

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 FOR UC BERKELEY CENTER FOR
CONSUMER LAW AND ECONOMIC JUSTICE,
DEMOS, AND HOUSING CLINIC OF JEROME N.
FRANK LEGAL SERVICES ORGANIZATION AT YALE
LAW SCHOOL AS *AMICI CURIAE* IN SUPPORT OF
SERGIO L. RAMIREZ**

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INTEREST OF *AMICI CURIAE*¹

The *amici curiae*² joining this brief are economic justice organizations and law school clinics with an interest in the analysis that should guide this Court in determining whether TransUnion caused a concrete and particularized injury to all class members pursuant to Article III.

The Housing Clinic of Jerome N. Frank Legal Services Organization at Yale Law School is a legal clinic in which law students, supervised by faculty attorneys, provide legal assistance to people who cannot afford private counsel. The Clinic's clients frequently face FCRA violations from credit reporting agencies like TransUnion, which often do not update credit reports to reflect the accurate status of a client's foreclosure matters. The Respondent resembles many of the Clinic's clients who have faced inaccurate credit reporting.

The UC Berkeley Center for Consumer Law & Economic Justice is a research and advocacy hub dedicated to ensuring safe, equal, and fair access to the marketplace. The Center works with courts, legislative bodies, and administrative agencies on a

¹ The parties have filed blanket consents to the filing of this and all other *amicus curiae* briefs. Pursuant to Supreme Court Rule 37.6, counsel for amicus represents that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other 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.

² Briefs filed by the *amici* do not represent any institutional views of the law schools and universities with which the *amici* are affiliated.

wide range of issues affecting low-income consumers -- including preserving access to justice.

Dēmos is a progressive think tank that powers the movement for a just, inclusive, multiracial democracy. Founded in 2000, Dēmos deploys litigation, original research, advocacy, and strategic communications to advance economic justice and remove barriers to political participation. The organization's economic justice work focuses on research and policy solutions to overcome racial economic inequality. Dēmos has a deep and longstanding engagement with policy governing credit reporting, and has advanced policies seeking to curb abuses by the credit reporting industry and to ensure low-income Americans have the access to credit so necessary to build wealth and close the racial wealth gap.³ Dēmos thus has a substantial interest in the matters at issue in this case.

³ *See, e.g.*, Amy Traub, Associate Director of Policy and Research, *Establish a Public Credit Registry*, Dēmos, (2019), *available at* https://www.demos.org/sites/default/files/2019-03/Credit%20Report_Full.pdf; Amy Traub, Testimony before the New York State Assembly Committee on Consumer Affairs and Protection and Committee on Banks (April 19, 2013), *available at* <https://www.demos.org/testimony-and-public-comment/testimony-accuracy-and-use-credit-reports>.

SUMMARY OF ARGUMENT

TransUnion caused a concrete and particularized injury to all class members pursuant to Article III. TransUnion allowed a third-party contractor to essentially mark class members as terrorists and drug dealers on the mere basis of sharing a name with an individual on the list of Specially Designated Nationals (SDN) maintained by the Office of Foreign Asset Control (OFAC). The contractor did not include any factors besides names in its matching, excluding birth dates and other basic information. TransUnion, as a credit reporting agency intimately familiar with its obligations under the Fair Credit Reporting Act to produce accurate credit reports, allowed the use of a methodology that any reasonable person would understand to be insufficient given the historical problems of credit reporting accuracy, even with far more complex matching criteria than simple name-matching. Moreover, TransUnion only notified class members that they had been flagged when they requested reports, and did so through an opaque two-notice process.

Class members eventually secured awards of statutory and punitive damages following trial on all three FCRA claims at issue. Those awards were appropriate as a matter of Article III standing (and statutory standing) because TransUnion created a material risk of harm to the class members – at a minimum, intangible injuries. We write now to explain more about the intangible injuries the class members suffered due to TransUnion’s conduct, injuries most similar to the common law tort of defamation *per se*. Resp. Br. 22.

