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 AMICI CURIAE eBAY, INC., FACEBOOK, INC., GOOGLE LLC, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, THE INTERNET ASSOCIATION, AND TECHNOLOGY NETWORK SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici and amici association members (together, amici) are leading technology companies that provide services via the Internet to billions of people worldwide for many facets of everyday life worldwide. The online services offered by amici have created or transformed a wide range of industries, including electronic communications of all forms; financial transactions and online commerce; social networking; delivery of video, television, music, and other media content; and the organization and accessibility of information. Amici are proven innovators that continue to generate valuable technology through significant investments in research and development.

The volume and type of communications and interactions that amici's technologies facilitate, however, make amici especially susceptible to abusive, no-injury class action litigation similar to the matter before the Court. Many federal and state laws confer private causes of action and contain statutory damages provisions similar to the provisions at issue here, and the volume and type of communications and interactions that amici's technologies facilitate make amici particularly vulnerable to the consequences of the Ninth Circuit's misreading of both Article III's injury-in-fact requirement and Rule 23. In similar cases, class action plaintiffs have exploited lower courts' lax enforcement of Article III's and Rule 23's requirements and used the

[1] The parties have consented to the filing of this brief. Copies of letters granting consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person, other than *amici*, members of an amicus, or their counsel made any monetary contribution to the preparation or submission of this brief.

threat of exorbitant statutory and punitive damages to extract *in terrorem* settlements from amici. Amici thus have a direct and substantial interest in the question presented by this case, and urge this Court to curb these abusive practices by reaffirming the constitutional requirement of a concrete injury-in-fact and the strict requirements of Rule 23.

eBay Inc. ("eBay"), with over 157 million active buyers globally and more than 800 million items listed for sale, is one of the world's largest online marketplaces, where practically anyone can buy and sell practically anything. Founded in 1995, eBay connects a diverse and passionate community of individual buyers and sellers, as well as small businesses, whose collective impact on e-commerce is staggering.

Facebook, Inc. ("Facebook") is a social media and technology company. Facebook's mission is to give people the power to build community and bring the world closer together. To that end, Facebook operates a portfolio of services used by billions of people around the globe. People use the Facebook platform and the company's other services, including Instagram and WhatsApp, to stay connected, share photos, and chat with friends and family, to discover what is going on in the world, and to share and express what matters to them.

Google LLC ("Google") is a diversified technology company whose mission is to organize the world's information and make it universally accessible and useful. To that end, Google offers a suite of web-based products and services to billions of people worldwide. Google's business started with its search engine and now includes a variety of other products and services,

such as Gmail, YouTube, Google Maps, Drive, and the Android operating system.

The Computer & Communications Industry Association ("CCIA") represents a broad cross section of communications and technology firms.[2] For nearly fifty years, CCIA has promoted open markets, open systems, and open networks.

The Internet Association ("IA") represents over 40 of the world's leading internet companies.[3] IA's mission is to foster innovation, promote economic growth, and empower people through a free and open Internet.

Technology Network ("TechNet") is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American companies ranging from startups to the most iconic companies on the planet, and represents over three million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance.[4]

Amici, association amici's members, and the billions of individuals they serve worldwide (often with free or very low-cost services), thus have an interest in this

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[2] CCIA's full membership is available at https://www.ccianet.org/about/members/.

[3] IA's full membership is available at https://internetassociation.org/our-members.

[4] TechNet's full membership is available at http://technet.org/membership/members.

Court reaffirming the injury-in-fact requirement and Rule 23's typicality requirement. Amici urge this Court to reject the Ninth Circuit's mistaken holding, which allows plaintiffs to bring expansive class action lawsuits in federal court based on nothing more than an allegation of a bare statutory violation without any requirement of a material risk of actual harm.

SUMMARY OF ARGUMENT

Amici provide a wide variety of innovative and important online services that rely on highly sophisticated computer programming and systems to serve billions of people each day. These systems are essential to amici's ability to automatically process and facilitate billions of complex interactions efficiently for people across the globe. This automation enables amici to unlock the power of modern communications technology to deliver immense value to users, typically at no or very little cost. But this model, which is deployed by amici on an immense scale, also makes amici and similar businesses vulnerable to the untoward consequences of the Ninth Circuit's dilution of both Article III's and Rule 23's requirements.

