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 OF THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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.

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INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. (the "RLC") is the only public policy organization dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the Retail Litigation Center has participated as an amicus in more than 150 judicial proceedings of importance to retailers. Its amicus briefs have been favorably cited by multiple courts, including this Court. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013).

The members of the RLC have a strong interest in the outcome of this proceeding. The question in this case is whether Article III or Rule 23 permits a damages class action where most class members are uninjured or have suffered an injury far more modest

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

than the class representative. The RLC's members have been targets of litigation featuring elastic classes. In a typical case, class counsel will allege that a large corporate defendant committed some technical error that did not harm consumers or employees in any way, but nonetheless entitles class members to statutory damages. Because it is much easier to assemble large classes when there is no requirement that class members suffered any injury, the putative classes—and resulting damages demands—can be astronomical in size. When classes are certified, retailers are often forced to settle with class counsel to avoid the risk of bet-the-company liability, resulting in small dollar transfers to class members—many of whom may never even realized they were "damaged"—and large dollar transfers to class counsel. These proceedings reflect an abuse of both the underlying statutory causes of action and of Rule 23. The RLC and its members have a strong interest in curtailing such pathological class action proceedings.

SUMMARY OF ARGUMENT

The class certification order in this case, and the resultant judgment in favor of the class, violated Article III and Rule 23. The district court entered judgment in favor of uninjured class members, and hence violated Article III. Further, because the class representative did sustain an injury, he was not representative of the class, hence violating Rule 23's typicality requirement.

The class action in this case is merely one example of a broader problem. Class action attorneys routinely seek to certify classes composed of uninjured class

members seeking statutory damages, leading to staggering damages demands. Such suits arise not only under the Fair Credit Reporting Act, but also under a variety of statutes, such as the federal Telephone Consumer Protection and Illinois' Biometric Information Privacy Act. In many such suits, uninjured class members may be indifferent to or even benefit from the allegedly illegal practice, yet class action attorneys still count them as class members on the theory that they suffered bare statutory violations.

No-injury class actions have no social benefits and cause significant social harms. Uninjured consumers do not benefit from being unwittingly included in classes. And no-injury classes tend to be very large, resulting in a deprivation of due process for defendants and extortive settlements to avoid potentially existential liability. To avoid those harms, the Court should hold that a class cannot be certified unless each class member was injured.

ARGUMENT

The RLC agrees with Petitioner that Article III does not permit a class that includes uninjured members to be certified. The RLC further agrees with Petitioner that Rule 23 does not permit a class to be certified when the named plaintiff suffered an injury different in kind from even the class members who were injured. These conclusions should not be controversial: they merely require the straightforward application of settled law.

The RLC offers two additional contributions in this brief. First, the RLC will explain how the problem of

no-injury class actions extends beyond Fair Credit Reporting Act ("FCRA") lawsuits. Class action lawyers have sought to certify no-injury classes under other statutes, such as the federal Telephone Consumer Protection Act ("TCPA") and Illinois' Biometric Information Privacy Act ("BIPA"), and have reaped enormous settlements against retailers and other businesses. Second, the RLC will explain the strong policy justifications for enforcing Article III and Rule 23 in cases where, as here, plaintiffs seek certification of large classes and seek statutory damages for each class member.

I. The Class Certification Order Violated Article III and Rule 23.

Under Article III, a plaintiff who has suffered no injury cannot seek federal judicial relief. Under Federal Rule of Civil Procedure 23, a class cannot be certified unless the class representative is typical of the classs. These basic principles establish that the judgment in favor of the class at issue here is unconstitutional, and the class should never have been certified.

It is hornbook law that "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). A plaintiff may not "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.*

It is equally well-settled that a plaintiff cannot avoid substantive legal requirements merely by bringing a

case as a class action. "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013) (citation omitted). "A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). "And like traditional joinder," a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id.*

Hence, class actions do not provide litigants with any more substantive rights than they otherwise would have had if their claims had proceeded individually. Class actions are simply a procedural vehicle that provides "'the manner and the means' by which the litigants' rights are 'enforced'" without "alter[ing] 'the rules of decision by which [the] court will adjudicate [those] rights.'" *Shady Grove*, 559 U.S. at 406-07 (citations omitted) (alterations in original).

