NO. 20-297

In the
Supreme Court of the United States

TRANS UNION LLC,

Petitioner,

v.

SERGIO L. RAMIREZ,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

This petition arises out of a Fair Credit Reporting Act class action in which the named plaintiff suffered atypical injuries and the vast bulk of the class suffered no Article III injury at all. The named plaintiff claimed that an inaccurate credit report hindered his effort to secure credit, caused him embarrassment in front of family, and led him to cancel a vacation. Yet he sought to represent a class of thousands of individuals, the vast majority of whom (>75%) never had a credit report disseminated to any third party, let alone suffered a denial of credit or other injury anything like the class "representative." The trial court nonetheless let the class proceed on the theory that the absent class members all suffered Article III injury and that the vast differences between the experiences of the named plaintiff and the class he purported to represent were immaterial. The results were predictable. Having heard only about the named plaintiff's entirely atypical injuries, the jury awarded the entire class statutory damages near the statutory maximum and then awarded classwide punitive damages that dwarfed the statutory damages. In a 2-1 decision, the Ninth Circuit then affirmed across the board, save for minimally trimming the punitive damages award.

The question presented is:

Whether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered.

PARTIES TO THE PROCEEDING

Petitioner, and defendant-appellant below, is Trans Union LLC.

Respondents, and plaintiffs-appellees below, are Sergio L. Ramirez and 8,184 absent class members "to whom Trans Union sent a letter similar in form to the March 1, 2011 letter Trans Union sent to [Ramirez] regarding 'OFAC (Office of Foreign Assets Control) Database' from January 1, 2011-July 26, 2011."

CORPORATE DISCLOSURE STATEMENT

Trans Union LLC is a wholly owned subsidiary of TransUnion Intermediate Holdings, Inc. TransUnion Intermediate Holdings, Inc. is wholly owned by TransUnion. TransUnion is a publicly traded entity with the ticker symbol TRU. Investment funds affiliated with T. Rowe Price Group, Inc., a publicly traded entity with the ticker symbol TROW, own more than 10 percent of TransUnion's stock.

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INTRODUCTION

This case is a paradigmatic example of a class action that never should have been certified. While the class representative suffered real injuries, he sought to represent thousands of individuals who did not suffer any concrete injury, let alone experience anything similar to the atypical class representative. When the lower courts allowed this class action to proceed, the results were predictable: The jury heard only about the class representative's real injuries and atypical experience, and awarded each and every class member thousands of dollars in statutory and punitive damages. Both Article III and Rule 23 prevent this outcome and require this class to be decertified.

Sergio Ramirez suffered difficulty obtaining credit, was embarrassed in front of family members, and even canceled a vacation after a car dealer received a credit report indicating that his name matched a name on a government list of persons with whom U.S. businesses may not transact. In response, he initiated a class action alleging three violations of the Fair Credit Reporting Act (FCRA), two concerning the mode of providing consumers with a copy of their own credit file and one concerning the procedural requirements for furnishing an accurate credit report. But although Ramirez had difficulty obtaining credit, he was not content to represent a class of individuals who were denied credit, or even a class of individuals who had arguably inaccurate reports disseminated to third parties. Instead, he sought to represent a class of all individuals who received similar information *themselves* when TransUnion sent them their credit file in two mailings. And even then, he did not limit

the class to individuals who were confused or alarmed by the mailings, or even to those who read them. His own class definition thus swept in countless individuals who suffered no injury and had no experience remotely analogous to his own unpleasant experience at the dealership. Indeed, Ramirez stipulated that more than 75% of the class never had a credit report with Name Screen information disseminated to a third party during the class period. That stipulation should have been the end of the class action.

The district court nonetheless let the class action proceed on the misguided view that only a class representative need have Article III standing even when seeking money damages for the entire class. The Ninth Circuit corrected that error, but a divided panel still declined to decertify the class. In its view, whether a credit report containing inaccurate information was disseminated to a third party is irrelevant; simply receiving one's own credit file in a noncompliant format—literally, in two envelopes rather than one—and the bare existence of inaccurate information lying dormant in the file sufficed to satisfy Article III. And the majority was even more dismissive of typicality concerns: Unable to deny the substantial differences between Ramirez and a typical class member, it deemed the differences irrelevant, holding that typicality is satisfied so long as there is *some* common denominator tying representative and class together.

Those holdings are impossible to reconcile with this Court's precedent. Standing requires an injury that is both "concrete and particularized," *Spokeo, Inc.*

v. Robins, 136 S.Ct. 1540, 1545 (2016), and that either has already materialized or is "certainly impending," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). None of the abstract and inchoate injuries asserted on behalf of the absent class members here begins to satisfy those requirements. And Rule 23(a)(3) requires a class representative to be *typical* of those he seeks to represent. A plaintiff who suffered public humiliation and canceled a vacation is not remotely typical of a class of individuals who received information about their own credit files in the privacy of their homes (and *may* have been briefly confounded by receiving information in two envelopes, if they even opened them). By sanctioning an award of more than $40 million in statutory and punitive damages to 8,184 individuals who were never proven to have suffered any concrete injury at all, the decision below flouts bedrock constraints on cases, controversies, and the class-action device.

OPINION BELOW

The Ninth Circuit's opinion is reported at 951 F.3d 1008 and reproduced at Pet.App.1-58. The district court's order denying TransUnion's post-trial motions is available at 2017 WL 5153280 and reproduced at Pet.App.61-90.

JURISDICTION

The Ninth Circuit issued its decision on February 27, 2020, and issued its order denying rehearing en banc on April 8, 2020. Pet.App.1-60. The petition for certiorari was timely filed on September 2, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of Article III of the U.S. Constitution, FCRA, and Federal Rule of Civil Procedure 23 are reproduced at Pet.App.91-128.

STATEMENT OF THE CASE

A. Legal Background

1. Congress enacted FCRA "to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007). "To achieve this end, the Act regulates the creation and the use of 'consumer report[s]' by 'consumer reporting agenc[ies]' for certain specified purposes, including credit transactions, insurance, licensing, consumer-initiated business transactions, and employment." *Spokeo*, 136 S.Ct. at 1545 (alterations in original; footnotes omitted); *see* 15 U.S.C. §1681a(d)(1) (defining "consumer report"); *id.* §1681a(f) (defining "consumer reporting agency").

"FCRA imposes a host of requirements concerning the creation and use of consumer reports." *Spokeo*, 136 S.Ct. at 1545. This case involves three of them. The first is 15 U.S.C. §1681e(b), one of FCRA's "[c]ompliance procedures," which requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" when "prepar[ing] a consumer report." The other two are part of FCRA's consumer disclosure requirements, which are designed "to allow consumers to identify inaccurate information in their credit files and correct this information via the grievance procedure established under §1681i." *Gillespie v. Equifax Info.*

Servs., L.L.C., 484 F.3d 938, 941 (7th Cir. 2007); *see* S. Rep. No. 91-517, at 1 (1969). Under §1681g(a)(1), each "consumer reporting agency shall, upon request, … clearly and accurately disclose to the consumer … [a]ll information in the consumer's file."[1] And under §1681g(c)(2), each "consumer reporting agency shall provide to a consumer, with each written disclosure … to the consumer under [§1681g]" a "summary of rights" prepared by the Consumer Financial Protection Bureau.

FCRA authorizes private parties to seek damages for violations of its terms. Consumer reporting agencies that negligently violate a FCRA requirement "with respect to any consumer" are liable for "actual damages," plus attorney's fees and costs. 15 U.S.C. §1681o(a). For "willful" violations, a consumer may obtain either "actual damages" in any amount or statutory damages between $100 and $1,000, as well as attorney's fees, costs, and punitive damages. *Id.* §1681n(a).

2. Simply having a FCRA claim for statutory damages does not itself confer Article III standing. That is the lesson of *Spokeo*, which "abrogated the [view] that the violation of a statutory right

[1] The term "file" "means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored." 15 U.S.C. §1681a(g). The "file" that goes to the consumer is different from a "consumer report," which is a "communication" of "information" from a consumer reporting agency to a third party "bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living," if "used or expected to be used or collected" for certain specified purposes. *Id.* §1681a(d)(1).

automatically satisfies the injury-in-fact requirement whenever a statute authorizes a person to sue to vindicate that right." *Frank v. Gaos*, 139 S.Ct. 1041, 1046 (2019) (per curiam).

