No. 20-297

In the Supreme Court of the United States

TRANSUNION LLC,

Petitioner,

v.

SERGIO L. RAMIREZ,

Respondent.

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

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF ACA INTERNATIONAL[1]

ACA International, the Association of Credit and Collection Professionals (ACA), is a not-for-profit corporation based in Minneapolis, Minnesota. Founded over eighty years ago, ACA is now the largest trade association representing the debt-collection industry with members located in every state and in more than forty countries. ACA brings together nearly 2,500 member organizations as well as their more than 129,000 employees worldwide, including third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates. ACA International, *ACA International Fact Sheet*, at 1 (Jan. 2019), j.mp/ACA2019FactSheet (*Fact.Sheet*).

The ACA-member workforce is incredibly diverse, with racial and ethnic minorities accounting for some 40% of employees, and women making up 70% of the workforce. Josh Adams, PhD., ACA International White Paper, *Diversity in the Collections Industry: An Overview of the Collections Workforce*, at 2 (Jan. 2016),

[1] Pursuant to Rule 37.6, ACA affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than ACA, its members, or its counsel, made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

j.mp/CollectionRole2016. Nearly a third of ACA members are woman-owned businesses. *Fact.Sheet*.

ACA's members include sole proprietorships, partnerships, and corporations ranging from small businesses to large firms that employ thousands of workers. These members include the very smallest of businesses that operate within a limited geographic range of a single state, as well as the very largest of multinational corporations that operate in every state as well as outside the United States. Nearly 90% of ACA's members qualify as small businesses with less than $15 million in annual revenue. *Id.* Some 44% employ fewer than nine workers. *Id.* ACA members are not only small businesses themselves, nearly half provide an essential service for their small-business clients as well—which form the majority of their clientele. Josh Adams, PhD., ACA International White Paper, *Small Businesses in the Collection Industry in 2018*, at 2 (May 2018), j.mp/SmallBusinesses2018.

ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service. ACA provides its members with essential information, education, and guidance regarding how to comply with governing laws and regulations. ACA produces a wide variety of products, services, and publications, including educational- and compliance-related information.

ACA also articulates the value of the credit-and-collection industry to businesses, consumers, policymakers, and courts. As part of this mission, ACA

regularly files briefs as *amicus curiae* in cases of interest to its membership like this one. ACA and its member organizations enthusiastically support the full and fair enforcement of the Fair Credit Reporting Act (FCRA). *See* 15 U.S.C. § 1681, *et seq*.

ACA submits this *amicus curiae* brief both because its over 400 members in the Ninth Circuit—employing more than 19,400 people—now face the very real and likely prospect of increased exposure to class-action abuse, as well to prevent such abuses from metastasizing across the nation. *See* Kaulkin Ginsberg, *2020 State of the Industry Report*, at 3–4 (2020), j.mp/2020IndustryState (*2020.State.Industry*).

INTRODUCTION AND SUMMARY OF ARGUMENT

Class-action lawsuits are fast becoming one of the most prominent and costly types of litigation in the United States. *See* Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. Chi. Legal. F. 475, 475 (2003) (*Aggregation.Amplification.Distortion*) ("class actions have surged to prominence in recent years"). Across all industries in 2019, corporate spending on class actions increased for the fifth consecutive year—now accounting for nearly 12% of all litigation spending. Carlton Fields, *2020 Carlton Fields Class Action Survey*, at 10 (2020), j.mp/2020 ClassActionSurvey. The $2.64 billion corporations devoted to legal spending on class actions during 2019

was the highest ever. *Id.* 11; *see* Chamber.Amicus.Br.14 (noting corporate legal spend on class actions the year before in 2018 was nearly $200 million lower at $2.46 billion). Similarly, the average company faced an average of 10.2 class-action lawsuits during 2019—the first time the average has reached double digits. *Id.* 14. Just seven years ago, it was half that. *Id.*

If not reversed by this Court, the decision below will exacerbate and accelerate this trend while at the same time leaving companies like those ACA represents largely defenseless to combat the near boundless standing and typicality paradigms established by the Ninth Circuit.