Two corollaries flow from those principles. The first is that under Article III, a court cannot rule in favor of a class unless *each* class member has sustained an actual injury. A class member does not gain any additional substantive rights merely by being associated with others through the class mechanism. Hence, if a court lacks Article III jurisdiction to enter judgment in favor of an uninjured individual plaintiff, it also lacks Article III jurisdiction to enter judgment in favor of that person if he is a class member. And because courts should not certify classes when it would

be illegal to enter judgment in favor of the class, a court should not certify a class unless each class member has been injured. It follows that the class-certification order and resultant judgment in this case, in which thousands of uninjured class members were awarded relief, violated Article III.

The second corollary is that the class certification order violated Rule 23's typicality requirement. To be typical of the class, the class representative must "possess the same interest and suffer the same injury as the class members." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011) (quotation marks omitted). Here, the class representative testified at trial regarding the concrete injury he suffered as a result of Petitioner's alleged statutory violation. But most class members did not suffer *any* concrete injury, let alone the "same injury." *Id.* A class representative who brings a claim over which courts *do* have Article III jurisdiction is not "typical" of class members bringing claims over which courts *do not* have Article III jurisdiction.

In sum, the RLC fully agrees with Petitioner that the class-certification order and resultant judgment violated Article III and Rule 23.

II. Class Action Lawyers Take Advantage of Statutory Damages Provisions to Generate Astronomical Settlement Demands.

As this case illustrates, FCRA's statutory damages provisions can yield enormous classes of uninjured plaintiffs seeking statutory damages. FCRA is not alone. Numerous other statutory damages provisions

are regularly deployed by class-action lawyers, resulting in settlements in which defendants pay large sums to remedy non-existent injuries. Here, the RLC highlights two such statutes: the federal TCPA, and Illinois' BIPA.

TCPA. The TCPA generally makes it unlawful "to make any call … using any automatic telephone dialing system or an artificial or prerecorded voice" to any cellular telephone. 47 U.S.C. § 227(b)(1)(A). The FCC has interpreted "call[s]" to include text messages. *See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 7964 ¶ 1 n.3 (2015), *set aside in part by ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) ("*2015 FCC Order*"); *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156 (2016) ("A text message to a cellular telephone, it is undisputed, qualifies as a 'call' within the compass of § 227(b)(1)(A)(iii)."). The TCPA provides statutory damages of $500 for each violation, and up to three times that amount for willful violations. 47 U.S.C. § 227(b)(3)(B).

When Congress first enacted the TCPA, it did not have class actions in mind. Congress's purpose was to allow consumers sufficiently irked by telemarketers to collect small damages recoveries in small claims court. *See* 137 Cong. Rec. 30,821 (1991) (statement of Sen. Hollings) ("Small claims court or a similar court would allow the consumer to appear before the court without an attorney."). The modest $500 statutory damages amount was "set to be fair to both the consumer and the telemarketer." 137 Cong. Rec. 30,821.

It did not turn out that way. Because the TCPA authorizes statutory damages, with no requirement to prove actual damages, it has become "one of the most lucrative areas for the plaintiffs' bar." Stuart L. Pardau, *Good Intentions and the Road to Regulatory Hell: How the TCPA Went from Consumer Protection Statute to Litigation Nightmare*, 2018 U. Ill. J.L. Tech. & Pol'y 313, 321-22. Over 1,000 nationwide class actions were filed in 2015 and 2016—over a third of the total number of TCPA lawsuits. U.S. Chamber Inst. for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* 3 (Aug. 2017). Many of these suits have yielded settlements in the tens of millions of dollars, including a $76 million settlement in a suit against Caribbean Cruise Line and a $75 million settlement in a suit against Capital One. *Id.* at 10. Retailers, too, have been forced to pay large settlements in TCPA class actions, with American Eagle Outfitters, Walgreens, and Abercrombie & Fitch each paying settlements of $10 million or more. *Id.*

TCPA classes routinely include uninjured class members. Because the TCPA does not require a showing of actual damages, class counsel routinely argues that anyone who received a phone call or text message in violation of the TCPA is entitled to statutory damages—regardless of whether the recipient noticed the communication or might even have wanted it.