Spokeo involved a putative class action against "a website that provides users with information about other individuals, including contact data, marital status, age, occupation, economic health, and wealth level." *Robins v. Spokeo, Inc.*, 742 F.3d 409, 410-11 (9th Cir. 2014). The plaintiff alleged that Spokeo willfully included false information on its site, in violation of §1681e(b). The Ninth Circuit allowed the case to proceed without requiring the plaintiff to allege any tangible harm resulting from the asserted FCRA violation, reasoning that the mere "violation of a statutory right" suffices to "confer standing." *Id.* at 412. This Court disagreed.

As the Court explained, no matter the source of a cause of action or whether statutory damages are available, a plaintiff must always demonstrate that he "suffered an injury in fact"—*i.e.*, an injury "that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S.Ct. at 1547-48 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). It need not be a physical or pocketbook injury; "intangible injuries can … be concrete" in "some circumstances" too. *Id.* at 1549. But while "the judgment of Congress" is "instructive and important" in determining whether an intangible injury is sufficiently concrete to satisfy Article III, that "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to

authorize that person to sue to vindicate that right." *Id.* "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.*

Applying those principles to FCRA, the Court explained that plaintiffs "cannot satisfy the demands of Article III by alleging a bare procedural violation," as "[a] violation of one of the FCRA's procedural requirements may result in no harm." *Id.* at 1550. For example, "[i]t is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm." *Id.* Accordingly, to bring a claim under FCRA, plaintiffs must allege—and, to recover damages, ultimately prove—that they suffered some real-world injury on account of the alleged FCRA violation. *Id.*

3. "In determining whether an intangible harm constitutes injury in fact," this Court has found it "instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 1549; *see also Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008). History confirms that a bare procedural violation of FCRA, particularly one involving disclosures only to a consumer at her home, does not necessarily cause injury-in-fact.

"Prior to the FCRA, injuries that resulted from the dissemination of erroneous information by credit reporting agencies could be redressed through the common law action of defamation." Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95, 97 (1983). To bring a defamation action at common law, a plaintiff

had to demonstrate "[p]ublication … to one other than the person defamed." *Restatement (Second) of Torts* §577(1) (1977); *see also Restatement (First) of Torts* §569 (1938) (libel); *id.* §570 (slander *per se*). The common-law torts of false light and public disclosure of private facts likewise required dissemination of the offending information, and on an even greater scale: Both required "giv[ing] publicity to a matter concerning another" that is false (false light) or private (public disclosure of private facts), with "publicity" defined as "communicating … to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Restatement (Second) of Torts* §§652D cmt. a, 652E & cmt. a. Thus, while "common-law courts" could and did "adjudicate suits involving the alleged violation of … rights of personal security (including security of reputation)," *Spokeo*, 136 S.Ct. at 1551 (Thomas, J., concurring), they did not recognize any legal right to get into court (let alone to recover money damages) when the allegedly defamatory information was never published to any third party.

B. Factual Background

1. In addition to preparing traditional consumer credit reports, in 2002, TransUnion began offering a product variously known as "OFAC Name Screen Alert," "Name Screen," or "OFAC Advisor." OFAC refers to the U.S. Treasury Department's Office of Foreign Assets Control, which "administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists,

international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States." *Office of Foreign Assets Control – Sanctions Programs and Information*, U.S. Dep't of the Treasury, http://bit.ly/1VZNDSI (last visited Jan. 31, 2021). OFAC publishes a list of individuals, known as specially designated nationals, or "SDNs," with whom U.S. businesses may not transact. Doing business with an SDN is no small matter and "may result in civil as well as criminal penalties." *Cortez v. Trans Union LLC*, 617 F.3d 688, 696, 701 (3d Cir. 2010); *see* 31 C.F.R. §501 app. A, II. Businesses use TransUnion's Name Screen product to assist in complying with their OFAC obligations, but not all businesses that received traditional credit information from TransUnion opted to receive the Name Screen product.

When this litigation arose, Name Screen was in one of its earliest iterations (it has since been significantly refined) and worked as follows: When TransUnion ran a credit check for a business that had opted for the additional Name Screen feature, TransUnion not only would produce and send the individual's traditional credit report, but also would use third-party software and data to screen the person's name against the OFAC list. If the individual's first and last names matched the first and last names of a name on the OFAC list, TransUnion would place an alert on the report that the "name" was a "potential match" to a name on the OFAC list. Pet.App.6-7, 12-14. The reporting of the individual as only a "potential match" reflected the reality that the

product at the time compared only names and not other data, like date of birth, that could clarify whether the credit applicant and namesake on the OFAC list were one and the same. *See* J.A.657 ("[T]here was[] … no date-of-birth filtering technology [known] to TransUnion during the class period, and Plaintiff presented no contrary evidence in this regard." (emphasis omitted)).

The reporting of "potential matches" to names on the OFAC list, even though additional information could disprove an actual match, is part of the trade-off inherent in the credit-check process. On the one hand, "a 'stricter' matching algorithm" containing, *e.g.*, past addresses and/or Social Security Numbers, could "reduce[] inaccuracy," *i.e.*, false positives. Fed. Trade Comm'n, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003*, at 46 (Dec. 2004). But adding variables also means that "incomplete" results and false negatives "will increase." *Id.* And incomplete results and false negatives are no small problem for businesses given the harsh penalties for transacting with SDNs. In light of those penalties, lenders and other businesses have an interest in an OFAC product that casts a wide initial net and then relies on a lender's human review and judgment to determine whether a credit applicant whose name *potentially* matches an SDN's is *actually* on the OFAC list.

Given the limited nature of the information Name Screen supplied, TransUnion made clear to its customers that a potential-match alert should be the beginning, not the end, of their OFAC screening. Not only did TransUnion advise that clients "shall not

deny or otherwise take any adverse action against any consumer based solely on [Name Screen]," J.A.487, but its terms of service stated:

> Client understands that a "match" may or may not apply to the consumer whose eligibility is being considered by Client, and that in the event of a match, Client should not take any immediate adverse action in whole or in part until Client has made such further investigations as may be necessary (*i.e.*, required by law) or appropriate (including consulting with its legal or other advisors regarding Client's legal obligations).

J.A.639 (emphases omitted).

2. On February 28, 2011, Sergio Ramirez and his wife visited a Nissan dealership in Dublin, California, accompanied by his father-in-law, looking to buy a car. Both Ramirez and his wife completed a credit application. Despite TransUnion's express instruction that reports should describe an individual's name as only a "potential match" to a name on the OFAC list, the advisory on Ramirez's report—which the dealer had obtained not directly from TransUnion, but from a third-party reseller called DealerTrack—noted that the "INPUT NAME MATCHES NAME[S] ON THE OFAC DATABASE" and listed two names: Sergio Humberto Ramirez Aguirre, born 11/22/1951; and Sergio Alberto Ramirez Rivera, born 1/14/196*. Pet.App.4. Respondent is neither of those individuals. The dealership nonetheless recommended, in violation of TransUnion's express instructions and terms of service, that Ramirez and his wife purchase the car in her name alone, which they did. Ramirez later

recalled that he was "embarrassed, shocked, and scared" to go through this experience in front of his wife and father-in-law. Pet.App.5.

Ramirez called TransUnion the next day and requested a copy of his credit file. That same day, TransUnion sent him two mailings. The first mailing included his traditional credit file, along with the requisite summary of rights. Pet.App.5-6. The second was a letter, unaccompanied by an additional summary of rights, that alerted him to additional information regarding "the name that appears on your TransUnion credit file":

> [Y]ou recently requested a disclosure of your TransUnion credit report. That report has been mailed to you separately. As a courtesy to you, we also want to make you aware that the name that appears on your TransUnion credit file "SERGIO L. RAMIREZ" is considered a potential match to information listed on the [OFAC] Database.

Pet.App.6; J.A.92. The letter explained the nature of the OFAC, provided the "potential match[es]" to his name, and advised that "[i]f you have any additional questions or concerns, you can contact TransUnion at 1-855-525-5176." Pet.App.6-7; J.A.93-94.