The briefing submitted by TransUnion LLC (TransUnion), the Chamber of Commerce for the United States of America (Chamber), and the Consumer Data Industry Association (Association) comprehensively explore the Ninth Circuit's breathtaking legal overreach, including how the decision below directly conflicts with not only this Court's prior holdings but at least six of the Ninth Circuit's sister courts as well. Pet'r.Br.25–51; Pet.Reply.4, 6–7; Chamber.Amicus.Br.5–16; Association.Amicus.Br.5–20; *e.g.*, *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548–49 (2016); *Clapper v. Amnesty Internat'l USA*, 568 U.S. 398, 409 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348–49 (2011). ACA writes separately only to highlight the existential threat the decision below poses under the Telephone Consumer Protection Act (TCPA) and the Fair Debt Collection Practices Act (FDCPA) not only to its

more than 400 members in the Ninth Circuit but also to those in other jurisdictions that may be tempted to adopt the Ninth Circuit's flawed reasoning. *See* 15 U.S.C. § 1692, *et seq*. (FDCPA); 47 U.S.C. § 227, *et seq*. (TCPA).

For the reasons that follow, ACA supports TransUnion's request that the Court reverse the decision below and confirm that: (1) absent class members must show the injuries they suffered were concrete or "certainly impending" under Article III; and (2) class representatives must demonstrate that their injuries are typical of those suffered by absent class members under Rule 23. *See* U.S. Const. art. III, § 2; Fed. R. Civ. P. 23(a)(3).

ARGUMENT

I. Because TCPA and FDCPA Filings in General and Putative Class Actions in Particular Far Outpace Those Under the FCRA, the Ninth Circuit's Decision Below Will Dramatically Increase the Exposure to Class-Action Abuse ACA Members Face

In their *amicus curiae* briefs, both the Chamber and the Association soberly and thoroughly describe how the Ninth Circuit's decision below will likely foster class-action abuse under the FCRA. Chamber.Amicus.Br.4, 13–16; Association.Amicus.Br.4–5, 17–20. ACA members also occasionally face class-action claims under the FCRA. But most commonly,

ACA members defend against class-action lawsuits brought under the TCPA and the sister act to the FCRA housed in Title VI of the Consumer Credit Protection Act—the FDCPA contained in Title VIII.

While the Chamber and the Association accurately paint a grim outlook for organizations forced to defend FCRA class-action claims under the Ninth Circuit's novel interpretation of Article III's standing and Rule 23's typicality requirements, the decision below will likely impose exponentially greater risks to ACA members defending TCPA and FDCPA class actions. The problem is both one of scale and statutory operation.

1. The difference in magnitude of total FCRA claims filed compared to TCPA and FDCPA claims, as well as class actions brought under each act is alarming. In 2020, more than 10,000 TCPA and FDCPA lawsuits were filed, compared to just over half that for FCRA actions. WebRecon LLC, *WebRecon Stats for Dec 2020 and Year in Review*, j.mp/WebReconDec2020 (*2020.Stats*) (6,876 FDCPA and 3,302 TCPA claims compared to 5,223 FCRA lawsuits). So too do the class actions brought under the TCPA and FDCPA dwarf those lodged under the FCRA. In 2020 alone, 1,219 TCPA and 1,354 FDCPA class actions were filed compared to just 237 under the FCRA—roughly a sixfold difference. *See 2020.Stats*; WebRecon LLC, *WebRecon Stats for Nov 2020—Complaint Statistics*, j.mp/WebRecon Nov2020; WebRecon LLC, *WebRecon Stats for Oct 2020—Complaint Statistics*, j.mp/WebReconOct2020; WebRecon LLC, *WebRecon Stats for Sept 2020—Complaint*

Statistics, j.mp/WebReconSept2020; WebRecon LLC, *WebRecon Stats for Aug 2020—Complaint Statistics*, j.mp/WebReconAug2020; WebRecon LLC, *WebRecon Stats for July 2020—Complaint Statistics*, j.mp/Web ReconJuly2020; WebRecon LLC, *WebRecon Stats for June 2020: Complaint Statistics*, j.mp/WebRecon-June2020; WebRecon LLC, *WebRecon Stats for May 2020: Complaint Statistics*, j.mp/WebReconMay2020; WebRecon LLC, *WebRecon Stats for April 2020—Complaint Statistics*, j.mp/WebReconApril2020; WebRecon LLC, *WebRecon Stats for March 2020: Complaint Statistics*, j.mp/WebReconMarch2020; WebRecon LLC, *WebRecon Stats for Feb 2020: Complaint Statistics*, j.mp/WebReconFeb2020; WebRecon LLC, *WebRecon Stats for Jan 2020: Complaint Statistics*, j.mp/Web ReconJan2020.

