No. 20-297

In The
Supreme Court of the United States

TRANS UNION LLC, INC.,

Petitioner,

v.

SERGIO L. RAMIREZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. When a credit reporting agency falsely identified a class of consumers as terrorists on their credit reports and denied them statutorily-mandated information necessary to remove the defamatory information, were those consumers exposed to a risk of material harm satisfying Article III requirements?

2. When a credit reporting agency, despite prior consumer disputes and a warning from a court of appeals, continued to label innocent consumers as terrorists on their reports and then misled thousands of consumers and the U.S. Department of Treasury about how to correct these inaccurate labels, was the agency's conduct sufficiently reprehensible to warrant a 4:1 ratio of punitive damages to compensatory damages?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

The litigation described in the petition bears little resemblance to the actual case tried below. Far from reflecting a "perfect storm" of legal error (Pet. 1), the result in this case was entirely predictable given the particularly egregious credit reporting practices at issue coupled with Petitioner TransUnion's litigation strategy decisions. Faithfully applying settled law, the court below correctly resolved the standing, class certification, and damages issues that the petition now raises. Although Petitioner strains to conjure up a circuit conflict, there is none. The rulings below were grounded in the unique set of factual circumstances this case presents—facts that Petitioner repeatedly misstates or ignores.

For over a decade, TransUnion, one of the nation's "Big Three" credit reporting agencies, misidentified thousands of innocent Americans as government-designated terrorists, drug traffickers, and other threats to national security. It marketed this erroneous information to third parties, including prospective creditors. TransUnion made these highly damaging misidentifications using only a name, ignoring date of birth information available on government records and in its own database. In 2010, the Third Circuit held that TransUnion's practices were in willful violation of the Fair Credit Reporting Act ("FCRA"). *See Cortez v. Trans Union, LLC*, 617 F.3d 688 (3d Cir. 2010).

But even after the Third Circuit's decision, TransUnion continued to sell credit reports with those

false designations and continued to ignore available dates of birth in its search procedures. TransUnion further violated the FCRA by providing incomplete and misleading disclosures regarding these terrorist records that hindered consumers' efforts to discover and erase the black mark on their records. The victims of TransUnion's continued unlawful conduct sued in 2012 for three violations of the FCRA. The district court certified a single class of consumers for all three claims, and a jury found that TransUnion willfully violated the FCRA and awarded both statutory and punitive damages. The court of appeals affirmed, adjusting the punitive damages award.

Neither of the issues TransUnion raises in its petition warrants this Court's review. First, TransUnion suggests that the jury's verdict awarding statutory damages to redress its misconduct runs afoul of either Article III or Rule 23. That suggestion is incorrect. There is no dispute about the governing rule for standing. The court of appeals recognized that every member of a class must satisfy the requirements of standing to recover damages. TransUnion objects only to the straightforward application of that settled rule to the facts of this case. That objection, in turn, is based on a misconception of the injuries it imposed on the class members. Contrary to its mischaracterization, every member of the class suffered the same injuries stemming from each of TransUnion's three FCRA violations. The court of appeals accordingly concluded that every class member had standing and that the named plaintiff was typical of the class. Those

conclusions were correct, and they comport with the decisions of every other court to address similar issues.

TransUnion repeatedly asserts that "the vast bulk of the class" suffered no Article III harm (Pet. i) based almost entirely upon a stipulation at trial documenting the rate at which it disseminated terrorist records to third parties. However, this assertion is both factually and legally incorrect. Factually, the stipulation does not mean that the vast majority of Class members "never had a credit report disseminated to any third party" (Pet. i)—the stipulation says nothing about third party sales outside of a narrow six-month period, and in fact demonstrates the brisk pace of TransUnion's sales that placed all class members at risk of a third party sale during the FCRA's two-year statute of limitations. Legally, TransUnion's argument regarding the stipulation also misses the mark. The relevant harm for standing purposes is not the sale or publication of a credit report containing a terrorist record, it is the risk of significant injury of that inaccurate information being reported. Contrary to TransUnion's depiction, the stipulation provided evidence that the risk of harm was significant, real and impending. Moreover, whether TransUnion disseminated a credit report is irrelevant to the two disclosure claims Ramirez and the class prevailed on at trial. In fact, TransUnion affirmatively agreed that a finding in favor of Ramirez and the class on any one of the three claims could support an award of statutory and punitive damages

TransUnion made another strategic decision at trial that fundamentally undermines its attempt to

carve the class into two groups based upon the sale of a terrorist record to a third party. At trial, the district court offered TransUnion the opportunity to craft a jury verdict form that apportioned statutory damages based upon whether a report had been sold to a third party, and it declined, waiving the issue.

TransUnion's cursory typicality challenge similarly fails. While it faults the lower court for permitting Ramirez to testify at trial about his personal experiences with being falsely labeled a terrorist on a TransUnion report, TransUnion failed to object to any of his testimony or move *in limine* to exclude it, and therefore waived that challenge as well.