TransUnion sent the "potential match" information in a separate mailing because, at the time, it did not house OFAC information on-site in the same basic credit files it kept on consumers. It generated that information from a separate database using third-party software only when a lender that had opted to receive the Name Check information in addition to traditional credit data requested a credit

check or a consumer requested a copy of his file. At that point, TransUnion would use the third-party software and data to screen the person's name against the OFAC list. While TransUnion replicated that process when Ramirez requested his credit file, the OFAC alert was generated separately; hence the need for the separate letter. *See* CA9.ER262-65.

After receiving the two mailings, Ramirez canceled an impending vacation to Mexico out of concern about the OFAC alert. J.A.627. He subsequently contacted TransUnion and succeeded in getting TransUnion to exclude the OFAC alert from all future credit reports. J.A.345-46.

C. District Court Proceedings

1. Shortly thereafter, Ramirez filed a complaint against TransUnion alleging three violations of FCRA. He alleged that TransUnion failed to maintain reasonable procedures to assure maximum possible accuracy of the information about him when preparing a consumer report. *See* 15 U.S.C. §1681e(b). He also alleged that TransUnion violated its obligation to provide consumers, upon request, with all the information in their files, *see id.* §1681g(a)(1), because it provided the OFAC "potential match" information in a separate contemporaneous mailing. Finally, he alleged that TransUnion violated its obligation to provide consumers with a summary of their rights, *see id.* §1681g(c)(2), because it included the summary in the credit-report mailing, but not in the separate, contemporaneous OFAC-alert mailing. Ramirez alleged that all three violations were willful, entitling him to statutory and punitive damages under

§1681n(a). Pet.App.15. He also brought companion claims under California's FCRA analog. J.A.266.

Ramirez sought to certify a single class on all of his FCRA claims. The defining feature of the class was not sharing a similarly embarrassing experience in being denied credit, or being denied credit because the Name Screen process produced false positives, or even having a credit report with the Name Screen feature disseminated to a third party. Instead, the defining feature of the class was simply having had TransUnion send credit-file mailings containing information about the Name Screen feature to their home address in two contemporaneous-but-separate mailings during the class period. Thus, an individual who was actually denied credit because of the Name Screen feature during the class period would fall *outside* the class if she did not request and receive a copy of her own credit file. Conversely, someone who requested her credit file during the class period but never even applied for credit during that period would fall *within* the class.

Put differently, Ramirez crafted his class around the two alleged disclosure violations—*i.e.*, sending the credit report and OFAC-alert letter to the consumer in two separate-but-contemporaneous mailings, only one of which included the summary of rights. Specifically, Ramirez defined his class to include "all natural persons in the [U.S.] to whom Trans Union sent a letter similar in form to the March 1, 2011 letter Trans

Union sent to [Ramirez] regarding [OFAC] from January 1, 2011 - July 26, 2011.'" J.A.294.[2]

2. TransUnion opposed certification, arguing that Ramirez could not prove that the class he sought to represent suffered any common Article III injury. TransUnion contended that merely being sent two letters rather than one is not a concrete injury. Some recipients may not have even opened the letter, let alone been confused or frustrated by the manner in which TransUnion provided the information. Others may have understood the mailing perfectly and, like Ramirez himself, successfully contacted TransUnion to correct any errors. Putative class members likewise would not necessarily have suffered any difficulty obtaining credit or any defamation-like reputational injury, as the class definition did not even require members to have had a credit report disseminated to a third party. Accordingly, while it was *possible* that some class members suffered Article III injury, nothing in the class definition assured that any (let alone all) of them *actually* did.

TransUnion further argued that Ramirez failed to satisfy Rule 23(b)'s typicality requirement. *See* Fed. R. Civ. P. 23(a)(3) (requiring proof that "the claims or defenses of the representative parties are typical of the claims or defenses of the class"). Among other things, Ramirez's unique experiences of learning of the OFAC alert at a car dealership in front of his wife

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[2] Consistent with the focus on the alleged defects with the mailings sent to consumers—rather than the dissemination to third parties—the class period ended on July 26, 2011, because that is when TransUnion ceased sending consumers the OFAC potential-match information in separate envelopes.

and father-in-law, being hindered in his effort to obtain credit for the car, and canceling a vacation out of concern about the OFAC alert, were entirely atypical of putative class members who did not have their credit reports disseminated to any third party during the class period and simply had two letters sent to them in the privacy of their own homes, which was enough for putative class membership. *See* J.A.275-76.

Ramirez responded that "[t]he 'effect' of Trans Union's disclosures, including the circumstances of when and how they were received by consumers, is irrelevant" to the Article III inquiry "because no individualized showing of harm is required" to demonstrate standing to assert a claim under FCRA. Dist.Ct.Dkt.125 at 6-8. As for typicality, Ramirez argued that his myriad unique experiences were irrelevant because all class members suffered the same purportedly common "injury" of being sent mailings informing them that their name was a "potential match" to a name on the OFAC list.

The district court rejected TransUnion's arguments and certified the federal class. The court "agree[d]" with TransUnion "that whether a class member was actually injured … is an individualized question" and thus not susceptible to common proof. J.A.281. But relying on the Ninth Circuit's later-vacated decision in *Spokeo*, it reasoned that "whether a class member was actually injured … is not an element of the [FCRA] claims or statutory damages." J.A.281. As for typicality, the court acknowledged the "litany of unique facts involved with [Ramirez's] claims" and that Ramirez provided no reason to

believe that any class member suffered anything remotely comparable. J.A.275-76. But it declared the myriad distinctions between Ramirez and the class he sought to represent "not material." J.A.276.

The court reached the opposite conclusion, however, with regard to Ramirez's proposed state-law subclass for California residents. Because the California Supreme Court had held that the state-law claims "require[] a showing of actual harm," J.A.289-90, the court found commonality lacking: Ramirez did "not offer any suggestion for how the actual damages issue can be addressed with common proof," and "[t]he Court can think of none." J.A.291. The court accordingly declined to certify the state-law subclass, and Ramirez ultimately dropped the state-law claims.

3. This Court granted certiorari in *Spokeo* shortly thereafter, and the district court agreed to stay the trial pending *Spokeo*. J.A.295-98. After this Court decided *Spokeo*, the district court lifted the stay, and TransUnion filed a motion to decertify. In response, Ramirez continued to argue that plaintiffs bringing FCRA "disclosure claim[s] and [ ] accuracy claim[s]" need not prove any "'tangible' injury or 'consequence'" as a result of the alleged statutory violations. Dist.Ct.Dkt.221-3 at 33.

The district court declined to decertify. First, the court concluded that it did not matter whether the absent class members lacked Article III standing, reasoning that nothing in *Spokeo* "alter[ed]" "binding Ninth Circuit precedent" purportedly holding that only the class representative, not the class members, need have Article III standing. J.A.299, 310. In the alternative, the court concluded that the absent class

members *did* "suffer[] a concrete injury" because "[e]ach class member was incorrectly identified as a potential OFAC match and each received the same allegedly inaccurate disclosures as [Ramirez]." J.A.299, 310. The court did not attempt to reconcile that conclusion either with its earlier conclusion that state-law claims requiring a showing of "actual injury" were unsuited for class treatment, or with its earlier "agree[ment]" with TransUnion "that whether a class member was actually injured … is an individualized question." *See* J.A.281-82, 290-91.

4. The case proceeded to trial. "[T]he hallmark of the trial was" the focus on Ramirez and his unique experience, and "the absence of evidence about absent class members." Pet.App.54 (McKeown, J., concurring in part and dissenting in part). "[T]he trial … opened with class counsel telling jurors that they would learn 'the story of Mr. Ramirez'" (and "indeed they did"), and it closed with a dramatic narration of his experience at the car dealership. Pet.App.53 (McKeown, J.).

While the jury heard repeatedly of Ramirez's humiliation at the dealership and resulting injuries, *see, e.g.*, J.A.627-28, it heard nothing about the experience of a typical class member. Indeed, Ramirez presented no evidence that any absent class member suffered any concrete injury at all—let alone an injury like his own. Although the defining feature of the class was having been sent two mailings similar to the ones Ramirez received in response to his request for his credit file, Ramirez introduced no evidence that anyone else even opened the mailings, let alone was confused or distressed on account of receiving the requisite information from their credit files in two

contemporaneous mailings instead of one. The only evidence that spoke to that issue proved precisely the opposite: Ramirez testified that he succeeded in contacting TransUnion and getting the OFAC alert excluded from all future credit reports, J.A.345-46, and TransUnion's unrebutted evidence showed that the two-letter format actually *increased* contact with TransUnion relative to later single-letter mailings, J.A.611.

