No. 20-297

In the
Supreme Court of the United States

TRANS UNION LLC,

Petitioner,

v.

SERGIO L. RAMIREZ,

Respondent.

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

REPLY BRIEF

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November 24, 2020

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The decision below vividly illustrates the grave constitutional and Rule 23 concerns that the admixture of statutory damages, punitive damages, and class actions can pose. Rather than take those concerns seriously, the Ninth Circuit exacerbated them by blessing a radically atypical plaintiff's effort to collect more than $40 million on behalf of a class of absent members who were not injured at all, let alone comparably to their atypical representative. The result is a decision that conflicts with this Court's precedent, cases from other circuits, and bedrock Article III, Rule 23, and due process rules.

Ramirez's efforts to defend that decision require distortion (invoking potential injuries outside the class period or conflating statutory and compensatory damages) and succeed only in confirming the need for this Court's review. Ramirez remarkably never acknowledges *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), and his effort to describe the class's injury as being "labeled a terrorist" only highlights that 75+% of class members were never labeled anything to any third party during the class period. Their reports were sent only to themselves with no greater risk of further dissemination than an inaccuracy lying dormant in a database or a desk drawer. That the reports arrived in two envelopes rather than one is the kind of "bare procedural violation" that falls far short of what Article III requires. *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1549 (2016). The Ninth Circuit's standing decision flouts both *Clapper* and *Spokeo*, and decisions from other circuits.

Ramirez's efforts to defend the court's typicality and punitive-damages holdings fare no better. Unable to deny that "the hallmark of the trial was the absence of evidence about absent class members, or any evidence that they were in the same boat as Ramirez," Pet.App.54 (McKeown, J., dissenting in part), he faults TransUnion for not objecting to Ramirez's testimony about his own unique experiences. But the problem is Ramirez's typicality, not the admissibility of his own actual (but atypical) experiences, and the former objection was raised repeatedly. And, as with *Clapper*, Ramirez simply ignores this Court's admonition that when the underlying damages award is substantial, a punitive-damages award of the same amount "reach[es] the outermost limit of the due process guarantee." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). Citing pre-*State Farm* decisions approving larger ratios does not make that problem go away, let alone address the distinct problems with layering large punitive-damages awards on top of statutory damages that already provide deterrence and punishment.

The decision below is both plainly wrong and highly consequential, as evidenced by the grave threats to a wide range of businesses. *See* Chamber.Amicus.Br.13-17; CDIA.Amicus.Br.13-21. Under the Ninth Circuit's rule, a single atypical plaintiff can open the door to massive statutory and punitive damages based on a single hyper-technical procedural violation. Neither Rule 23 nor the Constitution tolerates that result. This Court should not leave this dangerous precedent unreviewed.

ARGUMENT

I. The Ninth Circuit's Article III And Rule 23 Holdings Contradict This Court's Precedent And Conflict With Other Circuits' Caselaw.

The Ninth Circuit's conclusion that all 8,185 class members had standing to recover thousands of dollars in damages is "*SCRAP* for a new generation" of absent class members. *Massachusetts v. EPA*, 549 U.S. 497, 548 (2007) (Roberts, C.J., dissenting). That much is clear from the opinion itself, and doubly so from Ramirez's attempts to defend it.

1. Ramirez begins by insisting that TransUnion "misunderstand[s]" the nature of injury the Ninth Circuit found sufficient on the reasonable-procedures claim, which he emphasizes was the "risk" that an inaccurate report might be disseminated, not any concrete injury that actually "materialized" from any such dissemination. BIO.17, 21. Ramirez's description fully accords with TransUnion's understanding of the Ninth Circuit's ruling. The problem is that that "risk" does not satisfy the Constitution. Under this Court's precedent, *potential* harms must be "certainly impending" to satisfy Article III. *Clapper*, 568 U.S. at 410. Here, Ramirez not only failed to present *any* evidence that *any* absent class member *actually* suffered *any* concrete harm from dissemination of an inaccurate report, but *stipulated* that 75+% of the class never had a report disseminated to any third party during the class period. Pet.App.14-15. A risk that concededly never materialized is very nearly the opposite of "certainly impending"—which likely explains why Ramirez simply pretends *Clapper* does not exist.