For its second issue, TransUnion complains that the award of punitive damages was excessive. That fact-bound inquiry raises no unsettled question of law. The court of appeals' ratio of 4:1 for punitive to statutory damages falls comfortably within the requirements of Due Process recognized by this Court. In light of the court of appeals' unremarkable holding that such a ratio is constitutional, TransUnion cannot point to a single decision by any other court with which the decision below conflicts. The facts of this case, moreover, fully justify the punitive damages award. For years, TransUnion was warned—by consumers, by the Third Circuit, and by the very government agency that maintains the terrorist records at issue here—that, in the words of the court of appeals, it was "flippant[ly] placing . . . terrorist alerts on consumer credit reports." Pet. App. 49. The court of appeals recognized that "it is

unsurprising that a jury was 'incensed'" by TransUnion's "consistent refusal to take responsibility or to acknowledge the harm it has caused." *Id.* Its holding that a low single-digit ratio of punitive to compensatory damages is constitutional to punish and deter that repeated reprehensible conduct does not warrant this Court's intervention.

STATEMENT OF THE CASE

1. TransUnion LLC is one of the nation's largest credit reporting agencies. Every year, TransUnion sells consumer credit reports about millions of Americans to prospective lenders, employers, and other companies. Those reports include a broad range of information, including names, dates of birth, current and former addresses, employment history, and credit history. TransUnion markets its credit reports as a tool to assist companies in making decisions about whether to lend to or to hire the consumer who is the subject of the report. On the basis of the information contained in TransUnion's reports, prospective lenders and employers frequently make decisions to deny loan or job applications.

Congress enacted the FCRA to ensure that companies like Petitioner "exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(3)-(4). Recognizing the "vital role" those agencies play "in assembling and evaluating consumer credit and other

information on consumers," Congress sought "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report." S. Rep. No. 517, 91st Cong., 1st Sess. 1 (1969).

In service of those aims, the FCRA regulates how consumer reporting agencies compile and communicate information about consumers. In particular, it imposes obligations on consumer reporting agencies in preparing "consumer reports," also frequently called credit reports, that contain "any information . . . bearing on [the] consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" that is used or expected to be used for certain specified purposes, including making credit decisions. 15 U.S.C. § 1681a(d)(1).

Three of the FCRA's mandates are relevant to this case. First, it requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b). Second, it requires consumer reporting agencies to disclose to consumers upon request "all of the information in the consumer's file," with exceptions not relevant here. *Id.* § 1681g(a)(1). Third, it requires consumer reporting agencies to "provide to [the] consumer, with each written disclosure . . . [a] summary of [the consumer's] rights," including the right to dispute and have inaccurate information corrected or removed. *Id.* § 1681g(c)(2). A consumer reporting agency that "willfully fails to comply with any requirement

imposed under [the Act] with respect to any consumer is liable to that consumer" for (a) "any actual damages sustained" or statutory "damages of not less than $100 and not more than $1,000," plus (b) "punitive damages as the court may allow." *Id.* § 1681n(a).

2. In 2002, TransUnion began including a new piece of information about consumers in its reports, called "OFAC alerts." The Department of the Treasury's Office of Foreign Assets Control ("OFAC") maintains a list of "specially designated nationals" or "SDNs" who are subject to sanctions that prohibit U.S. persons from doing business with them, including by extending them credit. *See Information Pertaining to the Specially Designated Nationals and Blocked Persons List*, 31 C.F.R. § 501 app. A, II. TransUnion marketed its OFAC alert product as a tool to assist its clients in complying with that legal prohibition. The product added an "alert" to the credit reports TransUnion sold indicating whether the consumer was a "match" (or in later years, a "potential match") with a person on OFAC's list of SDNs.

TransUnion did very little to confirm the accuracy of its designation of a consumer as a match with an SDN. TransUnion's process for determining whether to include an OFAC alert on a consumer's report relied on a simple name search. The search would check whether the consumer's first and last name were identical or similar to a name listed on the OFAC list of SDNs. This is in contrast to TransUnion's procedures for other types of information, like a bankruptcy or a tax lien. For those, TransUnion cross-checks the record

with at least one other type of identifying information like a date of birth or a social security number. Pet. App. 9 n.2. That cross-check serves as a safeguard to ensure that the information is in fact about the consumer rather than someone else with a similar name. Even though its OFAC alerts labeled consumers as SDNs with whom companies are prohibited by federal law from engaging in any business—and thus communicate a much more consequential piece of information than a credit history—TransUnion took none of those basic precautions with its OFAC product. Furthermore, TransUnion made a calculated decision not to comply with the FCRA with respect to OFAC information, and thus intentionally omitted OFAC alerts from its file disclosures to consumers.