Ramirez also introduced no evidence that anyone else suffered any credit denial or other adverse consequence from the dissemination of the materials to third parties. To the contrary, he *stipulated* that 6,332 of the 8,184 absent class members—more than 75% of the class—never even had a credit report containing Name Screen information disseminated to a third party during the class period. Pet.App.14-15. And even as to the 1,852 members who did, Ramirez provided no evidence about the nature or impact of the dissemination (such as whether they were denied credit).

Having heard only of Ramirez's highly atypical experience, the jury found for the class on all claims and awarded every class member $984.22 in statutory damages—just shy of FCRA's $1,000 maximum. Pet.App.72. After a short second phase at which the only new evidence was TransUnion's net worth, the jury awarded $6,353.08 per class member in punitives, for a total verdict of more than $60 million. Pet.App.78.

D. The Ninth Circuit's Opinion

Over a dissent from Judge McKeown, the Ninth Circuit affirmed across the board, with the exception

of reducing the punitive damages award to a 4:1 ratio. The majority began by agreeing with TransUnion (and Judge McKeown) "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. The majority then found that all 8,184 absent class members had proven sufficient Article III injury to justify their substantial recovery, even though Ramirez introduced no evidence that any of them suffered any injury and even stipulated that more than 75% of them never had a credit report with Name Screen information disseminated to any third party during the class period.

On the two disclosure claims, the majority held that every class member suffered concrete injury simply by virtue of having been sent two envelopes instead of one and having a summary of rights included in only one of those two envelopes, because the majority viewed the mailings as "inherently shocking and confusing." Pet.App.32 n.10. On the reasonable-procedures claim, the majority held that the bare fact "that TransUnion made [credit] reports available to numerous potential creditors and employers"—*i.e.*, that a report with Name Screen information would have been provided if a creditor had asked for one—"suffic[ed] to show a material risk of harm to the concrete interests of all class members." Pet.App.26-27.

Turning to typicality, the majority did not dispute that, of the 8,185 class members, only Ramirez's alert stated that he was a match (as opposed to a "*potential*

match"), *see* J.A.644, that only "Ramirez was denied credit because of the alert," and that only Ramirez "spent significant time and energy trying to remove the alert." Pet.App.39. Yet it summarily concluded that "these differences do not defeat typicality." Pet.App.39. According to the majority, "the unique aspects of Ramirez's claims," including, *e.g.*, the fact that he was actually hindered in seeking credit (and under particularly embarrassing circumstances) and then canceled a vacation, rather than having simply received two letters instead of one and having been exposed to a risk that a credit denial could someday occur, were not so "significant … that they 'threaten[ed] to become the focus of the litigation,'" Pet.App.40 (alteration in original)—even though "becom[ing] the focus of the litigation" is *in fact* exactly what happened at trial, Pet.App.51-54 (McKeown, J.). The majority then reduced the punitive damages award from $6,353.08 to $3,936.88 per class member and otherwise affirmed. Pet.App.50.

Judge McKeown dissented in relevant part. She first noted that "[t]he only asserted uniform classwide experience was the existence of TransUnion's internal terrorist watch list alerts and the mailing of separate letters—faint allegations that strain Rule 23's typicality requirements." Pet.App.52 (McKeown, J.). She then explained how that typicality problem flowed from a more fundamental problem: the failure to demonstrate that anyone other than Ramirez had Article III standing. With respect to the disclosure claims, Judge McKeown observed that "whether any … absent class member was confused, suffered the adverse consequences that befell Ramirez, or even opened the letter, is pure conjecture." Pet.App.57.

And "[c]onjecture based on an unrepresentative plaintiff does not meet the constitutional minimum." Pet.App.51. With respect to the reasonable-procedures claim, she concluded that only "the 1,853 individuals whose report was disclosed to third parties have standing." Pet.App.56. In her view—and, as she noted, the views of at least three other circuits, Pet.App.56—the mere potential that a report could be divulged "does not amount to a material risk" sufficient for Article III. Pet.App.56.

SUMMARY OF ARGUMENT

It is bedrock law that every member of a class must have Article III standing to obtain a judgment of money damages in her name. It is bedrock law (at least after *Spokeo*) that merely alleging a violation of a procedural statute like FCRA does not suffice to prove Article III injury. And it is bedrock law (at least after *Clapper*) that an *anticipated* injury must be "certainly impending" to satisfy Article III. Those principles confirm that this case never should have been able to proceed as a class action in the first place, let alone allowed to proceed all the way to a final judgment awarding more than $40 million in damages to 8,184 absent class members who were never proven to have suffered any concrete injury at all.

The lone thing that unites class members is that TransUnion sent each two mailings indicating that his or her name was a "potential match" to a name on the OFAC list. That alone is patently insufficient to satisfy Article III. Indeed, there is no evidence that any absent class member even opened and read the letters, let alone experienced any confusion based on the two-envelopes-not-one format. Ramirez thus

plainly failed to demonstrate that any absent class member had standing to pursue the two disclosure claims around which he crafted his class. Whatever is true of a plaintiff denied information that a statute requires to be publicly disclosed, simply getting the requisite information in the wrong-colored envelope, or in two envelopes instead of one, does not satisfy Article III.

Ramirez's class fares no better on the reasonable-procedures claim. Having framed his class in terms of individuals who had their credit files sent to their homes during the class period, Ramirez had little choice but to stipulate that more than 75% of the class members never even had a credit report with Name Screen information disseminated to a third party, thus confirming that they did *not* suffer Article III injury from the absence of better procedures to ensure the dissemination of more accurate credit reports to third parties. That alone requires decertification, but even for the remaining quartile, Ramirez offered no evidence that anyone other than himself was denied credit or suffered any injury on account of the dissemination of information that expressly instructed recipients to take further steps before denying credit or taking any other adverse action.

All of that was reason enough to decertify the class, for a class cannot be awarded money damages if its members have not been proven to satisfy the threshold requirement of Article III injury. But even if every class member somehow cleared the threshold of Article III, the class would still need to be decertified because Ramirez is wildly atypical of the 8,184 individuals on whose behalf he obtained tens of

millions of dollars in damages. In a universe of plaintiffs whose sole common "injury" was receipt of mailings informing them that their name was a "potential match" to a name on the OFAC list, a plaintiff who suffered public humiliation in front of family members, was hindered in his effort to obtain credit, and canceled a vacation out of concern about the alert has suffered injuries that are atypical in the extreme. Ramirez himself recognized as much when he implored the jury to focus on his own uniquely sympathetic experience in choosing what measure of damages to award. And the jury's award of statutory damages near the statutory maximum and sizable punitive damages to boot underscores that the jury focused on Ramirez's atypically unpleasant experience rather than that of typical class members, who suffered at most a technical violation and some minor confusion in the privacy of their own homes. The typicality requirement exists to guard against just such outsized awards.

In short, by affirming an award of $40 million in damages to an atypical plaintiff representing a class of uninjured plaintiffs, the Ninth Circuit eviscerated core Article III, Rule 23, and Rules Enabling Act constraints. The Court should reverse and direct that this misguided class be decertified.

ARGUMENT

I. Ramirez Failed To Prove That Any, Let Alone All, Absent Class Members Suffered An Article III Injury.

A. Concrete Injury For Every Class Member In A Damages Class Is Non-Negotiable.

1. This Court has "deduced a set of requirements that together make up the 'irreducible constitutional minimum of standing.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014). "The plaintiff must [1] have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is [2] fairly traceable to the challenged action of the defendant and [3] likely to be redressed by a favorable judicial decision." *Id.* While each of these elements helps "enforce[] the Constitution's case-or-controversy requirement," *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004), the injury-in-fact requirement is "[f]irst and foremost," *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998), as it "helps to ensure that the plaintiff has a 'personal stake in the outcome of the controversy,'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014).