Of course, most people find spam telephone calls by telemarketers annoying. But such calls are no longer the typical target of TCPA class actions. Rather, class-action lawyers extract large settlements by alleging

technical violations by businesses acting in good faith. For instance, businesses regularly keep databases of phone numbers owned by consumers who consented to receiving calls or texts from the business. Sometimes, a cell phone provider reassigns a phone number in the database to a different person. There is no way for a business to avoid making calls or sending texts to such numbers: "There is simply no realistic way for a company to comprehensively determine whether a number has been reassigned." *2015 FCC Order*, 30 FCC Rcd. at 8093 (O'Rielly, Comm'r, dissenting in part and approving in part). Most consumers receiving such a call would regard it as an honest mistake not worthy of a lawsuit. But professional TCPA plaintiffs actively seek out such calls and regard them as a golden opportunity to file a class action lawsuit. In one notorious case, a plaintiff purchased more than 35 cell phones, with area codes in economically depressed areas in which numbers are more likely to have been reassigned, in an effort to trawl for such fluke calls. *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 798-99 (W.D. Pa. 2016). Professional TCPA plaintiffs are not harmed by such phone calls—to the contrary, they view such calls as lottery tickets—yet they still file lawsuits on the basis of such calls and seek statutory damages often with large jackpots at the end of the rainbow.

Other beneficial, or at least innocuous, practices serve as the basis for TCPA class actions. For instance, pharmacies are sued for calling or texting their customers to pick up prescriptions. *See, e.g.*, *Lindenbaum v. CVS Health Corp.*, No. 17-cv-1863, 2018

WL 501307, at *1 (N.D. Ohio Jan. 22, 2018); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 487 (N.D. Ill. 2015); Compl. ¶¶ 1-4, *Rooney v. Rite Aid Headquarters Corp.*, No. 14-cv-1249 (S.D. Cal. May 20, 2014), ECF No. 1. A precursor to Uber and Lyft was sued based on confirmation text messages indicating a cab was dispatched. *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1190-91 (W.D. Wash. 2014). A Los Angeles Lakers fan who sent a text with a personalized message to be displayed on the arena's jumbotron, received a text confirmation in reply, and used that confirmation as the basis to file a class action lawsuit. *Emanuel v. Los Angeles Lakers, Inc.*, No. 12-cv-9936, 2013 WL 1719035, at *1 (C.D. Cal. Apr. 18, 2013).

In these types of nuisance class actions, most, if not all, class members are unharmed by these alleged violations—for example, a consumer might well want to know that her prescription is available so she can go pick it up. Hence, if courts abided by Article III and Rule 23, such classes would never be certified—both because most class members are uninjured, and because the question of whether any class member is injured is individualized and cannot be resolved on a class-wide basis. In light of that reality, class-action attorneys urge courts to certify such classes without a showing that each class member was injured. Instead, they argue that for each class member, the bare fact of receiving the call or text in violation of the TCPA is in and of itself sufficient to entitle each class member to $500 (and $1,500 for repeat violations). When courts accept such arguments—as the Ninth Circuit did

here—$500 or $1,500 per call can rapidly multiply into astronomical liability.

BIPA. Illinois' Biometric Information Privacy Act regulates the use of "[b]iometric identifiers," such as a "fingerprint, voiceprint, or scan of hand or face geometry," as well as "[b]iometric information," which is information "based on an individual's biometric identifier used to identify an individual." 740 Ill. Comp. Stat. 14/10. Private entities that collect biometric identifiers or information must comply with several requirements, including informing individuals "in writing," prior to the collection of biometric data, of the purpose and duration of the collection, storage, and use of that data; and obtaining a "written release." *Id.* 14/15(a)-(b). Under BIPA, a plaintiff can recover $1,000 in statutory damages for negligent violations and $5,000 for intentional or reckless violations.