TransUnion argues that only class members that had been denied credit or had their reports disseminated to a third party qualify as having been injured under Article III. Though TransUnion's spotty record-keeping only reveals how many class members had their reports accessed during the seven-month damages period, it is likely that each class member had their report disseminated at least twice between February 2010 and December 2013. *See* Resp. Br. 40. TransUnion also over-simplifies the potentially devastating harm that an erroneous OFAC SDN designation may have on the consumer. This is especially true in light of the accusations implicit in being paired with a name on the OFAC SDN list, as the designation often carries with it accusations of terrorism or drug trafficking. While these accusations are harmful to all consumers whose credit reports were marked in error, these accusations implicate stigmatizing stereotypes that have particularly serious psychological and legal implications for consumers of specific ethnic and cultural backgrounds.

This Court should affirm the Ninth Circuit because (1) name-based matching disproportionately misidentifies people of color, (2) a marked credit report that perpetuates stereotypes can adversely affect individuals' health and achievement, (3) a marked credit report can prevent immigrants from progressing towards citizenship and achieving financial independence, and (4) a marked credit report impedes class members from making basic purchases like cars and homes that rely on access to credit. These are all concrete injuries suffered by class members.

ARGUMENT

I. Using solely name-based matching systems disproportionately affects people of color.

The credit reporting industry has a vast history of complaints rooted in poor accuracy. Mixed files, when a consumer's data is incorrectly matched to data belonging to someone else, are a particularly problematic and frequent error in the industry. *See* National Consumer Law Center, *Fair Credit Reporting* 4.3.3 (2018). These errors are largely understood by experts in the field to be the result of insufficient matching requirements. *Ibid.* However, when credit reporting agencies collect public records to include on individual credit reports, matching requirements often get relaxed even further because of the absence of social security numbers in most such records. *Ibid.* This became especially problematic with TransUnion's OFAC SDN list product offering, which matched consumer data to the OFAC SDN list purely on the basis of name matches only (including, in some cases, matching on only first initial and last name) while using no other available metrics like date of birth to verify that the matches were accurate. TransUnion was aware of these shortcomings, having learned of them during the *Cortez* litigation. *Cortez v. TransUnion*, 617 F.3d 688 (3d Cir. 2010). Their solely name-matching practice was bound to produce errors at remarkable rates, particularly in light of the credit reporting industry's already marred history of inaccuracy even with other verification measures. Yet, while this practice is harmful to all consumers, it is particularly harmful for people of color.

For example, the SDN list is dominated by Hispanic surnames. Further, nearly one-fourth of the

people on the list come from one of three Latin-American countries: Mexico, Venezuela, or Colombia.

While the ethnicity of the individuals on the SDN list does not itself suggest discrimination on OFAC's part, TransUnion's use of name-only matching for the purpose of credit reporting is particularly problematic when one considers how overrepresented Hispanic surnames are in the list. That is because different regions of the world have differing degrees of surname diversity across the entire population, a phenomenon called "surname clustering." While all regions and ethnicities have some degree of name clustering, people of color in the United States have higher degrees of surname clustering than non-Hispanic White populations. For instance, in the 2010 census, the Hispanic population was found to have a high degree of name clustering among measured groups, with just 26 surnames accounting for a quarter of the population and 16.3 percent of people reporting one of the top 10 names.⁴ See Joshua Comenetz, *Frequently Occurring Surnames in the 2010 Census*, U. S. Census Bureau, Oct. 2016, at 7. A similar pattern was also observed among other ethnic minorities, including Asian and Black Americans. *Ibid.* In addition, while the U.S. Census does not collect self-identified data relating to Arab ethnicity, the prevalent use of name algorithms to measure health disparities in the Arab-American population suggests Arab-American name clustering is comparable to those of other ethnic minorities. See Abdulrahman M. El-Sayed, Diane S. Lauderdale, & Sandro Galea, *Validation of an Arab Name Algorithm*

⁴ Other preliminary research also suggests this phenomenon is common among first names. See Konstantinos Tzioumis, *Demographic Aspects of First Names*, Scientific Data, (Mar. 06, 2018).

in the Determination of Arab Ancestry for Use in Health Research, 15 *Ethnicity & Health*, December 2010, at 647.

Higher degrees of name clustering among communities of color, coupled with the high frequency of Hispanic surnames in the OFAC list suggests that Hispanic and Arab Americans and immigrants are particularly vulnerable to TransUnion's practice of using solely name-matching to pair the list with its consumer data. The result is that ethnic minorities in the U.S. are disproportionately vulnerable to being harmed by TransUnion's practices.