To qualify as injury-in-fact, an injury must be "distinct and palpable." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). It must be "particularized," *i.e.*, it "must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. And it must be "concrete," *i.e.*, "it must actually exist." *Spokeo*, 136 S.Ct. at 1548. "Abstract injury is not enough." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). To satisfy Article III, moreover, injuries "must be concrete in both a

qualitative and temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Plaintiffs thus may not rely on "conjectural or hypothetical" harm; the alleged injury must have either already occurred or be "imminent." *Spokeo*, 136 S.Ct. at 1548. "Allegations of *possible* future injury do not satisfy the requirements of Art. III." *Whitmore*, 495 U.S. at 158 (emphasis added). Indeed, even an "objectively reasonable likelihood" that an injury will materialize does not suffice. *Clapper*, 568 U.S. at 410. The injury must be "*certainly* impending." *Id.* at 409.

While injury-in-fact must be concrete, it does not need to be "tangible," *i.e.*, a pocketbook or physical injury. *Spokeo*, 136 S.Ct. at 1549. "[I]ntangible injuries can … be concrete" in "some circumstances" too. *Id.* But the injury-in-fact requirement is not automatically satisfied just because Congress "grants a person a statutory right" or provides a bounty in the form of statutory damages. *Id.* To be sure, "Congress is well positioned to identify intangible harms" or causal relationships "that meet minimum Article III requirements," but a statutory bounty is no substitute for concrete injury. *Id.* "Article III standing requires a concrete injury even in the context of a statutory violation," and courts, not Congress, are the ultimate arbiters of whether such injury exists. *Id.*; *accord Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.").

2. The availability of a statutory damages remedy not only fails to qualify as a concrete injury, but

requires courts to be particularly vigilant to ensure that plaintiffs are actually and concretely injured, rather than drawn into federal courts by the lure of statutory damages. In the case of a more traditional common-law or statutory cause of action, the need to ultimately prove the extent of damages to obtain monetary relief or to demonstrate irreparable injury to obtain injunctive relief typically deters would-be plaintiffs without actual injuries from suing. But when a statute promises a sizable statutory recovery (and attorneys' fees) for even a highly technical procedural violation, even individuals with no real-world injuries may be tempted to sue. That problem is exacerbated by the possibility of seeking statutory damages (and attorneys' fees) for an entire class, as statutory damages eliminate the need to prove the extent of each class member's actual injuries, which is often a highly individualized enterprise that precludes class certification. *See, e.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27, 34-38 (2013). The availability of statutory damages thus simultaneously eliminates an obstacle to class certification and provides a powerful incentive to sue—with or without real-world injury—as even modest amounts of statutory damages "can add up quickly in a class action." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S.Ct. 2335, 2345 (2020).

Accordingly, when a plaintiff seeks to proceed on behalf of a class seeking statutory damages, courts need to be especially vigilant to ensure that both the plaintiff and every class member has Article III standing "for each claim [the class] seeks to press." *Town of Chester v. Laroe Ests., Inc.*, 137 S.Ct. 1645, 1650 (2017). Doing so is essential to ensure that federal courts designed to provide remedies for actual

wrongs are not diverted into adjudicating abstract procedural disputes without any real-world impact. It is also essential because relieving class members of their obligation to prove standing just because they are part of a class action would violate the Rules Enabling Act. *See* 28 U.S.C. §2072(b) (Rule 23 "shall not abridge, enlarge or modify any substantive right"); *accord AmChem Prods. v. Windsor*, 521 U.S. 591, 612-13 (1997); Fed. R. Civ. P. 82 ("rules shall not be construed to extend … the jurisdiction of the district courts"). Thus, just as in an individual case, a plaintiff seeking to represent a class seeking to recover statutory damages must allege (and ultimately prove) more than a "bare procedural violation, divorced from any concrete harm." *Spokeo*, 136 S.Ct. at 1549. He must demonstrate that each and every class member suffered some common injury that is sufficiently concrete "[to] satisfy the injury-in-fact requirement of Article III." *Id.*

B. Concrete Injury Is Lacking Here.

Applying those principles, the Article III problem here is palpable. Ramirez failed to show an actual or imminent concrete and particularized injury for any of the 8,184 absent class members he sought to represent. Ramirez did not define his class in a way that would ensure that each member suffered a concrete injury; their only common experience was being sent two mailings from TransUnion indicating that their name was a "potential match" to a name on the OFAC list. That alone was plainly insufficient to constitute injury-in-fact, and Ramirez did nothing to substantiate the actual injury of any absent class member. The record is entirely bereft of evidence that

any other class member even opened the mailings, let alone suffered any injury on account of doing so, because the lower courts excused the need for any such showing (over TransUnion's objection). And Ramirez stipulated that more than 75% of the class never had a credit report including Name Screen information disseminated to any third party during the class period. Ramirez thus utterly failed to prove that any other member of the class—let alone *every* member, as Article III, the Rules Enabling Act, and *Town of Chester* all require—had standing to pursue either the disclosure or the reasonable procedures claims.

1. The disclosure claims.

a. The Article III problems begin with how Ramirez crafted his class. Ramirez did not seek to represent a class of individuals who were denied credit due to a TransUnion OFAC alert, or even a class of individuals who at least had a credit report including an allegedly flawed OFAC alert disseminated to a third party. Indeed, it is conceded that more than 75% of the class had no such report disseminated to any third party during the class period. Ramirez instead defined his class capaciously to encompass anyone potentially affected by two highly technical violations of FCRA's disclosure provisions—*i.e.*, his claim that TransUnion violated its obligation to provide consumers, upon request, with their entire credit file because it provided the OFAC "potential match" information in a separate contemporaneous mailing, *see* 15 U.S.C. §1681g(a)(1), and his claim that TransUnion violated its obligation to provide consumers with a summary of their rights because it included that summary in the credit-file mailing, but

not in the contemporaneous-but-separate OFAC-alert mailing, *see id.* §1681g(c)(2). The sole defining feature of the one and only FCRA class Ramirez sought to have certified was that TransUnion sent each class member these two mailings during the class period. In fact, the class period ended when TransUnion more fully incorporated OFAC information into its file-disclosure process and began sending one comprehensive mailing. Thus, as a direct result of Ramirez's own class definition, the only experience each member shared is that each was sent all the information to which FCRA entitled them in two contemporaneous mailings rather than one.

That is patently insufficient to satisfy Article III. Even assuming the two-envelope-not-one mailings constitute FCRA violations (a point TransUnion vigorously contested below), they are archetypal examples of the kind of hyper-technical violations that cannot be *presumed* to inflict concrete injury. To be sure, when Congress creates a right to obtain information, then the failure to disclose that information *at all* may constitute injury-in-fact. *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 20-25 (1998); *Pub. Citizen v. Dep't of Just.*, 491 U.S. 440, 449 (1989). But nothing in *Akins*, *Public Citizen*, or any other case suggests that an Article III injury exists if the information is disclosed but provided in the wrong-colored envelope or (as here) in two envelopes rather one. One does not have to deny that the statutory formatting obligation exists to recognize that a violation does not necessarily give rise to injury-in-fact. Instead, courts faced with such claims have recognized that if the requisite information is disclosed, then the bare statutory procedural violation

itself is not enough. *See, e.g.*, *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884, 888 (7th Cir. 2017) ("Because [the plaintiff] has not 'fail[ed]' to obtain information, he has not suffered an informational injury as illustrated in *Akins* and *Public Citizen*." (first alteration added)).