In *Rosenbach v. Six Flags Entertainment Corp.*, 129 N.E.3d 1197 (Ill. 2019), the Illinois Supreme Court held that, as a matter of state law, a BIPA plaintiff need not prove any actual harm (such as a release of personal information) to recover statutory damages under BIPA. Rather, a mere technical violation is enough to support a statutory damages award. The court reasoned that, "when a private entity fails to comply with one of [BIPA's] requirements, that violation constitutes an invasion, impairment, or denial of the statutory rights of any person or customer whose biometric identifier or biometric information is subject to the breach …. No additional consequences need be pleaded or proved. The violation, in itself, is sufficient

to support the individual's or customer's statutory cause of action." *Id.* at 1206.

Rosenbach has precipitated an onslaught of class action lawsuits brought by plaintiffs seeking statutory damages for unharmed class members. Retailers have become a regular target of such suits, brought both by employee classes and customer classes. For instance, Wal-Mart recently reached a $10 million settlement in an employee class action alleging that Wal-Mart's use of a palm scanner to verify that employees had checked in and out of work violated BIPA.[2] Similarly, Home Depot and Macy's have both been hit with consumer class actions alleging that their in-store consumer tracking technology violated BIPA.[3] Because BIPA authorizes $1,000 per violation—even when the violations are negligent—demands and settlements can be enormous. Facebook recently agreed to settle a BIPA class action for a remarkable $650 million,

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[2] *See Walmart Reaches $10M Settlement with Employees in Class Action BIPA Lawsuit*, FindBiometrics (Jan. 19, 2021), https://findbiometrics.com/walmart-reaches-10-million-settlement-employees-class-action-bipa-lawsuit-011907/.

[3] *See* Chris Burt, *Macy's Sued for Allegedly Violating Biometric Privacy with Clearview AI Use*, BiometricUpdate.com (Aug. 7, 2020), https://www.biometricupdate.com/202008/macys-sued-for-allegedly-violating-biometric-privacy-with-clearview-ai-use; Chris Burt, *BIPA Suit Brought Against Home Depot for Loss Prevention Biometrics*, BiometricUpdate.com (Sept. 9, 2019), https://www.biometricupdate.com/201909/bipa-suit-brought-against-home-depot-for-loss-prevention-biometrics.

including $110 million in attorney's fees.[4] It agreed to this settlement in view of the risk of the plaintiff class obtaining an incredible $35 billion in statutory damages had the case proceeded to trial.[5]

These classes regularly include—indeed, are dominated by—plaintiffs who have suffered no injury. Employees may not care that their employers failed to give them written notice of their collection policies with respect to palm prints, and may even prefer the use of palm prints to other methods of tracking employee arrivals and departures. Likewise, consumers may expect and may not care that stores are tracking them while they are in the store. They may even prefer the use of tracking software to other more heavy-handed methods of in-store tracking or benefit from e-coupons that are provided to the consumer based on his movement patterns in the store. Yet uninjured employees and consumers are included in these classes—and are the reason damages demands, and resultant settlements, are so high.

Other statutes. TCPA and BIPA are just two examples of the many statutory-damages statutes that have been transformed into boons for class-action attorneys. Federal law is studded with statutory

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[4] The settlement awaits judicial approval. *See* Hannah Albarazi, *$110M Fees Probed In $650M Facebook Biometric Privacy Deal*, Law360 (Jan. 14, 2021), https://www.law360.com/articles/1345296.