Amici's products serve large numbers of users and are especially vulnerable to poorly defined classes where typicality requirements (among other Rule 23 criteria) are not well-enforced. Those large user pools make it financially lucrative for plaintiffs' counsel to identify individuals who allegedly have suffered an atypical injury for which a statute supplies a private right of action and statutory damages. These suits often result in *in terrorem* settlements which provide little to no recovery for the majority of class members, defeating the compensatory aims of the statutes. Without rigorous enforcement of the Rule 23 require-

ments, particularly typicality, a single atypical plaintiff can certify a very large class, where the majority did not suffer the same injury as the class representative. Further, without rigorous enforcement of Article III standing requirements, the majority of class members may have been subjected to no more than a *de minimis* risk of a harm that never materialized in the past, and does not threaten ever to materialize in the future. If left intact, the Ninth Circuit's opinion in this case would degrade both standards and open the floodgates for abusive litigation that redresses no injury and benefits no consumer.

These concerns are not hypothetical. The services and products amici provide are often targets for claims under federal and state laws that confer private rights of action and contain statutory damages provisions similar to the provisions in the Fair Credit Reporting Act (FCRA) at issue in this case. These statutes include the Wiretap Act (as amended by the Electronic Communications Privacy Act of 1986), 18 U.S.C. §§ 2510-2522, the Stored Communications Act, *id.* §§ 2701-2712, the Video Privacy Protection Act, *id.* § 2710, and the Telephone Consumer Protection Act, 47 U.S.C. § 227. Amici are frequently subjected to opportunistic lawsuits based on alleged violations of these and similar statutes, in which the only alleged harm is a bare statutory violation—an injury-in-law presenting, at most, a *de minimis* risk of an injury-in-fact.

That is precisely what happened here. Rather than requiring a material, impending risk of concrete, actual harm to establish a "case or controversy" appropriate for judicial resolution, the Ninth Circuit's reasoning in this case allows such suits to proceed with effectively no limiting principle.

The misguided approach to Article III and Rule 23 embodied in the decision below creates incentives for the plaintiffs' bar to pursue no-injury class action lawsuits in federal court with increased frequency, absorbing judicial resources without serving the needs of the consumers the that statutes are intended to protect. Permitting these abusive no-injury class action lawsuits has a particularly negative impact on amici due to the broad scale of their operations. Amici's successful innovations and use of easily replicated computer processes allow billions of people to benefit from the valuable services and products they provide. Yet, under the Ninth Circuit's decision, if any of the millions of individuals who interact with amici each day claims to be injured by a generalized act or practice that allegedly violates a statute that provides a private cause of action and statutory damages, she can, without more, launch and prosecute to trial a class action on behalf of herself and millions of other "similarly situated" users, without proving that any other member of the class has actually suffered an injury similar to hers—or any risk of injury greater than *de minimis* at all. Exploiting the Ninth Circuit's lax standing and class certification rules, entire classes of plaintiffs could secure astronomical damages awards despite having suffered no injuries, or even any real risk of an injury. Single named plaintiffs can (and, as explained below, often do) capitalize on the threat of such awards to extract exploitative settlements at the early stages of litigation.

The rigors of Article III and Rule 23 must be applied to these suits in the same way that they are applied to any other lawsuit brought in federal court—every plaintiff must allege actual, concrete injury, and that injury must be typical across the putative class. Otherwise, companies like amici will continue to be

wrongly subjected to the substantial expense of defending such actions and the risks of massive class-wide statutory damages or burdensome injunctive relief, creating a strong incentive to settle even the most frivolous suits for significant sums. That creates a perverse incentive that rewards plaintiffs (and their attorneys) for filing meritless strike suits in circumstances where, at best, the vast majority of absent class members have not been harmed. Article III's standing requirement and Rule 23 exist to prevent precisely this result.

Amici ask the Court to reverse the Ninth Circuit and reaffirm that Article III standing requires every plaintiff, including all absent class members, to allege and establish an actual and concrete injury. Further, amici ask the Court to hold that Rule 23 requires that the named plaintiff's injury be typical of the class's in nature and degree, and that a common right to statutory damages is not sufficient to permit class certification.

ARGUMENT

I. THE DECISION BELOW IS WRONG, AND REFLECTS A TROUBLING PATTERN IN THE LOWER COURTS

A. Article III Standing Requires A Concrete Injury

"'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997). To meet the case-or-controversy requirement, a plaintiff "must establish that [the plaintiff] ha[s] standing to sue." *Id.* To have standing, "the

plaintiff must have suffered an 'injury in fact'" which is both "concrete and particularized" and "'actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) ("The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is … restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate."). Thus, a cognizable injury-in-fact "must *affect the plaintiff* in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1 (emphasis added); *see also id.* at 581 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he party bringing suit must show that the action injures him in a concrete and personal way.").