3. Petitioner's OFAC-related practices soon gave rise to litigation and to a forceful rebuke from a federal appellate court. In 2005, Sandra Cortez was denied an auto loan after TransUnion included a false OFAC alert on a credit report about her. She spent months attempting to correct the misinformation, but TransUnion failed to disclose the OFAC record to her upon her request, and refused to investigate. She sued alleging TransUnion committed numerous violations of the FCRA, including a failure to follow reasonable procedures to ensure the maximum possible accuracy of the information in her credit report in violation of 15 U.S.C. § 1681e(b), and a failure to disclose all of the information in TransUnion's file about her in violation of 15 U.S.C. § 1681g(a). The jury found TransUnion liable and awarded compensatory and punitive

damages. The Third Circuit affirmed. *Cortez v. Trans Union, LLC*, 617 F.3d 688 (3d Cir. 2010). The court of appeals rejected TransUnion's contention, which it continues to advance in its petition, that OFAC alerts are not subject to the FCRA although TransUnion includes OFAC alerts in its credit reports. *Id.* at 707-08. *See* Pet. at 6 (characterizing OFAC alerts as a "product" it provides "*in addition* to preparing consumer credit reports" (emphasis added)).

The Third Circuit upheld the district court's decision and condemned Petitioner's practices with respect to OFAC as "reprehensible," specifying that "at the very least" Petitioner should use available dates of birth in its matching procedures. 617 F.3d at 707-08. Further, the *Cortez* court warned Petitioner that the "gravity of harm that could result from TransUnion's 'match' " of the consumer "with an individual on a 'terrorist' list cannot be over stated." *Id.* at 723.

4. Despite the Third Circuit's decision, "TransUnion made surprisingly few changes to its practices regarding OFAC alerts." Pet. App. 12. It added no cross-check between its simple name search and any other piece of identifying information. *Id.* Officials at the Treasury Department subsequently informed TransUnion that they "continued to hear from TransUnion customers and individual consumers who had been adversely affected by false OFAC alerts on TransUnion credit reports." *Id.* Treasury officials further expressed "concern[]" that "name-matching services" such as TransUnion's OFAC product lacked "rudimentary checks to avoid false positive reporting,"

which would "create more confusion than clarity and cause harm to innocent consumers." *Id.*

In response to the central problems that the Third Circuit and Treasury Department identified, Petitioner did not change its OFAC product to better assure accuracy or to include OFAC alerts in disclosures to consumers. Instead, when a consumer Petitioner considered to be a match to an OFAC record requested a copy of her credit file, TransUnion continued to send the credit file with no mention of an OFAC alert, as it did prior to the *Cortez* decision, despite the fact that a credit report sold to third parties about the consumer would include the alert. This credit file (also labeled by TransUnion as a "personal credit report") included the summary of rights required by the FCRA. TransUnion's only change was to begin sending a second mailing—a letter informing the consumer "as a courtesy" that her name "is considered a potential match" to an entry in OFAC's database. This second mailing by its own plain terms was separate and distinct from the consumer's file disclosure. Importantly, it included no summary of rights as required by the FCRA, and thus failed to inform consumers that the OFAC alert in the letter was part of their TransUnion file and could be disputed and corrected. Shortly after adopting this procedure, TransUnion responded to the Department of Treasury by misrepresenting the contents of its OFAC letter, asserting that it contained instructions on how to block inaccurate matches, despite the absence of any such instructions. CA9.SER1578; CA9.SER1518.

5. Sergio L. Ramirez was one of thousands of individuals who had OFAC alerts erroneously placed in their credit files, and who, after requesting their credit information, received Petitioner's OFAC disclosure letter separate from the rest of their personal credit report. Ramirez learned of the OFAC alert while attempting to purchase a vehicle in February of 2011. The car dealership ran a TransUnion credit report, which included an OFAC alert referencing two different SDNs. The dealership told him that it "would not sell the car to Ramirez because he was on 'a terrorist list.'" Pet. App. 4. Ramirez contacted TransUnion, which repeatedly and falsely told him that there was no OFAC alert in his credit file. After Ramirez requested a copy of his file, TransUnion sent him the two distinct documents in separate mailings, in accord with its practice at the time. The first document was his credit file which did not include an OFAC alert, and was accompanied by the FCRA-mandated summary of rights. The second document was a separate letter that, in accord with TransUnion's practice at the time, informed Ramirez "as a courtesy" that his name "is considered a potential match" with two different SDNs listed by OFAC, and that TransUnion would include these OFAC records on reports sold about him in the future. Pet. App. 6. Ramirez was only able to contact TransUnion and have the OFAC alerts removed from his file after consulting with a lawyer. CA9.SER0699-700.