Ramirez protests that the stipulation covered only the six-month class period. BIO.17 n.1. But Ramirez (and his lawyers) picked the class period, which is what defines the class and who stands to recover thousands of dollars in statutory and punitive damages. The possibility that some of the 6,962 absent class members who concededly did not have a credit report disseminated to any third party during the class period *might* have had one disseminated at some other time accentuates, rather than solves, the *Clapper* problem.

It also highlights the square conflict between the Ninth Circuit's decision and the decisions of three other circuits correctly holding that the mere existence of inaccurate information in a database does not suffice for Article III standing. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 879 F.3d 339, 340-47 (D.C. Cir. 2018); *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 910-11 (7th Cir. 2017); *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930-31 (8th Cir. 2016); Pet.23-24. Ramirez claims the risk of dissemination was more "substantial" here. BIO.23. But that is both wrong and beside the point. It is wrong because the only thing that distinguishes 75+% of the class from non-class-members whose inaccurate information never left the database is that an inaccurate report was sent to class members themselves. But that does nothing to increase the risk that inaccurate information could be disseminated to third parties. To the contrary, it actually *reduces* that risk, because the whole point of sending someone their own credit report is to identify and correct errors. Perhaps because it recognized as much, nothing in the Ninth Circuit's reasoning turned

on the class members' receipt of their own credit reports or any other fact making dissemination imminent. Instead, it declared the "risk" of dissemination sufficient simply because "[c]redit reports exist for the very purpose of being disseminated to third parties." Pet.App.25. That credit-reports-exist-to-be-shared theory is just another way of saying that everyone whose credit file contains any material inaccuracy has Article III standing, whether or not the inaccuracy was ever disseminated or instead just lay dormant in a database.[1] That holding squarely conflicts with *Clapper* and the decisions of three circuits.

2. Ramirez's efforts to defend the Ninth Circuit's analysis of his "disclosure" claims fare no better. Unable to deny his abject failure to prove that anyone else even read the purportedly confusing mailings, Ramirez insists that "whether individual class members were 'shocked and confused' when they received" them "is beside the point"; all that matters is that "TransUnion failed to provide them with information that Congress determined they had a legal right to receive." BIO.19. But *Spokeo* squarely rejected the argument that a plaintiff may "allege a bare procedural violation" of a statute, "divorced from

[1] Ramirez tries to distinguish *Owner-Operator* on the ground that "'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." BIO.23 (quoting *Owner-Operator*, 879 F.3d at 346). But that was the reason the court denied *injunctive* relief to the two plaintiffs who had standing because their information *had* been disseminated to a third party; it was not the reason the other individuals lacked standing. 879 F.3d at 346.

any concrete harm, and satisfy the injury-in-fact requirement of Article III." 136 S.Ct. at 1549.

Ramirez claims that *Spokeo* embraced an exception for "disclosure" violations. BIO.19. In fact, *Spokeo* merely cited two disclosure cases for the proposition that "the violation of a procedural right granted by statute *can be sufficient in some circumstances*." 136 S.Ct. at 1549 (emphasis added). Both cases dealt with a government agency's failure to disclose information *at all*. *See id.* That a plaintiff has standing when he is denied access to information hardly establishes that he has standing when he receives all the information to which he is entitled in the wrong-colored envelope or in two envelopes rather than one.

Indeed, if any disclosure violation will really suffice, then someone who received the two letters, understood them perfectly, called TransUnion immediately, and got the "potential match" alert removed before anyone else learned of it would still have Article III standing to recover thousands—even though the disclosure accomplished exactly what FCRA intended. That is no exaggeration; that has to be Ramirez's view, because there is no reason to think that this description does not describe some absent class members to a tee. Nothing in *Spokeo* supports that nonsensical result, as the Fourth, Fifth, Sixth, and Seventh Circuits have recognized in rejecting arguments just like this one. Pet.24-25.