Just five years ago, this court in *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016), explained the contours of the "concrete" injury requirement. "A 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Id.* at 1548. "[T]he adjective 'concrete' … convey[s] the usual meaning of the term—'real,' and not 'abstract.'" *Id.* Moreover, "the *risk* of real harm can[] satisfy the requirement of concreteness," but only in limited circumstances. *Id.* at 1549 (emphasis added). As this Court has "repeatedly reiterated," "'threatened injury must be *certainly impending* to constitute injury in fact.'" *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). A merely "'*possible* future injury' [is] not sufficient." *Id.* Accordingly, "a bare procedural violation" of a statute, "divorced from any concrete harm," cannot "satisfy the injury-in-fact requirement of Article III." *Spokeo*, 136 S. Ct. at 1549. Such a violation must in fact "cause harm or present [a] material risk of harm" to

confer standing. *Id.* at 1550; *see Thole* v. *U.S. Bank, N.A.*, 140 S. Ct 1615, 1620-1621 (2020) (reaffirming *Spokeo*'s holding that "Article III standing requires a concrete injury even in the context of a statutory violation"). To hold otherwise would allow Congress to "erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3.

B. The Ninth Circuit Consistently Fails To Enforce Article III's Requirement Of A Concrete Injury

The fundamental error in the decision below, like the decisions discussed in Part I.C, is that it elevates to an Article III injury-in-fact any technical violation of a federal statute that exposed a plaintiff to no more than a *de minimis* risk of harm. This is not a unique error for the Ninth Circuit. And it is irreconcilable with this Court's precedents establishing that a risk of injury is sufficient to confer standing only when that risk is "material," *Spokeo*, 136 S. Ct. at 1550, and the injury threatened is "certainly impending," *Clapper*, 568 U.S. at 409.

The "risk" plaintiffs identified in this case was contingent upon a series of hypothetical events that never occurred. This is plainly insufficient to establish an Article III injury-in-fact. "Standing is not 'an ingenious academic exercise in the conceivable.'" *Lujan*, 504 U.S. at 566. The risk of any actual harm materializing here went well "beyond the limit … and into pure speculation and fantasy." *Id.* at 567.

Multiple courts of appeals have properly reached the same conclusion following this Court's decision in *Spokeo*. For example, the D.C. Circuit held that the

"mere existence of inaccurate information in … [a] database" creates no cognizable harm and is insufficient to establish standing. *Owner-Operator Independent Drivers' Ass'n* v. *U.S. Department of Transportation*, 879 F.3d 339, 347 (D.C. Cir. 2018). The Seventh Circuit similarly concluded that the "*risk* of harm" associated with the improper retention of personal information, absent any evidence suggesting that this information might be disseminated, works no Article III injury. *Gubala* v. *Time Warner Cable, Inc.*, 846 F.3d 909, 910-911 (7th Cir. 2017); *see also Braitberg* v. *Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016) ("Braitberg alleges only that Charter violated a duty to destroy personally identifiable information …. He identifies no material risk of harm from the retention; a speculative or hypothetical risk is insufficient.").

The Ninth Circuit deepened its split with this Court and its sister circuits just a week after the decision below was issued, when it effectively returned to its pre-*Spokeo* categorical rule in *Campbell* v. *Facebook, Inc.*, 951 F.3d 1106 (9th Cir. 2020). In that case, the Ninth Circuit held that a class had Article III standing to challenge, under the Electronic Communications Privacy Act (ECPA) and the California Information Privacy Act (CIPA), Facebook's use of user-shared URLs via its Messenger application in calculating the number of "Likes" a post receives. *Id.* at 1112. The only injury plaintiffs alleged was Facebook's collection of URL data. *Id.* The court determined that ECPA and CIPA each created a "private right of action," and held that a plaintiff "need not allege any further harm" than the violation of a "substantive right" under a statute "to have standing" for purposes of Article III. *Id.* at 1117 (citation omitted). Although purporting to apply *Spokeo*, *Campbell* reiterated the Ninth

Circuit's departure from that case's holding. *Spokeo* makes explicit that a court must go beyond identification of a private right of action and determine whether the alleged harm satisfies the concreteness requirement. 136 S. Ct. at 1550. *Campbell* held that an allegation of a statutory violation creating a substantive private right of action satisfies standing requirements, reestablishing the Ninth Circuit as an outlier in which the constitutional bar to maintain a class action is erroneously diminished.