To pursue his disclosure claims on behalf of the 8,184 absent class members, then, Ramirez had to *prove* that each actually suffered some concrete injury on account of receiving all the information to which they were entitled in two envelopes rather than one. But consistent with his any-statutory-violation-will-do theory and the lower courts' lax standing requirements, Ramirez introduced "no evidence … that a single other class member so much as opened the dual mailings," leaving questions whether any given class member found them confusing, found them helpful, or discarded them unopened a matter of "pure conjecture." Pet.App.57 (McKeown, J.). That failing is fatal, for "unnamed class members … who received [a] letter" from a consumer reporting agency "but ignored it as junk mail or otherwise gave it no meaningful attention" "lack a cognizable injury under Article III." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020).

b. Even assuming some class members did review the mailings, moreover, that alone would not constitute Article III injury, for there is nothing "inherently shocking and confusing," Pet.App.32 n.10, about receiving all the information to which one is entitled in two contemporaneous mailings instead of one. The only thing even theoretically "shocking" is the information itself (*i.e.*, the "potential match" to a

name on the OFAC list), but that cannot give rise to any Article III injury because the whole point of the right to receive a copy of your own credit file and the related disclosure requirements "is to allow consumers to identify inaccurate information in their credit files and correct" it. *Gillespie*, 484 F.3d at 941; *see* S. Rep. No. 91-517, at 1. While it may be disconcerting to learn that a credit card debt is wrongly listed as in default, that an unpaid court judgment is wrongly attributed to you, or that your name is a "potential match" to a name on the OFAC list, FCRA entitles individuals to receive their credit files precisely so they can identify and redress such issues, pursuant to the process set forth in §1681i, before a misleading credit report is disseminated to a third party. Simply receiving the information the statute entitles individuals to receive cannot itself constitute injury-in-fact. If the mailings made class members aware of the "potential match," then the mailings were doing their job as intended by Congress, not inflicting Article III injury.

As for the claim that the mailings were inherently "confusing," no evidence substantiates it and Ramirez's own experience refutes it. Upon receiving the mailings, Ramirez contacted TransUnion and succeeded in demonstrating that he was not the individual on the OFAC list and in securing TransUnion's assurance that the alert would be omitted from any credit reports that might be disseminated in the future. J.A.345-46. Ramirez himself thus did not suffer any concrete injury as a result of the manner in which he received the OFAC-alert letter. And the only other relevant evidence showed that the two-mailing format *increased*

consumer contact with TransUnion relative to subsequent statutorily compliant one-mailing communications—something that would not have happened if the two-letter format were inherently confusing. In short, there was no evidence even "plausibly suggesting that" any absent class member "was confused by" receiving all the requisite information in two mailings rather than one, *Groshek*, 865 F.3d at 889, let alone that the dual-mailing format actually impeded any class member's efforts to "obtain the information he needed" to ensure that his file was correct, *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 347 (4th Cir. 2017). *Cf. Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374-75 (1982) (holding that plaintiff lacked standing to vindicate statutory entitlement to "accurate information" when he received accurate information).

The absence of evidence reflects the fact that neither the district court nor the Ninth Circuit required any. The district court relied on earlier Ninth Circuit law that disclaimed the need for anyone other than the class representative to have standing even in a class action seeking money damages. J.A.299, 310. The Ninth Circuit recognized that that view was foreclosed by this Court's precedent, but protested nonetheless that requiring Ramirez to present "individualized evidence of shock or confusion would defeat the purpose of class actions." Pet.App.32 n.10. That gets matters backward. If something—either the requirements for Article III standing or the efficiencies of class actions—has to give, it is not the non-negotiable prerequisites of Article III.

This Court has already settled that all parties seeking "money judgments in their own names" must "have Article III standing" in their own right. *Town of Chester*, 137 S.Ct. at 1651. In classes where the injury is both concrete and uniform, the need to show injury-in-fact for every class member will not prove onerous. In such cases, Article III injury is the kind of common issue that can be determinined "in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). But when (as here) the only common experience (receiving the requisite information in two envelopes rather than one) does not result in any concrete injury, the need to demonstrate an actual injury to each class member cannot be excused even if it means that a class cannot be certified. The prerequisites for standing and Article III jurisdiction are fundamental and non-negotiable. They cannot be sacrificed for the felt need to make a case work as a class action. Indeed, the Rules Enabling Act and Rule 82 expressly preclude using Rule 23 to expand either substantive rights or the courts' subject-matter jurisdiction. *See AmChem*, 521 U.S. at 612-13. Because Ramirez failed to demonstrate that *anyone* suffered Article III injury on account of the highly technical disclosure violations he alleged, he should not have been able to pursue those claims at all, let alone secure $40 million in damages on behalf of 8,184 uninjured class members.

2. The reasonable-procedures claim.

a. The case for classwide standing on the reasonable-procedures claim suffers the same basic defects. Here too, and perhaps even more acutely, the problems start with how Ramirez defined his class. Ramirez did not content himself with a class defined

in terms of individuals for whom the alleged failure to employ reasonable procedures translated into a denial of credit or some other concrete consumer injury. Instead, Ramirez employed the same broad class definition he used for his disclosure claims for his reasonable-procedures claim. Thus, for all three claims, anyone to whom TransUnion mailed a traditional credit file and a separate mailing concerning the OFAC "potential match" during the six-month class period is in the class.

As noted, that broad class is fatally over-inclusive as to the disclosure claims because it sweeps in individuals who never opened the mailings or suffered any injury from the two-not-one mailing format. But the class definition was at least somewhat tailored to the disclosure claims given that the disclosure requirements are specific to mailings sent to consumers in their homes. As to the reasonable-procedures claim, by contrast, the class definition is a complete mismatch. The statutory reasonable procedure provisions do not govern the reasonable procedures for mailing a consumer's own credit information to her home; that is the office of FCRA's disclosure provisions. The reasonable procedures provisions govern the way databases are maintained and credit reports are formulated, with an eye to ensuring that reports disseminated to third parties are as accurate as is feasible. Given that purpose, it would be logical to define a reasonable-procedures class in terms of individuals who were denied credit because of faulty procedures, or perhaps in terms of those who had a credit report generated by the flawed procedures actually disseminated to a third party. But defining a reasonable-procedures class in terms of

individuals who were sent their own credit files is a non sequitur.

The resulting class is both under- and over-inclusive when measured against the universe of individuals who suffered any concrete Article III injury. For example, the class *excludes* someone denied credit because of an OFAC alert formulated using the allegedly deficient procedures, if that individual did not also request that their credit file be sent to their home address. At the same time, the class *includes* thousands of individuals who received their credit files, but never had a credit report with Name Screen information disseminated to any third party, during the class period. Indeed, Ramirez stipulated that such individuals make up more than 75% of the class. Pet.App.14-15. Thus, by using a class definition that was at least rationally targeted to his disclosure claims for his reasonable-procedures claim too, Ramirez has generated a class that includes thousands of individuals who did not suffer a concrete injury from the reasonable-procedures claim.

Ramirez's stipulation leaves 6,332 class members with no plausible claim of concrete injury as to their reasonable-procedures claim. Certainly the mere existence of purportedly inaccurate information in one's credit file—wholly apart for a report being disseminated to anyone, including the consumer herself—is not itself a concrete injury. That is no different from a defamatory letter left in a desk drawer, which injures no one unless and until it leaves the drawer. To be sure, this Court has recognized that the *dissemination* of a credit report containing false information may constitute injury-in-fact if the

information is material. *See Spokeo*, 136 S.Ct. at 1550. But the Court has never accepted the proposition that the mere existence of inaccurate information lying dormant in a credit file is enough to constitute injury-in-fact even if there is no evidence that it was shared with any third party. *Spokeo* certainly did not involve such a claim; the defendant there ran a "people search engine" that compiled personal information in a database made available to anyone with Internet access to review and search at any time, with additional information available for a small fee. *Id.* at 1544-46. Credit reports, by contrast, are not sitting out there for all the world to peruse. They may be disclosed to third parties only in certain statutorily defined circumstances, most of which require the consumer to initiate a transaction. *See, e.g.*, 15 U.S.C. §§1681b, 1681d-1681h, 1681u-1681v.

The mere existence of inaccurate information in a credit file thus does not create the kind of concrete injury necessary to demonstrate Article III standing.[3] If it did, it would allow an exponentially larger class that would include anyone with inaccuracies lying dormant in a credit file. After all, the only thing that distinguishes the 6,332 class members who did not have a credit report with Name Screen information disseminated to any third party during the class period from someone whose information lay entirely dormant in their files is that the information was sent to their home addresses for purposes of identifying

[3] Indeed, it is not even clear that it gives someone statutory standing, as the harms Congress identified in FCRA arise from the *communication* of inaccurate information to someone other than the consumer. *See* 15 U.S.C. §§1681a(d)(1), 1681b, 1681e(b).

and correcting any inaccuracy. But that cannot matter for purposes of the *reasonable-procedures* claim. The mailings to the home are not an injury produced by a failure to follow reasonable procedures, but part of a broader process designed by Congress to identify and correct errors before inaccurate reports cause injury by being disseminated to third parties. They are at most the equivalent of a defamatory letter taken from a desk drawer and sent in a self-addressed-stamped envelope—which still causes no injury.