6. In 2012, Ramirez filed a class action alleging that TransUnion's practices in connection with OFAC

alerts continued to violate the FCRA. The class included Ramirez and 8,184 other consumers to whom TransUnion sent the same separate OFAC letter between January 1, 2011 and July 26, 2011. Just like Ramirez, each of these consumers (1) was associated with an OFAC record using only their first and last name; (2) requested a copy of his or her credit file from Petitioner; and (3) received a "personal credit report" from Petitioner with no mention of the OFAC record, and a separate form letter containing the OFAC record but omitting any statement of FCRA rights. Pet. App. 14. The district court certified the class and denied TransUnion's motion to decertify. *Id.*

The class complaint alleged three claims against TransUnion: (i) that it willfully failed to follow reasonable procedures to ensure the accuracy of its OFAC alerts by using rudimentary name-only searches, in violation of 15 U.S.C. § 1681e(b); (ii) that it willfully failed to disclose the full contents of its files to class members who asked for them by omitting the OFAC alerts, in violation of 15 U.S.C. § 1681g(a)(1); and (iii) that it willfully failed to provide class members with a summary of their rights with the letter it sent informing them of the OFAC alert in their credit file, in violation of 15 U.S.C. § 1681g(c)(2).

At trial, the jury heard evidence that showed the magnitude, gravity and impending nature of the risk posed by TransUnion's unlawful OFAC practices. On the basis of TransUnion's records, the parties stipulated that TransUnion transmitted OFAC alerts about 1,853 class members to creditors in the six-month

period between January and July of 2011. Pet. App. 15. In a single year, Petitioner placed OFAC alerts on credit reports that it disseminated to third parties more than 200,000 times. *See* CA9.SER1593. Moreover, "TransUnion presented *no* data showing that *any* of its name matches through OFAC Advisor were correct. In other words, TransUnion could not confirm that a *single* OFAC alert it sold to its customers was accurate." Pet. App. at 13 n.4 (emphases added). TransUnion itself affirmatively stated that it was likely to sell OFAC information about class members to third parties, telling each of them in its OFAC letter that it would sell the damaging information upon request. Pet. App. at 7. Ramirez testified about the grave consequences that can follow from TransUnion's false OFAC alerts about innocent consumers, asking the jury rhetorically, "if somebody tells you you're on a terrorist list, what are you going to do?" *Id.* at 24. None of Petitioner's six pre-trial motions *in limine* sought to preclude Ramirez from offering testimony about the consequences TransUnion's inaccurate report had on his life, nor did Petitioner object to this testimony at trial. CA9.SER0690-98.

The jury returned a verdict in favor of the class on all three claims, awarding $984.22 in statutory damages and $6,353.08 in punitive damages per class member. In framing the verdict form, Petitioner affirmatively agreed that the jury should make only a single award of statutory damages if it found for the class on any one of the three claims, without regard for any perceived difference in the experiences of class members. Pet. App. 72-73. The district court denied TransUnion's

post-trial motions, and found that it waived any challenge to the aggregation or apportionment of statutory damages. *Id*.

The court of appeals affirmed, adjusting the punitive damages award to $3,936.88 per class member. First, the court of appeals rejected TransUnion's argument that the class members lacked Article III standing. It "agree[d] with TransUnion that every class member needs standing to recover damages at the final judgment stage," but "also agree[d] with Ramirez and the class that every class member has standing on each of the claims in this case." Pet. App. 33. Second, it rejected TransUnion's challenge to the sufficiency of the evidence to establish that TransUnion willfully violated the FCRA. It had "no difficulty upholding the verdict" because "TransUnion was provided with much of the guidance it needed to interpret its obligations under the FCRA with respect to OFAC alerts in 2010 when Cortez was decided." *Id.* at 38. Finally, it adjusted the punitive damages award to a ratio of 4:1 to the jury's award of statutory damages. It was "unsurpris[ed] that a jury was 'incensed' by TransUnion's flippant placement of terrorist alerts on consumer credit reports and its consistent refusal to take responsibility or acknowledge the harm it has caused." *Id.* at 49. Despite the "reprehensibility of TransUnion's conduct," it nonetheless "conclude[d] that a ratio of 4 to 1 between the statutory and punitive damages is the most the Constitution permits on this record." *Id.* Judge McKeown concurred in part and dissented in part.

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REASONS FOR DENYING THE WRIT

I. The award of statutory damages does not warrant this Court's review.

A. The court of appeals' decision was a straightforward application of this Court's cases on Article III standing and Rule 23.

There is no dispute in this case about the governing legal rules for Article III standing or Rule 23 typicality. The court of appeals recognized 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 recover monetary damages in federal court." Pet. App. 17. TransUnion does not ask for a different rule. The court of appeals also recognized that "there is sufficient injury in fact when a defendant's statutory violation creates a 'risk of real harm' to a plaintiff's concrete interest." *Id.* at 20 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)). Again, TransUnion does not ask for a different rule. Instead, it merely contends that the injuries suffered by the class members in this case fail to meet that standard. That fact-bound contention is incorrect with respect to each of TransUnion's statutory violations and does not warrant this Court's review.