2. In addition to the sheer volume of TCPA and FDCPA class actions compared to those brought under the FCRA, the statutory operation of the TCPA's damages provisions in particular threaten to magnify the deleterious jurisprudential effects of the decision below. Like the FCRA, the TCPA permits compounding individual statutory damages across an entire class. 15 U.S.C. § 1681n(a)(1)(A) (FCRA); 47 U.S.C. § 227(b)(3)(B) (TCPA). Each also provides for the award of actual or statutorily-capped damages.[2]

[2] Both acts also provide for damages other than actual or statutory ones. 15 U.S.C. § 1681n(a)(2) (FCRA); 47 U.S.C. § 227(b)(3)(C) (TCPA). The FCRA permits the recovery of punitive damages for willful violations, while the TCPA provides for the trebling of any actual or statutory damages awarded for willful or knowing violations. *Ibid.*

Ibid. (FCRA statutory damages capped at $1,000; TCPA statutory damages capped at $500). But while the FCRA permits the recovery of damages only for willful violations, the TCPA allows recovery of actual or statutory damages for merely negligent or per se violations. *Ibid.* As a result, even inadvertent conduct under the TCPA can be swept into and magnified by a class action, while only intentional conduct under the FCRA can do the same.

II. The Ninth Circuit's Unfettered Interpretation of Article III Standing and Rule 23 Typicality Will Invite Class-Action Abuse Under the TCPA and the FDCPA

The Ninth Circuit's unprecedented interpretation and application of Article III's standing and Rule 23's typicality requirements will serve as a beacon for putative classes of TCPA or even select FDCPA plaintiffs who may have suffered no injury at all but can nevertheless be tethered to an atypical class representative who endured idiosyncratic injuries.

1. As the late Justice Ginsberg explained on behalf of the Court, class actions function "by aggregating the relatively paltry potential recoveries" provided under statute "into something worth someone's (usually an attorney's) labor." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)). But, as University of Chicago Professor Richard Epstein observed nearly two decades ago, "aggregation produces intense

distortion." *Aggregation.Amplification.Distortion.*505; Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 115 (Winter 2009) (*Class.Action.Problem*) ("[a]ggregating statutory damages claims warps the purpose of both statutory damages and class actions"). By amalgamating nominal individual statutory damages afforded by the FCRA and the TCPA, class actions provide a "clear tactical edge[]" to the "armies . . . massed on the other side of the table." *Aggregation.Amplification.Distortion.*505; *see Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978), *limitation on other grounds recognized by Microsoft Corp. v. Baker*, 137 S.Ct. 1702, 1709, 1715 (2017) ("[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle"); Chambers.Amicus.Br.15 (describing the "hydraulic pressure" to settle generated by class certification).

Traditionally, the twin bulwarks of Article III's requirement of concrete, particularized, or certainly impending injury and Rule 23's typicality prerequisite have operated in tandem to ensure the inherent distortion and tactical advantage that aggregation encourages can be leveraged only in those cases in which an actual injury has similarly befallen each member of a class. *See Clapper*, 568 U.S. at 409 (injury); *Dukes*, 564 U.S. at 348–49 (typicality); *see also* U.S. Const. art. III, § 2; Fed. R. Civ. P. 23(a)(3). But no longer. Now that the Ninth Circuit has jettisoned the foundational restraints of requiring absent class members to suffer

the same concrete, particularized, or certainly impending injuries as the class representative, the "inherent distortion" Professor Epstein cautioned against nearly twenty years ago is all but assured. *See Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1021–30, 1033 (9th Cir. 2020).