II. A marked credit report constitutes particular harm for groups that are the subject of negative stereotypes.

This Court should affirm, because being marked as a terrorist or drug dealer by virtue of a false link to the SDN list constitutes particular harm for people who are frequently victims of stereotypes. While harm from ethnic stereotyping may seem abstract, it has very real, concrete effects on health and achievement. Even vague allusions to stereotypes can produce health and performance problems in marginalized groups.

This phenomenon is known as "stereotype threat." In one of the earliest studies on stereotype threat, researchers found that women performed worse on a mathematics exam when they were told that the exam would reveal "gender differences" in mathematic ability as compared to women who were not presented with such stereotypes. *See* Steven J. Spencer et al., *Stereotype Threat and Women's Math Performance*, 35 *J. Experimental Social Psychology* 4 (1999). In another study, researchers found that black

college students performed worse on an exam when they had been primed with racial stereotypes. *See* C. Steele and J. Aronson, *Stereotype threat and the intellectual test performance of African Americans*. 69 *J. of Personality and Social Psychology* 797 (1995). In both of these studies, female students and black students performed worse, even when researchers only made statements about “intellectual ability” and “gender differences” that vaguely alluded to negative stereotypes. If even a vague reference could recall stereotypes and harm these students’ exam performances, the damage from an OFAC alert, which is an association with terrorism or drug dealing, could be severe and deserves this Court’s consideration.

Stereotype threat can also result in physical health problems. Coping with stigma requires self-regulation. *See* Michael Inzlicht et al., *Stigma as Ego Depletion: How Being the Target of Prejudice Affects Self-Control*, 17 *Association for Psychological Science* 262 (2006). Individuals rely on self-regulation, or self-control, to control their emotions and moderate their behavior. *Ibid.* Self-control is, however, a limited resource. *Ibid.* Research has shown that each task requiring self-control depletes this limited resource and impairs future performance on tasks that require self-control. *Ibid.* Since coping with stigma requires self-regulation, it drains this limited resource. *Ibid.* As a result, living with stereotype threat can affect memory and other crucial cognitive functions. Toni Schmader et al., *An Integrated Process Model of Stereotype Threat Effects on Performance*, 115 *Psychology Rev.* 336 (2008). Stereotype threat has also been correlated with higher blood pressure, higher heart rate, cancer, and higher levels of the stress hormone, cortisol. *See* Jim Blascovich et al., *African Americans and High Blood Pressure: The*

Role of Stereotype Threat, 12 *Psychological Science* 225 (2001); Jean-Claude Croizet et al., *Stereotype Threat Undermines Intellectual Performance by Triggering Disruptive Mental Load*, 30 *Personality and Social Psychology Bulletin* 721 (2004); Abdulrahman M. El-Sayed & Sandro Galea, *The Health of Arab-Americans Living in the United States: A Systematic Review of the Literature*, 9 *BMC Public Health* 1 (2009); Mary C. Murphy et al., *Signaling Threat: How Situational Cues Affect Women in Math, Science, and Engineering Settings*, 18 *Psychological Science* 879 (2007); Sarah S. M. Townsend et al., *From “In the Air” to “Under the Skin”: Cortisol Responses to Social Identity Threat*, 37 *Personality and Social Psychology Bulletin* 151 (2011). These health issues can result from even mild stigma. In the case of these marked credit reports, the individuals have been accused of serious crimes stereotypically associated with their racial or ethnic identity. The stress of these accusations threatens to take a toll on the victims’ health and performance at work or school.

While one person may see an OFAC alert as only a preposterous allegation, another may find it a deeply troubling reminder of stereotypes. Those who have Arabic names, for example, may find that an OFAC alert accusing them of terrorism feeds into stereotypes. See Anne Al-Malki et al., *Arab Women in Arab News: Old Stereotypes and New Media* (2012); John Sides & Kimberly Gross, *Stereotypes of Muslims and Support for the War on Terror* 75 *J. of Politics* 583 (2013). Similarly, stereotypes labeling Latinos as drug dealers are rampant in the media, and an OFAC alert could be a grim reminder of these stereotypes for a Latino individual. See Héctor Tobar, *Hollywood’s Obsession With Cartels*, *NYTimes* (Jan. 5, 2019)

<https://www.nytimes.com/2019/01/05/opinion/sunday/latinos-cartels-trump-narcos-hollywood.html>. When an OFAC alert targets Latinos and those with Arabic names who shared names with foreigners on the OFAC SDN List, it can feed into these harmful stereotypes. An accusation of terrorism or drug dealing likely feels like more than a mistake for many of these victims. A baseless OFAC alert that feeds into stereotypes causes severe emotional harm with physical consequences. We ask the Court to affirm the Ninth Circuit's decision, and that of the jury, so that class members can be compensated for their injuries.

