctive relief and damages class of Black teachers who alleged racial discrimination in school turnaround plans).

[9] Hon. Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179, 2184 (1989).

unable to serve as a representative in the case (or as a plaintiff in an individual action) but deserve to have their discrimination claims heard by a court. Yet, TransUnion would needlessly eliminate this flexibility by requiring representatives in civil rights cases to have suffered injuries that are identical or nearly identical to those of the class members, refashioning the typicality analysis at the class certification stage into a merits-based inquiry more appropriately suited for other phases of litigation.

Circuit courts have routinely affirmed class certification in civil rights cases under Rule 23(b)(2) and (b)(3) despite variations among class member injuries. For example, in *Postawko v. Missouri Department of Corrections*, three incarcerated plaintiffs filed a putative class action asserting that they and others at a prison received inadequate medical care for viral infections. 910 F.3d at 1033. Although the nature of the named plaintiffs' injuries varied from those suffered by class members, the Eighth Circuit rejected the defendants' arguments that the plaintiffs' claims were not typical. *Id*. at 1039. The court concluded that "the potential for minor factual variations does not undermine" that the named plaintiffs satisfied the typicality requirement. *Id. See also*, *e.g.*, *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 914, 917, 924 (10th Cir. 2018) (affirming district court's certification of two classes of immigrants in private detention facility under Rule 23(b)(3), as the claims of the class representatives and class members shared the same legal theories, involving either the threat of serious harm or physical

restraint, or injury from unjust enrichment); *Ruiz Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1142 (9th Cir. 2016) (affirming district court's certification order and noting that one class representative's "somewhat more colorful" story did not defeat typicality); *DG*, 594 F.3d at 1199 (affirming district court's typicality finding and rejecting the defendant's argument that the class representatives were not typical because not all class members may have been subjected to abuse or neglect while in foster care).

District courts also regularly find that claims of class representatives in civil rights cases are typical of those of the class members, despite variations in their injuries. *See, e.g.*, *Zollicoffer v. Gold Standard Baking Co.*, 335 F.R.D. 126, 157-58 (N.D. Ill. 2020) (finding that factual variations among the class representatives did not destroy typicality in Rule 23(b)(3) employment discrimination case); *K.A. v. City of New York*, 413 F. Supp. 3d 282, 302 (S.D.N.Y. 2019) (certifying Rule 23(b)(2) class challenging the inadequacy of prison medical care to women even though their physical injuries varied); *Chen-Oster v. Goldman, Sachs & Co.*, 325 F.R.D. 55, 77-80 (S.D.N.Y. 2018) (certifying employment discrimination class under Rule 23(b)(3) and finding that representatives and class members were all subject to challenged performance criteria, despite individual factual differences); *Ramirez v. Greenpoint Mortg. Funding, Inc*., 268 F.R.D. 627, 635 (N.D. Cal. 2010) (certifying nationwide Rule 23(b)(3) class of Black and Latinx mortgage borrowers who alleged

lending discrimination and noting that typicality does not require claims to be "substantially identical").

The decisions cited above reinforce that Rule 23 typicality can be satisfied without requiring identical or near-identical facts among class members. For example, in *Zollicoffer*, an employment class action alleging that a staffing agency steered Black workers from assignments at an industrial baking facility, the court considered whether the proposed representatives' "unique experiences" rendered their claims atypical. 335 F.R.D. at 157. There, the issue was not that the plaintiffs were too compelling, but rather that their specific facts potentially made their claims weaker. For example, one named plaintiff had stopped visiting the employment office after experiencing transportation difficulties, and the other had been incarcerated and unavailable to work during part of the class period. *Id.* The court said that it would "expect" every class member to have some unique circumstances, but that such factual variations do not make claims "atypical" or "inadequately aligned." *Id.* Instead, typicality was satisfied because the proposed representatives and class members alleged the same legal claim against the defendants. *Id.* at 158. The court also stated that the defendants' contentions "address[ed] the merits" and were "generally irrelevant" at class certification. *Id.* (quoting *Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 823 (7th Cir. 2012)).[10] *Zollicoffer* illustrates

[10] The statement made by the court in *Zollicoffer* about the merits reinforces the purpose of the typicality analysis: to determine whether the claims or defenses of the named plaintiffs and

precisely what is at stake in civil rights litigation should this Court adopt TransUnion's refashioned typicality rule. TransUnion's approach would force a merits-based inquiry into every alleged discriminatory experience of class representatives, which is simply not what Rule 23(a)(3) calls for, and would impose excessive burdens on plaintiffs challenging discriminatory policies and practices.

Rule 23(a)(3)'s typicality requirement obligates plaintiffs to demonstrate that the class representative and the unnamed class members share the same legal claims or defenses; nothing more. TransUnion's distortion of the established typicality rule—which would require named plaintiffs and putative class members to have factually identical or near-identical injuries—would upend civil rights cases seeking class-wide treatment and unduly impede Rule 23's efficacy to remedy widespread, systemic discrimination. Such a novel formulation of Rule 23(a)(3) is inconsistent with Rule 23's specific purpose and its text.

CONCLUSION

TransUnion's grievance about the alleged unfairness of Mr. Ramirez's testimony at trial is not a class

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the class are sufficiently aligned, not to address whether plaintiffs may ultimately succeed on their claim. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.").

certification issue at all. This Court should not distort the text and purpose of Rule 23(a)(3) to address a problem for which there are other procedural tools better suited to the task. The class action mechanism is integral to the enforcement of civil rights laws and should not be unnecessarily narrowed, impairing access to justice.

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

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