First, with respect to TransUnion's violation of § 1681e(b)'s reasonable procedures requirement, every class member was falsely told by TransUnion that they might be on a government list of terrorists and other national security threats. And every single class

member suffered the same "risk of real harm" that an inaccurate and libelous designation as an SDN on their credit report would be sent to a creditor. *Spokeo*, 136 S. Ct. at 1549. The question, this Court explained, is "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." *Id.* at 1550. The court of appeals correctly applied that rule to the facts here, concluding that TransUnion's failure to use reasonable procedures to ensure the accuracy of its OFAC alerts, instead relying on a "rudimentary" name-search, satisfied this Court's standard.

The risk of real harm TransUnion imposed on all class members arose from both the gravity and the likelihood of dissemination of its false OFAC alerts. As the court of appeals explained, the "nature of the inaccuracy" was "severe" because TransUnion "inaccurately identified and labeled all class members as potential terrorists, drug traffickers, and other threats to national security; it did not inaccurately report a zip code." Pet. App. 23. *Cf. Spokeo*, 136 S. Ct. at 1550 ("[N]ot all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an inaccurate zip code."). The nature of TransUnion's business—selling its credit reports to tens of millions of companies every year, including hundreds of thousands of OFAC alerts—compounded that substantial risk due to the high likelihood that TransUnion would communicate its false OFAC alerts to potential lenders. TransUnion's concession at trial that it actually transmitted false OFAC alerts about a quarter of the

class to third parties in just six months illustrated the magnitude and imminence of that risk.[1] Even TransUnion itself acknowledged this risk by telling class members in its OFAC letter that it would sell the damaging OFAC information to potential creditors upon request. Pet. App. 6-7.

TransUnion's disagreement with the court of appeals' application of this Court's legal rules rests on its misidentification of the injury suffered by the class members. Its petition ignores the risk of real harm its violation of § 1681e(b) imposed on every class member. Instead, it questions (at 20-21) whether that risk "materialized" through the transmission of its false OFAC alerts and whether that transmission "hindered" class members securing credit. Neither is necessary to ground the class members' standing. As this

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[1] TransUnion repeatedly misstates (Pet. at 2, 11, 19, 20, 26) the facts underlying its concession. The parties stipulated that TransUnion transmitted OFAC alerts about 1,853 class members to third parties between January and July of 2011. Pet. App. 14-15. But contrary to TransUnion's contention, that does not mean that "no third party . . . *ever* even saw a credit report for more than 75% of class members." Pet. 19 (emphasis added). The stipulation expressly covered only six months. TransUnion attempts to obscure that obvious fact by referring to the "class period." The class is defined (in part) as those consumers who *were sent* TransUnion's OFAC letter between January and July of 2011 after requesting a copy of their credit file. Pet. App. 14. Those class members suffered a significant risk that TransUnion would send a false OFAC alert about them to a third party both before and after that six-month period. The material risk of that real harm, whenever it might occur (within the FCRA's two-year statute of limitations period), serves to ground the standing of every class member.

Court explained in *Spokeo*, in enacting the FCRA Congress "plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." 136 S. Ct. at 1550.[2] TransUnion's "violation of a procedural right granted by statute" is here sufficient to ground standing because that right protects against the "risk of real harm" that every class member here actually suffered. *Id.* This Court concluded that "a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." *Id.* This is precisely that case.

TransUnion ignores the concrete injury that was universally suffered by the entire class. As the court of appeals concluded, "the fact that TransUnion made the reports available to numerous potential creditors and employers—coupled with the highly sensitive and distressing nature of the OFAC alerts disclosed to consumers, the risk of third-party access TransUnion created through its dealings with [its contractor], and the federal government's awareness of the alerts—is sufficient to show a material risk of harm to the concrete interests of all class members." Pet. App. 26-27. That conclusion was a correct and unremarkable

[2] Congress's concern with reducing the risk of inaccurate dissemination, and not just preventing dissemination itself is reflected in the text of the statutory language, which applies whenever a report is prepared, not just when it is sold to a third party. 15 U.S.C. § 1681e(b) (requiring accuracy "[w]henever a consumer reporting agency *prepares* a consumer report. . . .") (emphasis added).

application of the well-settled rules of standing for statutory violations to the remarkable facts of this case.

Second, with respect to TransUnion's violation of § 1681g(a)(1)'s disclosure requirement, the injury suffered by every class member is clear. Congress created a statutory right for every consumer to receive upon their request "all of the information in the consumer's file." 15 U.S.C. § 1681g(a)(1). The "primary purpose of . . . § 1681g(a)(1) is to allow consumers to identify inaccurate information in their credit files and correct this information via the grievance procedure." Pet. App. 30 (citation and quotation marks omitted). Ignoring Congress's command, TransUnion deprived the class members of that opportunity by "sen[ding] the[m] a document that purported to be their entire credit report, containing no mention of OFAC." *Id.* at 31-32. This Court has repeatedly reaffirmed that the inability to obtain accurate information that Congress determined should be disclosed "is a sufficient injury in fact to satisfy Article III." *Spokeo*, 136 S. Ct. at 1549 (citing *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20-25 (1998) and *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989)). TransUnion's focus (at 21-22) on whether individual class members were "shocked and confused" when they received their unlawfully incomplete credit reports is beside the point. The question of standing turns on whether TransUnion failed to provide them with information that Congress determined they had a legal right to receive. There is no question that every class member suffered that injury.