The Ninth Circuit's twin decisions in this case and in *Campbell* impermissibly contravene *Spokeo* and *Clapper* by dispensing with the requirement that each plaintiff must show a concrete and particularized injury-in-fact. The circuit incorrectly interprets *Spokeo* to hold that the injury-in-fact requirement is satisfied when plaintiffs plead any "material risk of harm," disregarding the requirements that the harm be "'certainly impending,'" and the risk be greater than *de minimis*. *See Clapper*, 568 U.S. at 409 (emphasis omitted). This reduced standard implicates numerous federal and state statutes that confer private rights of action and provide for statutory damages or other forms of relief regardless of actual or imminent risk of harm. By its reasoning and terms, the Ninth Circuit's rule allows any putative class representative to invoke federal jurisdiction on behalf of a boundless class of uninjured parties, based on the allegation of a *de minimis* "risk" of harm associated with a statutory violation—regardless of whether any class member was even aware of the violation, much less suffered harm. In practice, this holding would allow plaintiffs to pursue lawsuits seeking billions of dollars in statutory damages, sweeping injunctive relief, and even punitive damages based on novel legal theories or technical

statutory violations that are not alleged to have actually "affect[ed] the plaintiff" or subjected the vast majority of absent class members to any actual harm or imminent risk of actual harm. *Lujan*, 504 U.S. at 560 n.1.

C. Lower Courts Are Continuing To Find Standing To Exist In the Absence Of Actual, Concrete Injury

Amici interact with millions of individuals or more each day who use their services to conduct transactions, share information and content, and interact with people all over the world. Indeed, it is the very efficiency and worldwide reach of amici's online operations that enable them to deliver such enormous value at no, or little, cost to their users. At the same time, however, amici's huge volume of daily interactions with millions of different people renders them particularly vulnerable to putative class actions that allege bare statutory violations and claim statutory damages for enormous putative classes. Any process, practice, or alleged "risk," no matter how miniscule or theoretical, that allegedly applies to a particular user of services or websites provided by any one of the amici may well be alleged to apply equally or similarly to many thousands or millions of other users.

It is thus of little surprise that, with ever-increasing frequency, amici and other technology companies are named as defendants in class actions brought under statutes that provide private rights of action coupled with the ability to obtain statutory damages. Among other statutes, class plaintiffs have brought suit against amici or members of an amicus under the Wiretap Act (as amended by the Electronic Communications Privacy Act of 1986), 18 U.S.C. §§ 2510-2522, the Stored Communications Act (SCA), *id.* §§ 2701-2712, the Video

Privacy Protection Act (VPPA), *id.* § 2710, and the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. In addition, amici and other technology companies often face class claims brought under state laws that, like their federal counterparts, also provide private rights of action combined with statutory damages. *See, e.g.*, California Invasion of Privacy Act (CIPA), Cal. Penal Code § 630 *et seq.*; Illinois Biometric Information Privacy Act (BIPA), 740 Ill. Comp. Stat. 14/1 *et seq.* Claims under these state statutes can be brought in federal court based on diversity jurisdiction, 28 U.S.C. § 1332(a), supplemental jurisdiction, *id.* § 1367, or the Class Action Fairness Act, *id.* § 1332(d).

Under the Ninth Circuit's rule, class plaintiffs are permitted to maintain these broad class suits against amici and other technology companies despite their inability to allege any *actual* harm that would support standing for much of the class. The suits typically seek hundreds of millions or more than a billion dollars in statutory damages based on allegations of technical or trivial statutory violations and/or novel, untested legal theories. Commonly, many if not most members of the putative class are unaware of the defendant's technical violation and entirely unharmed.

These are not manufactured or overblown fears. Since *Spokeo*, amici and other technology companies have been subjected to a multitude of putative class actions involving large groups of uninjured persons alleging technical violations without concrete harms. And yet, despite *Spokeo*'s contrary guidance, the Ninth Circuit and other courts have consistently found that these class actions seeking statutory damages and predicated on a *de minimis* risk of injury meet Article III standing requirements.