[5] *See* Kate Cox, *Facebook Will Pay More Than $300 Each to 1.6M Illinois Users in Settlement*, ARS Technica (Jan. 15, 2021), https://arstechnica.com/tech-policy/2021/01/illinois-facebook-users-to-get-more-than-300-each-in-privacy-settlement.

damages provisions, ranging from the Electronic Communications Privacy Act, 18 U.S.C. § 2520(c)(1) (permitting $100 to $1,000 in statutory damages), to the Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681n(a)(1)(A) (same).

So is state law. California—the Nation's largest state, which hence yields the largest statewide classes—is notorious for its many statutory damages provisions that can yield large windfalls. As one example, California law authorizes statutory damages for unsolicited commerical e-mail advertisements, in the amount of $1,000 to a remarkable $1 million per incident. Cal. Unsolicited Commercial Email Law, Cal. Bus. & Prof. Code § 17529.8; *see also* Brief for *Amici Curiae* Home Depot, et al., § II.B (listing California statutory damages statutes). Other states have statutory damages provisions, too. *See* Brief for *Amici Curiae* Home Depot, et al., nn.3-6 (listing statutes from Alaska, Illinois, Florida, Minnesota, Hawaii, and Ohio).

Because federal courts frequently can exercise jurisdiction over state-law class actions, *see generally* 28 U.S.C. § 1332(d), federal decisions relaxing Article III and Rule 23 open the door to no-injury class actions in federal court arising under these state statutes. As the RLC next explains, such class actions are socially harmful, and adherence to Article III and Rule 23 is crucial for stemming their tide.

III. Classes that Include Uninjured Class Members Result in Class-Action Litigation at its Most Pathological.

An abundant literature critiques class action litigation, pointing out that it tends to enrich class counsel at the expense of the class. *See, e.g.*, Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 618-19 (2010); John H. Beisner et al., *Class Action 'Cops': Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441, 1471-72 (2005). But some class actions are worse than others. And class actions dominated by uninjured class members are worst of all. They are the least likely to be socially beneficial, the most likely to deprive defendants of due process, and the most likely to yield nuisance settlements that do nothing but redistribute funds from businesses to class counsel.

A. No-injury class actions have no social value.

Class actions dominated by uninjured class members are the least socially useful type of class action. The theory behind class action litigation is that each member of a large class of plaintiffs may have suffered a small injury that is insufficient to justify bringing an individual suit. Thus, the class action suit, in theory, deters wrongdoers from causing injuries that are, in the aggregate, large; in these cases, a high settlement or judgment merely reflects the fact that the aggregated amount of damage caused by the defendant is high.

That theory does not work when class members are unharmed and receive an arbitrary statutory damages award. When hundreds or thousands of uninjured class members are united in a class action suit, the aggregate injury remains zero, and the class action does not accomplish its goal of remedying large but diffuse injuries.

Further, the purpose of statutory damages awards is to *incentivize* litigation for otherwise small injuries. People whose dinners are disturbed by an annoying call from a telemarketer might not sue if they are required to prove the actual damages arising from that annoyance—which may be small or difficult to quantify. Authorizing $500 per plaintiff creates an incentive to go to small claims court. At the same time, plaintiffs who benefited from, or were indifferent to, a communication are unlikely to go through the trouble of filing a lawsuit to obtain $500. Hence, the sole plaintiffs who are likely to file such suits are the plaintiffs who are genuinely aggrieved by the unwanted call.

Class actions in statutory damages cases are therefore unnecessary to protect the people who would be class members. Class actions exist to encourage litigation when actual damages are so low that there is no incentive for an individual plaintiff to sue. Indeed the point of statutory damages regimes is to make damages high enough that there is an incentive for individual plaintiffs to sue, so that other mechanisms of encouraging litigation, like class actions, are unnecessary.

Merging class actions with statutory damages regimes is not only unnecessary, but also affirmatively

harmful to class members. When statutory-damages regimes and class actions are combined, the result is suits seeking massive damages awards, on behalf of unwitting class members who never sought such awards, that radically exceed any harm caused by the allegedly illegal conduct. The financially calamitous nature of these suits will lead to over-deterrence that does not benefit consumers. For instance, such suits induce business to incur substantial compliance costs that purportedly protect consumers from nonexistent harms. They also deter practices that many consumers may find beneficial if there is even a slight risk that a creative plaintiff's lawyer will use them as the basis for a class action suit. Enforcing Article III, and ensuring that unharmed plaintiffs and their counsel cannot obtain windfall damages, would protect against these harmful outcomes.