III. A marked credit report may be especially harmful to non-citizens.

An erroneous OFAC SDN designation may be of particular significance to non-citizens; as the designation implies that listed individuals are not allowed to engage in everyday financial or job-related transactions within the United States. For non-citizens in the United States, particularly those that are in the process of adjusting or transitioning their immigration status, such a designation can cause devastating emotional, psychological, and economic consequences.

Adjustment of status is the process by which a non-citizen may apply for lawful permanent residence while in the United States, usually while they are staying in the U.S. under a non-immigrant visa. Adjustment of status offers an avenue for qualifying non-citizens to apply for lawful permanent residence, and if a visa is available for their relevant category, avoid needing to return to their home countries to undergo the consular visa process. However, under the Immigration and Nationality Act, a noncitizen is barred from adjusting their status if they have ever

worked without authorization in the United States. Immigration and Nationality Act, 8 U.S.C. 1255(c) (2018). While an OFAC SDN designation does not itself revoke a non-citizen's work authorization, it would be reasonable for a non-citizen to believe that such a designation, however erroneous it may be, would have an impact on their ability to maintain the ability to legally work in the United States. This reasonable assumption is then compounded by the fact that the OFAC designation did not present itself on the actual credit report but was sent by TransUnion in a separate document the next day, which presented no procedures to dispute the designation. *See Ramirez v. TransUnion*, 951 F.3d 1008 (9th Cir. 2020).

Taken together, an erroneous OFAC designation was very likely to have raised critical concerns for non-citizen consumers. While the process to dispute the designation may have been traumatic and confusing for citizens as well, this process was likely especially so for non-citizens with limited English proficiency facing the added stakes of an OFAC designation: the prospect of losing their ability to legally remain in the country with their families. Such a designation has the power to instill tremendous fear over the success of their applications, or worse, influence behavior in the process of pursuing adjustment of status or seeking employment (*e.g.*, waiting to submit documents or waiting until the designation is removed to seek employment for fear of the consequences of working without legal authorization).

An erroneous OFAC SDN designation on a credit report may also cause a prospective citizen to unnecessarily seek out the advice of an attorney specializing in immigration related issues. The

presence of an OFAC alert may elevate the importance of legal representation in immigration proceedings, such as USCIS adjustment of status interviews, to a necessity. Yet, access to legal advice for non-citizens is limited and can be expensive. Between 2007 and 2012 non-citizens were represented by counsel in a mere 37% of all deportation cases. *See* Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, *American Immigration Council*, (Sept. 28, 2016). Even when non-citizens retained legal representation for non-removal procedures, such as adjustment of status interviews, advocacy groups found access to adequate legal counsel was severely limited in practice. Ben Johnson & Crystal Williams, *Letter to Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services*, *American Immigration Council*, https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/USCIS-Letter-with-Appendix-SIGNED.pdf (Mar. 24, 2011). In sum, the stress of affording and securing legal representation to combat the potential harm of an erroneous OFAC SDN designation is another likely contributor to the vast and devastating consequences of receiving an erroneous OFAC SDN matching on a credit report.

In addition, while immigrants experience poverty at higher rates than citizens, immigrants are under pressure to avoid availing themselves of public benefits, as becoming a public charge is a ground of deportability under the Immigration and Nationality Act. 8 U.S.C. 1227(a)(5)(2018). The result is that noncitizens are uniquely likely to be in a position to rely more heavily on credit as a financial safety net, because many public benefits programs trigger this “public charge” ground of deportability. Therefore,

apart from emotional and psychological harms, non-citizen consumers may face additional financial harms as a result of an erroneous OFAC SDN designation, even when that report may have never been sent to any prospective lenders. That is because negatively marked credit reports can change consumer behavior, preventing consumers from applying for credit that they may desperately need. This combined reality means that non-citizens are uniquely likely to face a difficult dilemma: either live without a necessity made unaffordable by a lack of access to credit or lean on family members for financial support. For many consumers, including the Respondent, being put in the position of having to rely on family members for essential purchases in lieu of traditional credit vehicles is a profoundly embarrassing and dehumanizing experience.