For example, in a California federal district court, a putative class sued amicus Facebook for tens of billions of dollars based on an alleged violation of Illinois's Biometric Information Privacy Act (BIPA) related to Facebook's facial-recognition software, which enables users to "tag" friends and family in photographs. *In re Facebook Biometric Information Privacy Litig.*, 326 F.R.D. 535 (N.D. Cal. 2018). The plaintiffs alleged that this popular tagging feature, widely used only within Facebook's ecosystem, violated BIPA without identifying any actual injury-in-fact. *Id.* Indeed, other than qualifying for statutory damages, no plaintiff alleged that he or she had suffered any harm from Facebook's technology. *Id.* Further, Facebook had provided the named plaintiffs and members of the putative class with notice and the opportunity to opt-out of this feature. *Id.* But—according to the complaint—Facebook had not sought the particular kind of consent, or provided putative class members with the particular kind of notice, required by BIPA. *Id.* On this basis, the district court certified the class. *Id.* The Ninth Circuit affirmed class certification, holding that statutory violations "pose a material risk of harm to … privacy interests" sufficient to satisfy Article III standing requirements. *Patel* v. *Facebook, Inc.*, 932 F.3d 1264, 1275 (9th Cir. 2019).

The Ninth Circuit similarly held that amicus Facebook could be subject to class-action suit under the Wiretap Act, SCA, and CIPA based on allegations that it used plug-ins and cookies to collect browsing data from users and sold the data to advertisers. *In re Facebook Internet Tracking Litig.*, 956 F.3d 589, 596 (9th Cir. 2020), *petition for cert. filed sub nom Facebook, Inc.* v. *Davis* (U.S. Nov. 20, 2020) (No. 20-727). The complaint related to Facebook plug-ins, which permit a

user to use Facebook's "like" and "share" features while engaging with content on third-party websites. Plaintiffs claimed that Facebook used cookies to collect URL browsing data from logged-out users who visited third-party websites on which Facebook plug-ins were enabled, and that the users' browser software sent those data to Facebook. Plaintiffs alleged that this transmission of user data constituted an "interception" under the Wiretap Act. *Id.* at 607. As in the BIPA suit against Facebook, plaintiffs did not identify any common way in which all putative class members were actually harmed by this alleged collection and transmission of browsing data, claiming only that Facebook had violated the terms of the Act. *See id.* at 598. The Ninth Circuit again focused on whether plaintiffs could allege a "material risk of harm" connected to the alleged statutory violation, and concluded that the mere *potential* for Facebook to "allegedly reveal an individual's likes, dislikes, interests, and habits over a significant amount of time" by reviewing the contents of private messaging conversations hosted on its software constituted an injury in fact, despite no allegation that Facebook had done so or that there was any risk that it would do so. *See id.* at 599.

The Third Circuit reached the same conclusion with respect to standing in similar litigation against amicus Google. *In re Google Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316 (3d Cir. 2019). Class plaintiffs alleged that Google illicitly set cookies on users' browsers that tracked user browsing behavior in violation of the Wiretap Act, SCA, and CIPA. The plaintiffs claimed that they had suffered no injury beyond the alleged statutory violations. Yet the court found that the entire class satisfied Article III standing simply by alleging that Google had improperly tracked browser

activity. *Id.* at 324-325. Because Congress had supplied a private right of action that plaintiffs alleged applied, the court held that the bare allegation of a violation could categorically satisfy the Article III standing requirements. *See id.* (citing *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 273-274 (3d Cir. 2016)). That ruling is irreconcilable with this Court's decision in *Spokeo*. *See Spokeo*, 136 S. Ct. at 1549 ("Congress' role in identifying and elevating intangible harms 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. Article III standing requires a concrete injury even in the context of a statutory violation."). Nevertheless, courts within the Third Circuit may now presume it to be settled law that "a concrete injury for Article III standing purposes occurs when Google, or any other third party, [allegedly] tracks a person's internet browser activity without authorization," regardless of any showing of whether or how that alleged tracking caused any concrete harm. *Google Cookie*, 934 F.3d at 325. This approach abdicates the courts' role as gatekeeper by failing to complete the *Spokeo* inquiry and determine whether "the particular … violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." 136 S. Ct. at 1550.