Ramirez contends that the Fifth Circuit did not reach standing in *Flecha v. Medicredit, Inc.*, 946 F.3d 762 (5th Cir. 2020). In reality, *Flecha* unambiguously concluded that "[c]ountless unnamed class members

lack standing," *id.* at 768, and repeated that conclusion multiple times, *e.g.*, *id.* ("many unnamed class members … lack the requisite injury to establish Article III standing"); *id.* (plaintiffs "who received the letter, but ignored it as junk mail … lack a cognizable injury under Article III").

The conflict with the other circuits is clear as well. Pet.24-25. While Ramirez suggests that the disclosure inadequacies in those cases were less confusing, BIO.25-26, he cannot have it both ways. If "whether individual class members were 'shocked and confused' when they received" TransUnion's mailings "is beside the point," BIO.19, then the degree of the class members' confusion cannot be the basis for distinguishing the Fourth, Sixth, and Seventh Circuit decisions. In reality, confusion is "beside the point" in the Ninth Circuit, and necessary for Article III standing elsewhere. *See* Pet.24-25. That is the definition of a circuit split.

Ramirez complains that TransUnion is merely "speculat[ing]" that absent class members may have "'ignored [the mailers] as junk mail.'" BIO.25 (quoting Pet.25). But that is the point: Because there is "no evidence that absent class members received, opened, or read the mailings, nor that they were confused, distressed, or relied on the information in any way," Pet.App.53 (McKeown, J.), speculation is all we have. Yet the Ninth Circuit affirmed an award of thousands of dollars to every single class member, some of whom remain blissfully unaware of their "injury." That result plainly violates the cardinal rule that *all* plaintiffs must "have Article III standing" to recover "money judgments in their own names." *Town of*

Chester v. Laroe Estates, Inc., 137 S.Ct. 1645, 1651 (2017).

3. At a minimum, the indisputable reality that Ramirez suffered injuries that were wholly atypical from anything any other class member experienced should have prevented this case from proceeding as a class action. A class representative who experienced credit problems in front of his family, suffered embarrassment, and canceled a family vacation as a result, is not remotely typical of a class of individuals who experienced no known credit complications, were subjected only to technical procedural violations in the privacy of their own homes, and at most suffered minor *risks* of potential harm. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011) (to satisfy typicality, "class representative[s] must … [have] suffer[ed] *the same injury* as the class members" (emphasis added)).

Ramirez protests that he suffered all the same (trivial) injuries as the absent class members. BIO.21. That is not even correct, as Ramirez's name was designated a "match," while other class members were designated a "*potential* match." Pet.9. At any rate, he misses the point, for the problem is that he *also* suffered more serious injuries that they *did not*. Someone with a broken arm and a broken fingernail is not typical of a class who suffered only broken fingernails. Someone defamed in the national news is not typical of a class subject to similar statements in letters that never left a desk drawer.

Ramirez next faults TransUnion for not objecting to his testimony. BIO.21. That also misses the point. Ramirez's testimony about his own experiences was

not inadmissible; it just underscored that he was a wholly atypical class representative. The latter point is a separate legal, not evidentiary, argument that TransUnion had already raised without avail (twice) by the time Ramirez took the stand.

In sum, no other circuit would have allowed this class action to proceed given the absent members' lack of standing and the class representative's atypicality. The decision below stands alone and should not stand for long.

II. The Ninth Circuit's Punitive-Damages Analysis Defies Due Process And This Court.

This Court has twice made clear that "[w]hen compensatory damages are substantial, then a … ratio[] perhaps only equal to compensatory damages[] can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425; *accord Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501 (2008). Those due process concerns are even *more* acute when (as here) *statutory* damages are substantial, because statutory damages are themselves "designed to deter future violations" and to impose "a penalty," in addition to compensating for harm. *Dryden v. Lou Budke's Arrow Fin. Co.*, 630 F.2d 641, 647 (8th Cir. 1980); *accord, e.g.*, *F.W. Woolworth Co. v. Contemp. Arts, Inc.*, 344 U.S. 228, 233 (1952). Thus, when it comes to statutory damages, the basic *State Farm* problem is compounded by a very real risk that the jury's punitive-damages award imposes unconstitutionally duplicative punishment. Here, even the Ninth Circuit acknowledged that the jury's $8-million statutory-damages award is "quite substantial" and that the jury's punitive-damages

award was constitutionally excessive. Pet.App.47-48. Yet the Ninth Circuit nonetheless approved layering $32 million in punitive damages on top of $8 million in statutory damages.