Third, with respect to TransUnion's violation of § 1681g(c)(2)'s summary-of-rights mandate, the injury suffered by every class member is again clear. In order to empower consumers to correct inaccurate information on their credit reports, Congress required credit agencies to "provide to [the] consumer, with each written disclosure . . . [a] summary of [the consumer's] rights." 15 U.S.C. § 1681g(c)(2). TransUnion's doubt (at 23) that a class member might be "'shocked' that a credit reporting agency . . . might include a summary of her FCRA rights in only one of two contemporaneous mailings" is again a red herring. Congress determined that consumers have a right to receive a summary of rights with "*each* written disclosure," 15 U.S.C. § 1681g(c)(2) (emphasis added). TransUnion's failure to do so in the OFAC letters that it sent to every class member "posed a serious risk that consumers not only would be unaware that this damaging label was on their credit reports, but also would be left completely in the dark about how they could get the label off their reports." Pet. App. 32. There is again no question that every class member suffered that injury. Furthermore, the court of appeals properly found that TransUnion's noncompliant disclosures substantially increased the danger that class members would not be able to correct erroneous OFAC information, a separate material risk of harm. Pet. App. 32-33.

In light of the injuries that all class members shared, named plaintiff Ramirez's claims are plainly typical of the class. *See* Fed. R. Civ. P. 23(a)(3) (class action may proceed if "the claims or defenses of the

representative parties are typical of the claims or defenses of the class"). Ramirez and every other class member alleged (and proved) the same three violations of the FCRA that caused the same injuries across the entire class. As the court of appeals explained, his injuries "arose from the same event or practice or course of conduct" by TransUnion "that gave rise to the claims of other class members and his claims were based on the same legal theory." Pet. App. 39 (cleaned up). The claims here thus satisfy Rule 23(a)(3), and indeed are paradigmatic of those claims appropriate for class resolution.

TransUnion complains (at 26) that Ramirez was "radically atypical" from the class based primarily upon his trial testimony regarding his personal experience arising from TransUnion's false reporting about him. Not so. As a procedural matter, TransUnion waived any objections to this testimony when it failed to raise them at trial or seek to limit Ramirez's testimony through a motion *in limine*. But this argument also fails substantively, because Ramirez's claims are typical of class members' in all relevant ways: like all class members, he was misidentified as an OFAC criminal based on the same faulty matching procedures, and TransUnion sent him the same noncompliant disclosures. TransUnion's complaint again arises from its misunderstanding of the injuries universally suffered by the class members due to its unlawful conduct. The fact that, for example, TransUnion's unlawful conduct towards Ramirez resulted in a car dealership denying him a loan illustrates the risk of real harm that

TransUnion imposed on every class member. But, as the court of appeals noted, "in the context of the FCRA, [an] intangible injury is itself sufficiently concrete. It is of no consequence how likely [the plaintiff] is to suffer *additional* concrete harm as well (such as the loss of a specific job opportunity)." Pet. App. 27 n.8 (cleaned up).[3] The merits of the class members' claims depend only on the injuries shared by all, including Ramirez. For that reason, his claims were typical of the claims of the class.

B. There is no conflict between the court of appeals' decision and the decision of any other court.

The court of appeals' application of established Article III and Rule 23 principles is consistent with those of every other court. With respect to each of the claims at issue here, TransUnion points to cases that reached different results on different facts by applying the same settled rules that the court of appeals applied in the decision below. There is no genuine conflict among the courts of appeals that warrants this Court's intervention.

First, TransUnion's alleged circuit split with respect to the class members' § 1681e(b) claim does not

[3] As the court of appeals recognized, TransUnion's complaint about alleged differences in the degree of injury among class members is undercut by the fact that TransUnion was offered the opportunity to craft a verdict form that distinguished between class members based on type of injury, such as sale of an OFAC alert to a third party, but declined to do so. Pet. App. 40-41 n.14.

exist. The D.C. Circuit's decision in *Owner-Operator Independent Drivers Association, Inc. v. United States Department of Transportation*, 879 F.3d 339 (D.C. Cir. 2018), rejected the argument that the plaintiffs "suffer[ed] concrete harm from the mere fact that the Department, in violation of its statutory obligations, has allowed inaccurate safety information to remain in the database." *Id.* at 344. The class members here allege far more than the mere existence of inaccurate information in untapped computer files. They allege that TransUnion's failure to follow reasonable procedures to ensure the accuracy of its OFAC alerts created a substantial risk that those inaccurate records would be disseminated to their detriment. The plaintiffs in *Owner-Operator* did not allege, and the D.C. Circuit did not consider, a comparable risk of real harm from the "mere existence of inaccurate information in the database" at issue in that case. *Id.* at 343. And in stark contrast to this case, where TransUnion has sold thousands of false OFAC alerts and has never considered discontinuing its OFAC product, in *Owner-Operator* "any risk of future disclosure of inaccurate information ha[d] been virtually eliminated by the Department's adoption" of a new policy by the time the D.C. Circuit heard the case. *Id.* at 346.