The Sixth Circuit similarly failed to properly apply *Spokeo* in permitting a largely uninjured class to pursue claims against Nationwide Insurance under FCRA. *Galaria* v. *Nationwide Mut. Ins. Co.*, 663 F. App'x 384 (6th Cir. 2016). Putative class representatives in that case alleged that Nationwide's anti-hacker procedures were inadequate under FCRA, and that a data breach had caused their personal data to be accessed, but not

misused, by third parties. *Id.* at 386. The plaintiffs alleged only a statutory injury and a threat of future harm, including "increased *risk* of fraud and identity theft." *See id.* at 388 (emphasis added). The district court dismissed for lack of Article III standing, but the Sixth Circuit reversed, despite acknowledging that there had been no misuse of the plaintiffs' data and no risk greater than *de minimis* that the data *ever* would be misused. *Id.* at 391.

II. THE NINTH CIRCUIT'S FAILURE TO ENFORCE THE TYPICALITY REQUIREMENTS OF RULE 23 EXACERBATES THE FAILURE TO ENFORCE THE REQUIREMENTS OF ARTICLE III

A. The Decision Below Degrades Rule 23

The Federal Rules of Civil Procedure require that the claims or defenses of the representative parties be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Rule 23(a)'s typicality requirement ensures that the class representatives "'suffer the same injury' as the class members." *Wal-Mart Stores* v. *Dukes*, 564 U.S. 338, 348-349 (2011). This rule ensures that the scope of the certified class is proportional to the wrong. *See Comcast Corp.* v. *Behrend*, 569 U.S. 27, 33 (2013); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 629 (1997).

Accordingly, many courts—including the Ninth Circuit in prior cases—have concluded that typicality is not satisfied when the named plaintiff is subject to unique claims or defenses "which threaten to become the focus of the litigation." *Hanon* v. *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992); *see Beck* v. *Maximus, Inc.*, 457 F.3d 291, 300-301 (3d Cir. 2006).

Further, Rule 23 supports Article III's requirement that only injured plaintiffs may be awarded relief. *See Tyson Foods*, 136 S. Ct. at 1053 (Roberts, C.J., concurring). Proper application of Rule 23(a) prevents a class that includes uninjured plaintiffs from being certified, and courts have declined to certify a class seeking statutory damages where plaintiffs "could [not] show an adverse effect" across the class. *Doe* v. *Chao*, 306 F.3d 170, 184 (4th Cir. 2002). In *Chao*, the Fourth Circuit held that a putative class does not satisfy Rule 23's typicality requirement merely by claiming identical statutory damages for all class members. *Id.* The court denied certification because plaintiffs had introduced "some evidence of adverse effect and actual damages" to unnamed members of the putative class, but no named plaintiff had demonstrated both adverse effect and actual damages. *Id.* Similarly, the D.C. Circuit recently found that plaintiffs in a putative antitrust class action failed to satisfy Rule 23's typicality requirements where an economic model showed no damages to 2,000 members of a 16,000-member putative class. *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619, 623-624 (D.C. Cir. 2019). Although the court did not conduct an Article III standing analysis, its application of Rule 23 was tailored toward "winnow[ing] away" uninjured class members, who "cannot prevail on the merits," reinforcing the constitutional requirement that all plaintiffs plead an injury-in-fact. *See id.* at 624. Likewise, the First Circuit reversed certification in a similar antitrust action, holding that the putative class failed to satisfy Rule 23 because the number of potentially uninjured parties in the putative class "overwhelm[ed] common issues." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 58 (1st Cir. 2018). In each of these cases, the court's careful Rule 23 analysis

precluded certification of a class which, if certified, would have raised significant Article III standing concerns.

In the present case, the Ninth Circuit eschewed any such scrutiny, disregarding the lack of evidence that *any* plaintiff other than Mr. Ramirez had suffered actual injury in its Rule 23 analysis. Other courts within and without the Ninth Circuit have issued similarly erroneous holdings. *See, e.g.*, *Parsons* v. *Ryan*, 754 F.3d 657, 685 (9th Cir. 2014); *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011); *Lacy* v. *Cook Cty.*, 897 F.3d 847, 866 (7th Cir. 2018); *Cobb* v. *Monarch Fin. Corp.*, 913 F. Supp. 1164, 1172 (N.D. Ill. 1995).