Ramirez's only response is to note that *State Farm* did not disturb the "long … history" of "providing for sanctions of double, treble, or quadruple damages to deter and punish," 538 U.S. at 425. BIO.27. But *the very next paragraph* of *State Farm*, which he simply ignores, states that the due process calculus changes when, as here, the underlying damages award is "substantial." 538 U.S. at 425; *accord Exxon*, 554 U.S. at 501. That is why multiple circuits have held that a 1:1 ratio is the ceiling in such cases. *See, e.g.*, *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1068-69 (10th Cir. 2016). Ramirez notes that years *before State Farm*, the Tenth Circuit upheld a 6:1 ratio in a case with a $1 million compensatory-damages award. BIO.29-30. Indeed. In the Tenth Circuit, Supreme Court decisions have consequences. And the Tenth Circuit is hardly alone in following precedent and concluding that due process requires a 1:1 ratio when the underlying award is "substantial." *See, e.g.*, *Epic Sys. Corp. v. Tata Consultancy Servs. Ltd.*, --- F.3d ---, 2020 WL 6813872, at *19 (7th Cir. 2020) (collecting cases). Nor are there "countless other multimillion-dollar cases upholding ratios at or above 4:1 in other circuits." BIO.30. Ramirez does not cite a single court of appeals decision post-*State Farm* upholding a greater-than-1:1 ratio when the underlying award was as big as it is here, and we are not aware of any.

That the "quite substantial" underlying award is for *statutory* damages only compounds the problem.

Ramirez baldly asserts that, unlike all other statutory damages, "FCRA statutory damages" are exclusively "compensatory." BIO.29. He tellingly cites no authority for that proposition—because there is none. In reality, FCRA explicitly distinguishes between compensatory damages and statutory damages, *see* 15 U.S.C. §1681n(a)(1)(A), and allows the plaintiff to opt for the latter, which is why multiple courts, including the Ninth Circuit, have held that FCRA "statutory damages" serve to "deter[]," not just compensate. *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 781 (9th Cir. 2018).

Ramirez himself recognized as much below when (after presenting no evidence that any absent class member suffered any compensable harm) he urged the jury to award the highest possible statutory damages *to impose the "maximum penalty" on TransUnion*. CA9.ER258 (emphasis added). That entreaty was wholly consistent with statutory damages' deterrence and punishment functions, which means that layering $32 million in punitive damages on top of $8 million in statutory damages not only ran afoul of *State Farm*, *Exxon*, and decisions from other circuits, but produced unconstitutional double punishment to boot.

III. The Questions Presented Are Important.

The decision below vividly illustrates why courts must be particularly vigilant when "the class action mechanism" is "combin[ed]" with "statutory damages awards on a per-consumer basis." *Parker v. Time Warner Ent. Co.*, 331 F.3d 13, 22 (2d Cir. 2003). Yet rather than enforcing constraints vigilantly, the Ninth Circuit minimized Article III, Rule 23, and due process constraints. The result is a decision that subjects

businesses to staggering liability for entirely speculative and indeed hypothetical injuries, *see* CDIA.Amicus.Br.12-13, and invites class-action abuse under statutory-damages provisions of all stripes, *see* Chamber.Amicus.Br.13-17.

This is an ideal case for resolving these highly consequential issues, as it is the relatively rare class action that was actually litigated all the way to a jury verdict despite settlement pressures along the way. Left standing, moreover, it could be one of the last, at least in Ninth Circuit, as no rational defendant will risk a jury trial against an atypical class representative with the decision below on the books. A single sympathetic and atypical plaintiff with actual but idiosyncratic injuries should be not be able to generate substantial monetary awards for absent class members whose first inkling that they were injured is receiving a nearly $5,000 check in the mail. That result defies common sense and due process, but it will be a recurring dynamic in the Ninth Circuit if the decision below is left standing.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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