While class members may have faced these experiences to varying degrees, non-citizen consumers are very likely to have experienced profound injury relating to TransUnion's erroneous OFAC SDN designations.

IV. A marked credit report restricts essential purchases.

This Court should affirm the Ninth Circuit's decision, because OFAC alerts prevent low-income or marginalized victims from accessing essentials for functioning in American society, such as cars and homes.

Credit is, and always has been, essential to the American economy. *See* Claire Priest, *Credit Nation: Property Laws and Institutions in Early America* (2021). Credit helps Americans pursue the American dream, allowing them to buy homes or cars by

working dutifully over time when they do not have the resources to pay upfront. *See* Lendol Calder, *Financing the American Dream: A Cultural History of Consumer Credit* (2001). As a prerequisite for loans, credit reports are essential for Americans who want to achieve their dreams of home or car ownership.⁵ Accordingly, policymakers have sought to expand access to credit and credit reports, with the Equal Credit Opportunity Act, the Community Reinvestment Act, and the Fair Credit Reporting Act. Misplaced OFAC alerts, however, block victims from pursuing the American Dream.

When an individual is the victim of an erroneous OFAC alert, that person may avoid even applying for car loans, mortgages, or rentals, because they are embarrassed about the designation or because they expected to be rejected. They may reasonably worry that an OFAC alert that appears in a credit report has also been disseminated to government authorities or employers. As such, these victims had an incentive to avoid seeking out loans for purchases like cars or homes – and, as a result, not spending money in their local economy. Therefore, these individuals may assume their applications will be rejected or, worse, fear losing their jobs or being pursued by the authorities. This fear and

⁵ “We must enhance their understanding of credit and the relationship between credit reporting and their ability to secure a mortgage. This is an essential step in helping all of our citizens become active and knowledgeable participants in the financial life of our Nation. It is also the first in helping low- and moderate-income Americans fully participate in the American economy and, ultimately, the American Dream.” *Fair Credit Reporting Act: Hearing Before the S. Comm. On Banking, Housing, and Urban Affairs*, 108th Cong. (2003) (statement of Stacey Stewart, President and CEO of Fannie Mae Foundation)

apprehension caused harm, preventing victims from even attempting to seek mortgages or car loans.

An OFAC alert on a credit report causes even more harm for low-income people. These alerts mainly targeted people of color, who are more likely to share a name with an individual on the OFAC list. People of color, who are also more likely to be lower income, have to rely more on credit to make essential purchases. *See* John Creamer, *Inequalities Persist Despite Decline in Poverty For All Major Race and Hispanic Origin Groups*, U.S. Census Bureau (Sept. 15, 2020) <https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html>. While those who have access to wealth do not necessarily need credit to purchase a car or home, people of color are statistically less likely to have access to that wealth. As a result, these low-income victims are especially impacted when denied an accurate credit report. Further, if an individual's income is already low, an accurate credit report is even more crucial for obtaining credit. While higher income individuals may not have difficulty getting loans, lower income individuals are considered riskier for loans. As a result, lower income individuals need accurate reports to demonstrate their ability to pay. An OFAC alert, for these low income victims, could be the difference between being approved or denied for a loan, and so they may be even more adversely impacted than the general population.

Finally, access to credit is especially important for marginalized populations. Households that are unbanked, for example, are lower-income and less educated than banked households. *See* 2017 FDIC *National Survey of Unbanked and Underbanked Households* at 62. Access to credit for these unbanked

households, then, is crucial for their social mobility. At the same time, unbanked lower-income, working-age disabled, or have volatile income are overall more likely to be denied for loans (conditional on having applied) or feel discouraged about applying. *See* 2017 FDIC National Survey of Unbanked and Underbanked Households at 49. Erroneous OFAC alerts constitute yet another barrier to credit for these households that need credit the most. This Court should affirm, because the members have suffered a concrete injury – the marked reports limited their much-needed access to credit.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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