B. The Ninth Circuit's Lax Enforcement Of Rule 23 Is Particularly Problematic For Amici

Permitting class certification on the mere basis that plaintiffs with atypical injuries are seeking to recover under the same federal statute—with provisions allowing for awards of statutory and punitive damages—abdicates the "rigorous analysis" courts are required to undertake before certifying any class, *Dukes*, 564 U.S. at 351, and dramatically expands the scope of certifiable classes and thus the burdens of protracted litigation and potential liability of defendants like amici. This approach encourages opportunistic plaintiffs' lawyers to seek out a plaintiff with a highly uncommon injury resulting from a statutory violation and to extend the plaintiff's claim to as broad a class as possible. In the absence of strict enforcement of Rule 23, a jury can base a class-wide damages award on facts presented at trial that are wholly unrepresentative of the experience of the absent class members. The potential for a jury to base its damages calculation on the most extreme claim

in the class, rather than a typical claim, permits plaintiffs' attorneys to leverage the experiences of their atypical named plaintiff into a multimillion-dollar award or settlement on behalf of tens of thousands (or more) of other individuals who have not suffered a similarly exceptional injury as a result of the same alleged statutory violation.

Such a windfall occurred here, as the record indicates that Mr. Ramirez suffered a unique injury as a result of TransUnion's violation, and there is no evidence that any other class member had suffered a similar harm. *See* Pet. App-26. But no evidence of class-wide harm was required: under the Ninth Circuit's rule, a showing of a common *violation* was deemed to satisfy Rule 23's requirement of a common *injury*. Thus, all class members, even the 75 percent that concededly suffered no individual injury, stand to recover damages. In combination with the erosion of Article III standing requirements, this development exposes businesses like amici to massive lawsuits over alleged violations that could, hypothetically, have caused no actual harm to over 99 percent of the class.

III. The Ability To Seek Class-Wide Statutory Damages For Mere Injuries-In-Law Allows Putative Class Representatives To Extract *In Terrorem* Settlements

District courts within the Ninth Circuit are now authorized to apply scaled-down forms of the requirements that class plaintiffs plead an injury-in-fact and a typicality of claims. Where the class representative can identify an alleged statutory violation common to all class members, courts can and do proceed on the presumption that the Ninth Circuit will affirm their exercise of jurisdiction and certification of the class. This

erosion of Article III and Rule 23, combined with the widespread availability of statutory damages under many statutes, has led to abusive, costly class-action litigation against technology companies throughout the circuit. These cases involve billions if not trillions of dollars of potential exposure for technical or procedural violations from which a class does not allege that all members have been harmed, or that the lead plaintiff's injury is typical across the class. Because any technology company practice that applies to a single user may often also be applied to millions or even billions of other users each day, the potential class size in such lawsuits can be enormous. Indeed, it is the very success of technology companies that have developed valuable and efficient services that are used and accessed every day by billions of people, often at no or little cost to the user, that makes them especially vulnerable to such opportunistic lawsuits.

Of particular concern, the combination of huge classes and statutory damages presents a threat of absurdly high potential damages that can force *in terrorem* settlements of meritless, no-injury cases. Frequently, these settlements offer little-to-no benefit to putative class members, who receive *de minimis* payments while class counsel pockets tens of millions in fees. The *in terrorem* effect of the damages exposure often forces defendants to agree to high-fee settlements, even in the face of strong defenses. This exposure is magnified in the Ninth Circuit, where defendants cannot successfully assert the correct Article III standard in a motion to dismiss, nor the correct Rule 23 standard at class certification.

For example, amicus Facebook recently settled the *Patel* BIPA class action described above for $650 million. *In re Facebook Biometric Information Privacy*

Litigation, 2020 WL 4818608, at *2 (N.D. Cal. Aug. 19, 2020). That action alleged no actual injury to any class member, yet survived Facebook's motion to dismiss for lack of jurisdiction due to the Ninth Circuit's dilution of the Article III standing requirement. Similarly, amicus Google settled another class action brought under CIPA and the Wiretap Act after the district court denied its motion to dismiss for lack of standing because "both Congress and the California Legislature intended to grant persons in Plaintiff's position a right to judicial relief without additional allegations of injury." *Matera* v. *Google, Inc.*, 2016 WL 5339806, at *13 (N.D. Cal. Sept. 23, 2016); *see also In re Google Plus Profile Litig.*, 2021 WL 242887 (N.D. Cal. Jan. 25, 2021) (order approving $7.5 million classwide settlement where software bug theoretically exposed users' names, addresses, and similar profile information to software developers).