B. No-injury class actions are unfair to defendants and induce nuisance settlements.

In addition to being socially useless from class members' perspective, no-injury class actions have a unique ability to inflict due process violations on defendants.

No-injury class actions tend to have *lots* of class members—as this case, involving 8,184 absent class members, illustrates. *See also, e.g.*, *In re Facebook Biometric Info. Priv. Litig.*, 326 F.R.D. 535, 543 (N.D. Cal. 2018) (noting that millions of Facebook users were class members in BIPA litigation), *aff'd sub nom. Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 937 (2020). Indeed, in the RLC's

experience, no-injury classes tend to be much larger than classes in cases where courts enforce Article III. This is so for two reasons. First, it is unusual for businesses to inflict actual injuries on thousands or even millions of their patrons. Most businesses need repeat customers in order to survive; a business that inflicted concrete harm on so many people would not survive for long. When courts certify classes composed of class members who are *not* injured, that barrier to certifying oversized classes vanishes. Second, because actual injuries will frequently vary depending on a particular person's circumstances, it is difficult to certify a large class of plaintiffs who have sustained actual injuries while satisfying Rule 23's commonality and predominance requirements. By contrast, when courts disregard the requirement that each class member suffer an injury, certifying large classes becomes much easier.

Classes composed of thousands or millions of class members are likely to yield profound unfairness to defendants. This Court has noted "the risk of '*in terrorem*' settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.* The bigger the class, the bigger the *in terrorem* risk. When a class becomes sufficiently large, the potential liability becomes so enormous that there is virtually no claim too weak to settle. *See* Brief for *Amici Curiae* Home Depot, et al., § II.A (offering numeric example of settlement pressure).

That *in terrorem* risk is further increased by two other features of large class actions. First, the bigger the class, the less likely it is that defendants can put on individualized defenses. As this Court has noted, class action defendants can in principle proffer individualized defenses for particular class members, and the presence of such individualized defenses does not automatically foreclose class certification: "That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014).

But as the class grows, the prospect of providing individualized defenses becomes unrealistic. Perhaps a defendant can investigate each member of a class of 500 members to provide individualized defenses. This becomes less realistic in a class of 10,000 members, and impossible in a class of millions. The practical effect of such super-large class actions is to strip defendants of defenses that would have been available in individualized litigation—precisely what class actions are not supposed to do.

Second, large classes result in a risk that the class representative will be unrepresentative of the class, causing unfairness to the defendant. As Petitioner correctly explains, the certified class in this case violated Rule 23's typicality requirement. The class representative's negative experiences, presented at trial through dramatic testimony, were not shared by his fellow class members. Yet that idiosyncratic testimony induced the jury to issue a large damages

award on behalf of *all* class members—illustrating how the violation of the typicality requirement caused real harm to Petitioner; *see also* Brief for *Amici Curiae* Home Depot, et al., § II.B (explaining how the use of an unrepresentative class representative resulted in an inflated damages award).

The bigger the class, the more likely that the class representative will be atypical. Large classes are composed of class members with varied experiences. A few might have sustained a significant injury; more might have been slightly injured; even more will not have been injured at all. And as classes get bigger, the more likely it is that the class will contain an idiosyncratic, particularly sympathetic class member who will be designated as the class representative and drive up damages for the whole class. Of course, Rule 23's typicality requirement is intended to protect against that danger, but as this case illustrates, typicality is sometimes loosely enforced.

For all these reasons, large, no-injury classes produce existential risk for class action defendants while depriving them of a meaningful opportunity to offer a defense. Adherence to Article III is not only required by this Court's cases, but is necessary to ensure that class action defendants receive a fair hearing.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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