Historical practice reinforces that conclusion. The closest common-law analogs for FCRA's reasonable procedures protections are defamation and the false-light privacy tort, each of which protects individuals against the reputational injury that results from having false or damaging information about them disseminated to the public. Maurer, *supra*, at 115; *see also Restatement (First) of Torts* §§569, 577; *Restatement (Second) of Torts*, §652A(2). But the irreducible minimum of such claims is that the information must actually be disseminated; "there is no common law analogue for a [defamation] suit 'absent dissemination.'" Pet.App.54 (McKeown, J.) (quoting *Owner-Operator Indep. Drivers. Ass'n v. Dep't of Transp.*, 879 F.3d 339, 344-45 (D.C. Cir. 2018)).

The Ninth Circuit tried to remedy that problem by claiming that the mere existence of the "potential match" information put every class member at "material risk" of having a credit report containing it disseminated, even though that risk never materialized for more than 75% of the class. Pet.App.22. But that runs headlong into *Clapper*, a case the Ninth Circuit never mentioned. As *Clapper*

makes clear, a "material risk" of future injury is not enough to satisfy Article III; indeed, even an "objectively reasonable likelihood" of injury does not suffice. 568 U.S. at 409. To be sufficiently concrete to constitute injury-in-fact, a future injury must be "*certainly impending*." *Id.* at 410.[4]

The mere fact that credit reporting agencies are in the business of providing credit reports to third parties does not make the dissemination of everyone's credit report "certainly impending" at all times—as evidenced by the fact that more than 75% of the class members concededly never had a credit report with Name Screen information sent to any third party during the class period. Moreover, any potential injury from dissemination to a third party was no more "certainly impending" for that 75% of the class than for countless non-class members who are outside the class only because they did not request their credit file during the class period. Indeed, the only thing that distinguishes the two groups is that the 75% requested their files, which provided an opportunity to identify and correct errors before dissemination, making the risk of inaccurate information being

[4] Indeed, even a risk that seemed "certainly impending" at the time, but in fact never materialized, would not suffice to provide Article III standing in a suit, like this one, that seeks retrospective relief for a discontinued practice. While being subjected to a risk that appeared certainly impending might manifest itself in (highly individualized) injuries like anxiety, loss of sleep, and the like, the mere exposure to such a risk that never materialized cannot itself satisfy Article III. In all events, the Court need not reach that issue because the risk here never rose to the "certainly impending" level.

disseminated to a third party, if anything, *less* "certainly impending."

b. The certification analysis should have begun and ended with the stipulation, as the class plainly could not be certified when the class representative stipulated to facts confirming that the vast majority of class members lacked standing to pursue the reasonable-procedures claim. Nothing in the class definition or the class members' recovery turns in any way on whether they had a credit report disseminated to a third party during (or even outside) the class period. Thus, the class must be decertified and there is no need for this Court to reach the question whether the class members who had a report disseminated to a third party also lack Article III standing.

But Ramirez did not even meet his burden of proving that the 1,852 absent class members who *did* have a credit report with Name Screen information disseminated to a third party suffered or faced any "certainly impending" risk of concrete injury. To be sure, this Court recognized in *Spokeo* that the dissemination of *false* information may suffice to prove injury-in-fact if the information is sufficiently material. 136 S.Ct. at 1550. That is consistent with historical tradition, as the publication of false information has "traditionally been regarded as providing a basis for a lawsuit in English [and] American courts." *Id.* at 1549; *see Restatement (First) of Torts* §§569, 577; *Restatement (Second) of Torts* §652D cmt. a. But the claim here was not that TransUnion disseminated *false* information. While the Ninth Circuit misleadingly claimed that TransUnion "falsely labeled" "all members of the class

… as terrorists and national security threats," Pet.App.32 n.10, that is simply not true. In reality, TransUnion merely identified the names of the absent class members as "potential matches" to a name on the OFAC list. Pet.App.14.

Ramirez did not and could not claim that TransUnion did so in a manner that produced false or wholly erroneous reports—*e.g.*, that it erroneously flagged John Smith's name as a "potential match" for Michael Johnson's name, or identified names as a potential match based on nothing at all. He claimed instead that TransUnion failed 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), because it did not employ additional screening measures to limit the number of individuals identified as "potential matches" to names on the OFAC list when they were not in fact the same individual. Whatever the merits of that theory as a FCRA claim, the information TransUnion provided was not false.[5]

That alone posed a significant obstacle for proving standing even as to the quartile of absent class members who did have a credit report with Name Screen information disseminated—particularly given TransUnion's explicit instructions that recipients of such a report "shall not deny or otherwise take any

[5] Nor could the information disclosed reasonably be understood as private information, as the recipient already has the applicant's name, and the OFAC list is publicly available. *See Sanctions List Search*, https://sanctionssearch.ofac.treas.gov (last visited Jan. 31, 2021).

adverse action against any consumer based solely on" that report, and "that a 'match' may or may not apply to the consumer whose eligibility is being considered." J.A.487; J.A.639. Unlike a report that contains materially false information, a report that merely informs the recipient of potentially relevant information in need of further investigation, while expressly instructing that the information is *not* a sufficient basis to take adverse action, cannot be *presumed* to present a material "risk of real harm" every time it is disseminated, even if different procedures could have flagged fewer individuals for potential further investigation. *Spokeo*, 136 S.Ct. at 1549. Indeed, even *false* information is not presumed to be injurious at common law; defamation *per se* is instead reserved for a narrow set of false statements that expose individuals to "hatred, contempt, or ridicule." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13 (1990).

Yet Ramirez never presented a single piece of evidence showing that *any* absent class member suffered any injury on account of having a credit report containing a "potential match" alert disseminated to a third party. For all the record shows, the potential creditor or employer who received such a report quickly dismissed the "potential match" alert after cross-checking it against additional information, such as a birthdate—just as TransUnion instructed. *See* pp.9-11, *supra*. Yet according to the Ninth Circuit, the absent class member in that situation may still collect nearly $4,000 in statutory and punitive damages, even though he suffered no injury whatsoever. Indeed, nothing in the class definition or the Ninth Circuit's decision even

precludes the possibility that the class could include someone who *is* the individual whose name was a "potential match" on the OFAC list. Again, those results are impossible to reconcile with this Court's admonition that all parties seeking "money judgments in their own names" must "have Article III standing" in their own right. *Town of Chester*, 137 S.Ct. at 1651.

II. Ramirez Was Demonstrably Not Typical Of The Class He Sought To Represent.

The class was infected not only with a fundamental Article III problem, but with a fatal typicality problem as well. Rule 23(a)(3) requires class representatives to be typical of the class they seek to represent. Ramirez was anything but typical of his class. In the context of a class whose sole unifying trait is having been sent letters informing them in the privacy of their homes that their name is a "potential match" to a name on the OFAC list, a plaintiff who was actually hindered in obtaining credit, was embarrassed in front of family in a public setting, and then canceled a vacation is about as atypical as it gets. Ramirez himself recognized as much in urging the jury to focus on his own experience, rather than the far more typical experience of someone potentially confounded by receiving two mailings instead of one, when assessing damages. Thus, even assuming the Article III bar is so low that every class member cleared it, the class still would need to be decertified for failure to satisfy the typicality requirement.

1. "The class action is an 'exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart*, 564 U.S. at 348. "In order to justify a departure from that rule,

'a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.'" *Id.* at 348-49. To that end, Rule 23 imposes several constraints designed to "limit the class claims to those fairly encompassed by the named plaintiff's claims." *Id.* at 349. One of those is that the class representative must prove that his own "claims or defenses … are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). That requirement serves to "screen[] out class actions in which the legal or factual position of the representatives is markedly different from that of other members of the class." 7A Charles A. Wright, *Federal Practice & Procedure* §1764 (3d ed. 2005). That screening function is critical to ensuring compliance with due process and the Rules Enabling Act, lest an atypically strong plaintiff obtain an outsized recovery for the class, or an atypically weak plaintiff obtain a paltry recovery or lose outright on behalf of a class suffering far graver injuries.