Amicus Google also entered into a settlement of claims under the SCA on behalf of a class estimated to "comprise[] … approximately 129 million individuals." *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1128 (N.D. Cal. 2015). The court had previously noted that "the full amount of statutory damages … is likely in the *trillions* of dollars considering the size of the class." *In re Google Referrer Header Privacy Litig.*, 2014 WL 1266091, at *5 n.4 (N.D. Cal. Mar. 26, 2014) (emphasis added). This Court vacated that settlement to reconsider whether the class members had Article III standing in light of its decision in *Spokeo*. *Frank* v. *Gaos*, 139 S. Ct. 1041 (2019). On remand, the district court relied on erroneous post-*Spokeo* Ninth Circuit precedent to conclude that the class had standing, despite the fact that its members failed to allege any harm resulting from the statutory

violation. *In re Google Referrer Header Privacy Litig.*, 465 F. Supp. 3d 999, 1010 (N.D. Cal. 2020).

Similarly, Vizio settled a class action for $17 million related to its alleged use of content regulation software built into its Smart TVs to collect information about consumers' viewing habits. *In re Vizio Consumer Privacy Litig.*, 238 F. Supp. 3d 1204 (C.D. Cal. 2017). Class plaintiffs alleged that Vizio violated the Wiretap Act, VPPA, CIPA, and privacy and consumer protection statutes from several states by collecting viewers' MAC addresses—which are insufficient to permit a third party to identify the individual connected to the address—and disclosing them to advertising partners. *Id.* at 1213. Vizio's Smart TV's permitted consumers to disable this collection software. *Id.* Plaintiffs did not allege any injury resulting from Vizio's alleged statutory violations beyond post-hoc dissatisfaction with their decision to purchase a Vizio television at the price they paid. *Id.* The district court found that all class members had satisfied Article III standing, suggesting that a motion to dismiss for lack of subject matter jurisdiction would have been appropriate only if the merits of the case been "'frivolous.'" *Id.* at 1216-1217. The court later approved a $17 million settlement on the basis of this claimed statutory violation and alleged *de minimis* risk of injury, and awarded plaintiffs' counsel fees of up to 33.3% of the class's recovery. *In re Vizio Consumer Privacy Litig.*, 2019 WL 3818854 (C.D. Cal. Aug. 14, 2019).

Although amici are particularly concerned about the effects of the Ninth Circuit's holding on technology creators, abusive no-injury class actions are filed against businesses large and small, across industries. Recently, a jury in the District of Oregon awarded $925 million in statutory damages to a class in a suit against

ViSalus, a health supplement manufacturer. *Wakefield* v. *ViSalus, Inc.*, 2019 WL 2578082, at *2 (D. Or. June 24, 2019). The class alleged that ViSalus had placed 1.8 million robocalls in violation of the TCPA. *Id.* The court upheld the award despite finding that plaintiffs had failed to establish that each of the 800,000 class members received a call that violated the TCPA, which does not prohibit robocalls to landlines used for business purposes, or that each of the 1.8 million calls violated the TCPA. *Wakefield* v. *ViSalus, Inc.*, 2019 WL 3945243, at *2 (D. Or. Aug. 21, 2019). Further, the plaintiffs did not plead that all members of the class had suffered any risk of injury greater than *de minimis*, or that all class members had a common injury beyond the statutory right of action. *See id.*

These examples offer a disturbing commentary on the consequences of the Ninth Circuit's diluted standing and class certification jurisprudence and the readiness of the class-action plaintiffs' bar to exploit it with opportunistic lawsuits. Plaintiffs' ability to file these types of cases, even after *Spokeo*, based on alleged injuries-in-law without identifying anyone who has suffered any actual harm or imminent risk of harm has an extreme and chilling effect on technology companies like amici. Further, the erroneous degradation of Rule 23's standards permits the plaintiffs' bar to swell a single plaintiff's concededly atypical alleged injury into a putative class action on behalf of tens of millions of uninjured consumers. This combination conjures from the ether enormous leverage against technology providers, forcing defendants to choose between litigating under lax rules or paying millions in settlements to dispose of meritless suits.

The Ninth Circuit's erroneous rules simultaneously fail to benefit the consumers the statutes aim to

protect while heavily burdening companies and the judicial system alike. A class action that survives a motion to dismiss for lack of standing based on a degraded Article III standard may consume court resources for years with litigation or ongoing administration of a class settlement, disrupting the administration of justice in meritorious actions. And *in terrorem* settlements divert resources away from technology companies' efforts to develop and provide increasingly innovative services and products to the very users who often comprise the putative classes in these cases. Thus, in the Internet-based technology sector represented by amici, the ultimate losers under the Ninth Circuit's ruling are members of the vast consuming public, who now or in the future may face limited or more costly access to the services and products offered by amici.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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