The other cases cited by the petition are similarly consistent with the court of appeals' decision. In *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909 (7th Cir. 2017), the plaintiff alleged a cable operator unlawfully retained his personal information in its internal database. But the plaintiff there offered "no allegation

or evidence that in the decade since he subscribed to Time Warner's residential services any of the personal information that he supplied to the company when he subscribed had leaked and caused financial or other injury to him *or had even been at risk of being leaked*." *Id.* at 910-11 (emphasis added). And in *Braitberg v. Charter Communications, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016), the plaintiff also "allege[d] only that Charter violated a duty to destroy personally identifiable information by retaining certain information longer than the company should have kept it." *Id.* at 930. Because "[h]e [did] not allege that Charter has disclosed the information to a third party, that any outside party has accessed the data, or that Charter has used the information in any way during the disputed period," the court similarly concluded that the plaintiff "identifie[d] no material risk of harm from the retention." *Id*.

Second, TransUnion's alleged circuit split with respect to the class's § 1681g(a)(1) and § 1681g(c)(2) inadequate disclosure claims is similarly illusory. In *Flecha v. Medicredit, Inc.*, 946 F.3d 762 (5th Cir. 2020), the Fifth Circuit "d[id] not reach the issue" of standing. *Id.* at 768. And in any event, the court there confronted a case in which the putative class members received an *unsolicited* letter from a debt collector, the accuracy of which varied by class member. *Id.* at 766-67.[4] By

[4] Though Petitioner misidentifies *Flecha* as being an FCRA case (Pet. 24-25), it was decided under a different statute, the Fair Debt Collection Practices Act, under which the disclosures to consumers have a different purpose and are evaluated according to a different standard. 946 F.3d at 765.

contrast, every class member here affirmatively requested her credit report and received TransUnion's uniformly incomplete and inaccurate disclosures in response—a very different situation in which a consumer is unlikely, contrary to TransUnion's speculation (at 25), to have "ignored [it] as junk mail."

In *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884 (7th Cir. 2017), the Seventh Circuit held that a plaintiff lacked standing to sue for the violation of a disclosure requirement because it did "not seek to protect [him] from the kind of harm he claims he has suffered, i.e., receipt of a non-compliant disclosure." *Id.* at 888. By contrast, Congress designed the FCRA's disclosure requirements to protect against precisely the harm suffered by the class members here: "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report." S. Rep. No. 517, 91st Cong., 1st Sess. 1 (1969).

The final two cases cited by TransUnion involve the failure to disclose information that was ultimately irrelevant—a far cry from TransUnion's failure to disclose that it falsely labeled the class members here as "terrorists" prohibited from doing business in the United States, and failure to tell consumers how to get those false labels removed. Pet. App. 32. In *Dreher v. Experian Information Solutions, Inc.*, 856 F.3d 337 (4th Cir. 2017), a plaintiff alleged an FCRA violation for failing to include the name of the servicer for the debts of a defunct creditor listed on a credit report. The Fourth Circuit held he lacked standing because he was "still able to receive a fair and accurate credit report,

obtain the information he needed to cure his credit issues, and ultimately resolve those issues," and therefore "failed to demonstrate how viewing [one] name . . . rather than [another] adversely affected his conduct in any way." *Id.* at 347. And in *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458 (6th Cir. 2019), a credit report "omitt[ed] . . . linked accounts and . . . missing transactions" but "the undisclosed information was irrelevant to any credit assessment." *Id.* at 466.

In sum, the alleged circuit splits simply reflect the varying facts of different cases. TransUnion's petition thus amounts to no more than a complaint about the application of settled legal rules to the facts of this case. That sort of fact-bound error correction does not warrant this Court's review.

II. The award of punitive damages does not warrant this Court's review.

The court of appeals' decision with respect to the punitive damages award also does not warrant this Court's intervention. TransUnion hints (at 30) that the court of appeals' ratio of 4:1 is "irreconcilable" with this Court's cases and those from other circuits. That is incorrect. The decision below does not conflict with the decision of this or any other court. The punitive damages award was supported by the record in this case and comports with the constitutional limitations established by this Court's decisions. Accordingly, certiorari is not warranted.

The court of appeals correctly held that an award of punitive damages at a ratio of 4:1 was appropriate and within constitutional limits in light of TransUnion's "repeated and willful" misconduct. Pet. App. 46. That holding is in line with what this Court has described as "a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of . . . quadruple damages to deter and punish." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). This Court has also made clear that the "precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.* The egregious facts of this case fully justify the punitive damages award imposed by the decision below.