2. The siren call broadcast by the decision below to putative class-action counsel, as both the Chamber and the Association have aptly described in the context of FCRA claims, will also attract similar class-action abuse under the TCPA and the FDCPA[3] against ACA's thousands of members as well. Chamber.Amicus.Br.13–16; Association. Amicus.Br.13, 19.

As Justice Kavanaugh noted in his plurality opinion in *Barr v. American Association of Political Consultants, Inc.*, damages for violating the TCPA "can add up quickly in a class action." 140 S.Ct. 2335, 2345 (2020). This "simple math[]" provides ample incentive to bring a class action—particularly now that neither common nor concrete injuries must be shown class-wide.

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[3] While the statutory damages for individual violations under both the FCRA and the TCPA may be aggregated in a class action, statutory damages under the FDCPA are capped in class actions at the lesser of either $500,000 or 1% of the debt collector's net worth. *Compare* 15 U.S.C. § 1681n(a)(1)(A) (FCRA); 47 U.S.C. § 227(b)(3)(B) (TCPA), *with* 15 U.S.C. § 1692k(a)(2)(B) (FDCPA); *see Class.Action.Problem*.115 n.81. Ambiguities in the FDCPA, however, combined with the vagaries of FDCPA jurisprudence across jurisdictions, all too often result in threadbare FDCPA claims that will also be subject to abuse under the Ninth Circuit's decision below.

Ramirez, 951 F.3d at 1021–30, 1033; *see Class.Action. Problem*.114.

The Association recounts the frightening likely result of the Ninth Circuit's casting aside of this Court's prohibition in *Spokeo, Inc. v. Robins* against "bare procedural violation[s]" sufficing for compensable injury by imposing untold liability for storing even a single inaccurate entry in the billions of records the consumer-reporting industry processes each month. Association.Amicus.Br.17; *see Spokeo*, 136 S.Ct. at 1548–49. So too will this holding by the Ninth Circuit reverberate for ACA's members who operate advanced dialing technology in accordance with the TCPA. *See* 47 U.S.C. § 227(a)(1). If even a single errant entry contained within a dialing database—regardless of whether it was ever actually dialed—can now confer Article III standing on putative class members, the potential for class-action abuse under the TCPA is virtually limitless and almost certainly ruinous for ACA members.

3. Through their attempts to recover outstanding accounts, ACA's members act as an extension of every community's businesses. ACA's members represent the local hardware store, the retailer down the street, and the family doctor. ACA members work with these businesses, large and small, to obtain payment for the goods and services they render.

Each year, their combined effort results in the recovery of billions of dollars returned to businesses and reinvested in local communities. In 2020 alone, third-party debt collectors returned more than $90 billion to

creditors. *2020.State.Industry.*2. These macro-collections translated into over $700 in annual savings on average per U.S. household. *Id*. Moreover, as of 2020, the third-party debt-collection industry supported an average annual payroll of $5 billion. *Id*. In turn, these collection agencies and their employees directly contributed some $1.2 billion in federal, state, and local taxes. *Id.* That same year, third-party debt collectors donated more than $108 million in charitable contributions. *Id.*

Without an effective collection process, the economic vitality of the nation's businesses are threatened—not to mention the local and national economies they support. At the very least, absent effective and legal collection remedies, consumers would be forced to pay more for their purchases to compensate businesses for the uncollected debts of others. In the end, and as the Chamber notes, consumers will literally pay the price for the increased costs of credit, goods, and services that the Ninth Circuit's juridic aberrance below licenses. Chambers.Amicus.Br.16.; *see* Julie Fonseca et al., Federal Reserve Bank of New York Staff Report No. 814, *Access to Credit and Financial Health: Evaluating the Impact of Debt Collection*, at 15 (May 2017), j.mp/NewYorkFedEvaluation ("Our findings regarding access to credit . . . have important implications at the borrower level and suggest a wide-spread deleterious effect of changes in debt collection legislation on individuals who retain access to credit").

CONCLUSION

For the foregoing reasons, ACA supports TransUnion's request that the Court reverse the Ninth Circuit's decision below.

Respectfully submitted,

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