Critically, Rule 23(a)(3) demands that a class representative's *injuries*—not just her claims and legal theories—be typical of those of the rest of the class. *Wal-Mart*, 564 U.S. at 348-49. In other words, the question is not just whether each class member claims to have suffered some common legal violation; if that were all that typicality required, then it would be entirely duplicative of commonality. The question instead is whether "the factual circumstances underlying" the class representative's claims are the same as those underlying the claims of her fellow class members. *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 599 (3d Cir. 2009); *accord* 35A C.J.S., *Fed. Civ. Pro.* §97 (Dec. 2020 update).

That focus on the facts giving rise to a claim protects absent class members and defendants alike. It is problematic to have a home-run plaintiff represent a class of single hitters, and vice-versa. Allowing a class to be represented by someone "whose substantial interests are not necessarily or even probably the same as those whom [he is] deemed to represent[] does not afford that protection to absent parties which due process requires," as it could leave them bound by a judgment procured by a plaintiff whose idiosyncratic experiences generated a less favorable outcome than a typical class members would have secured. *Hansberry v. Lee*, 311 U.S. 32, 45 (1940); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 847 (1999). Conversely, allowing a class to be represented by an atypically sympathetic plaintiff deprives defendants of the rights that due process and the Rules Enabling Act guarantee, as giving plaintiffs "the practical advantage of being able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff'" would expose the jury to inflammatory evidence and arguments that could not be presented in the suits of absent class members if they sued individually. *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344-45 (4th Cir. 1998).

To be sure, the requirements of commonality, adequacy, and, for a Rule 23(b)(3) class, predominance and superiority help guard against those risks as well. But typicality plays its own critical role—especially when it comes to classes seeking statutory damages. When a class seeks actual damages, the proof of damages will often be individualized, which can expose the atypical nature of the class representative's claim while creating commonality and predominance

problems. But a statutory damages remedy—especially a scheme like FCRA's that allows statutory damages within a range and punitive damages—can obscure commonality and predominance problems without eliminating the basic unfairness of having an atypical plaintiff. A jury is far more likely to award statutory damages near the top of the statutory range and substantial punitive damages when confronted with a plaintiff humiliated at a car dealership than with someone confounded at the mailbox. In fact, it is hard to imagine that if a plaintiff like Ramirez were suing on an individualized basis, he would not opt to prove up his actual damages. While the statute allows him to opt to seek statutory damages, which are far more amenable to class treatment, courts must be wary lest that option allow a seriously injured individual, with significant actual injuries, to obtain a super-sized statutory damages award for a class of individuals suffering (at most) only minor injuries. The typicality requirement of Rule 23(a)(3) plays a critical role in weeding out such efforts.

2. Ramirez was not remotely typical of the class of individuals he sought to represent. "Ramirez testified that he was embarrassed, shocked, and scared" when he learned from a car dealership in front of his wife and father-in-law that his credit report said his name was a "match" to a name on the OFAC list. Pet.App.5. He was hindered in his efforts to purchase the car, ultimately purchasing it in his wife's name, which likewise "disappointed and embarrassed" him—not just because of his father-in-law's presence, but "because he and his wife always made major purchases jointly." Pet.App.5. He "spent significant time and energy trying to remove the alert,"

Pet.App.39, making multiple unsuccessful calls to the Treasury Department and TransUnion before obtaining the assistance of a lawyer, Pet.App.8. And in the meantime, he canceled an international family vacation out of concern that the alert could complicate his travels. Pet.App.8.

Not one of those experiences was shared by the 8,184 class members he sought to represent. Ramirez stipulated that the vast majority of the class (>75%) never had a credit report containing Name Screen information disseminated to a potential creditor. Pet.App.14-15. He conceded that *no one* but himself had a report disseminated that failed to abide by TransUnion's instruction to include the modifier "potential" before "match." J.A.643-44. And nothing in the record suggests that any absent class member had a credit transaction denied or delayed as a result of the Name Screen information, let alone that they suffered such an experience in front of family members or canceled a vacation as a result. In short, Ramirez's distinctly unpleasant experiences resulted from a perfect storm of idiosyncratic experiences that are not remotely typical of rank-and-file class members.

In reality, the only common experience class members shared is having two mailings from TransUnion sent to their home informing them that their name was a "potential match" to a name on the OFAC list. There is not even any evidence that anyone other than Ramirez opened those envelopes or found the two-for-one format confusing, let alone shocking, distressing, or a reason to cancel vacation plans. And Ramirez's humiliation at the dealership flowed from a

denial of credit that is entirely atypical of the 75% of class members who never had a report disseminated to a third party during the class period. In a universe of class members whose only proven "injury" was being sent some potentially confusing mail, Ramirez's injuries are not just entirely atypical, but at the extreme end of the distribution curve.

Once again, the Ninth Circuit brushed that defect aside. The court first found it sufficient that Ramirez and his fellow class members shared a "class-wide theory of liability." Pet.App.40. But typicality is not focused on whether class members have a common legal theory; it is focused on whether the class representative "suffer[ed] the same injury as the class members." *Wal-Mart*, 564 U.S. at 348-49. If all that meant were that they claim to have suffered the same *legal* injury (*i.e.*, an invasion of the same legally protected interest), then typicality would be entirely redundant of commonality (and vice-versa), which already ensures that a class, at a bare minimum, has a common theory of liability for a common claim. While commonality and typicality serve the same ultimate ends and tend to merge in some cases, *id.* at 349 n.5, they are not entirely duplicative. There are still atypical representatives in the universe of class members bringing a common claim—especially when putative class representatives forgo available claims or the opportunity to recover actual damages to try to fit within the class-action device—and typicality plays a critical role in weeding out such claims. The Ninth Circuit was simply wrong to conflate typicality and commonality.

The court alternatively dismissed "the unique aspects of Ramirez's claims" as not so "significant … that they 'threaten[ed] to become the focus of the litigation.'" Pet.App.40 (alteration in original). That claim defies reality. There *was* a trial here, and it *in fact* "focused on Ramirez and his unique circumstances" to the exclusion of *any* "story of the absent class members." Pet.App.51, 53 (McKeown, J.). The only evidence about absent class members came in the form of stipulations and concessions that their experiences were *not* like those of Ramirez. Indeed, even their legal claims were different, as the only other court to address a comparable reasonable-procedures claim concluded that it made a material difference under FCRA whether a name was designated a "match" or a "potential match." *See Cortez*, 617 F.3d at 708-09.

Moreover, not only were Ramirez's atypical experiences the sole focus of the trial, but only his atypically unpleasant experiences explain the jury's substantial award—statutory damages near the maximum plus substantial punitive damages, for a total of more than $60 million, or more than $7,000 (before reduction on appeal) for each and every class member. While Ramirez's atypical experience may justify a $7,337.28 award, the notion that a typical class member who received the two mailings in the privacy of her home, never had a credit report disseminated, never had a car titled in a spouse's name, and never canceled a vacation would receive such an award beggars belief. What explains that significant award is not that highly technical disclosure and procedural violations and injuries that do not cross the Article III threshold (or do so only by

the thinnest margins) impelled the jury to impose statutory damages near the maximum and punitive damages. What explains the award is that an atypical representative was allowed to be the focus of the proceedings; an outsized award for the class was the predictable, and fundamentally unfair, result.

* * *

In sum, this case never should have been certified as a class action. A wholly atypical plaintiff, whose injuries were real, but idiosyncratic, was allowed to pursue claims for thousands of absent class members who suffered at most the indignity of receiving some non-compliant mailings and the risk that a credit report that was never disseminated might have unnecessarily reflected confusing information. The results were entirely unfair and entirely predictable: a substantial classwide award that bears no relationship to the experience of the typical class member, who likely will first learn of his "injury" when he receives a sizable check in the mail. The district court allowed this class to proceed on the deeply mistaken belief that only a class representative needs Article III standing to recover damages for the entire class. The Ninth Circuit corrected that error but committed two others, finding Article III injury where none exists and waving off a glaring typicality problem. The result not only is deeply flawed but offers a roadmap for generating outsized awards: find a plaintiff who has suffered real injuries, forgo proving up actual damages, and instead seek statutory and punitive damages on behalf of a substantial class who suffered only a foot fault; repeat. Fortunately, both

Article III and Rule 23 provide an insuperable obstacle to that practice.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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