It bears repeating: TransUnion falsely labeled thousands of innocent people as terrorists, drug traffickers, and other threats to national security on their credit reports, which it sells to millions of companies every year. It failed to utilize available personal identifying information that it had in its possession to ensure a correct match. Compounding the harm, it concealed its practices by omitting those false labels when class members requested their credit files, and misled the Department of Treasury regarding the contents of its OFAC disclosures. When it did inform people that it was labeling them as terrorists, it made it harder for people to correct the misinformation that TransUnion included in their credit files by failing to include the legally-mandated summary of rights. Through 15 years of litigation about this misconduct,

it has tried to avoid responsibility by advancing spurious legal positions that have been rejected by every single court to have looked at them.

The court of appeals recognized that "TransUnion's conduct demonstrated a disregard for the gravity of an OFAC match and what a false positive would mean, emotionally and practically, for each consumer." Pet. App. 47. It emphasized TransUnion's "consistent refusal to take responsibility or acknowledge the harm it has caused," noting that "even on appeal, TransUnion continues to take the position that labeling someone a terrorist *causes them no harm*." *Id.* at 49. Indeed, TransUnion's intransigent insistence on minimizing its misconduct continues in its petition, in which it characterizes its willful and unlawful conduct towards almost 10,000 innocent people as merely a series of "hyper-technical FCRA violations." Pet. 29. On this record, the jury, the district court, and the court of appeals all agreed that TransUnion deserved to be penalized with punitive damages.

TransUnion appears to identify two aspects of the damages award in this case as reasons to grant certiorari: that the jury awarded statutory damages, and that the damages award was substantial. Neither presents an issue that warrants this Court's review. First, TransUnion's observation that the jury awarded statutory damages rather than traditional compensatory damages has no bearing on the constitutional propriety of a punitive damages award. It points to no case in this or any other court that held otherwise—or that has even addressed the issue. TransUnion speculates

that the statutory damages award "was not a measure of the actual harm suffered by the plaintiffs, but was instead itself intended to punish." Pet. 29 (cleaned up). That conjecture is baseless.[5] No court has held that the FCRA statutory damages are punitive rather than compensatory. Rather, "[b]y providing a compensatory remedy for a private wrong," the "statutory damages" awarded here "did not impose a 'penalty.'" *Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1642 (2017) (citation and quotation marks omitted).

Finally, even though it does not allege a circuit split, TransUnion notes two circuit cases in which the court did "not hesitate to find much lower awards sufficiently 'substantial' to demand a 1:1 ceiling." Pet. 30-31 (citing *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041 (10th Cir. 2016); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004)). Such results are not surprising. In the fact-bound inquiry into the appropriateness of a punitive damages award, there are many cases that do not warrant a higher ratio—or even any punitive damages at all. TransUnion then hypothesizes that "[*a*] *fortiori*, a multimillion-dollar statutory award like this one could *never* justify a 4:1 punitive damages award in those circuits." Pet. 31 (emphasis added). That suggestion is contrary to the law of the two circuits whose decisions TransUnion references. *See*, *e.g.*, *Ondrisek v. Hoffman*, 698 F.3d 1020, 1031 (8th

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[5] Contrary to Petitioner's assertion (at 30), the court below explicitly acknowledged and rejected TransUnion's argument that punitive damages were duplicative of the statutory damages award. Pet. App. 44.

Cir. 2012) ("[T]he punitive damages [on the facts of this case] should not exceed a 4:1 ratio to maintain the notions of fundamental fairness and due process" in case "imposing $12 million in punitive damages for each plaintiff"); *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir. 1996) ("[U]sing our best judgment we determine that $6,000,000 is the maximum constitutionally permissible punitive damages award justified by the facts of this case [which] is approximately six times the actual and potential damages plaintiffs suffered."). And it is belied by the countless other multimillion-dollar cases upholding ratios at or above 4:1 in other circuits. *See*, *e.g.*, *Rainey v. Taylor*, 941 F.3d 243 (7th Cir. 2019) (upholding a jury verdict awarding $1.13 million in compensatory damages and $6 million in punitive damages, and stating the "punitive award raises no constitutional concerns"); *Brand Marketing Grp. LLC v. Intertek Testing Servs., N.A., Inc.*, 801 F.3d 347 (3d Cir. 2015) (upholding $1,045,000 in compensatory and $5 million in punitive damages); *Action Marine, Inc. v. Continental Carbon, Inc.*, 481 F.3d 1302 (11th Cir. 2007) (upholding an award of $1,915,000 in compensatory damages, and a 5:1 ratio of punitive damages); *Cable & Computer Tech., Inc. v. Lockheed Sanders Inc.*, 52 F. App'x 20 (9th Cir. 2002) (upholding a punitive damages award of $12.8 million per defendant, five times higher than the amount of compensatory damages awarded).

Pointing to no conflict among the lower courts or inconsistency with this Court's cases, the petition

presents no reason to review the well-justified punitive damages award in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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