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

REPLY BRIEF

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REPLY BRIEF

The class certified here suffers from at least two fatal defects. Despite Ramirez's constant refrain, the class is not limited to individuals who were falsely labeled "a terrorist" (or anything else) to third parties. Instead, it is defined to include 8,185 individuals whose only shared experience was being mailed their credit file and summary of rights in two envelopes rather than one. Labeling that a two-envelopes-not-one claim is not to denigrate it, but to describe the only "injury" shared by the class. That was enough for the Ninth Circuit, but it is not enough to satisfy Article III. That alone necessitates decertification, but the class has another fatal flaw: Ramirez was entirely atypical of the class. He did not just receive two envelopes at his home; he was hindered in obtaining credit at a Nissan dealership, suffered humiliation in front of family, and canceled a vacation. The jury heard about all of those indignities, even though they were entirely atypical of class members, and awarded thousands of dollars to each and every class member. That is a legal—not evidentiary—error that TransUnion repeatedly raised and fully preserved.

Ramirez seeks to defend the decision below by running away from its reasoning. While the Ninth Circuit found the *risk* of injury sufficient to find that every class member suffered *actual* injury, Ramirez relegates that misguided risk-based theory to a footnote. In its place, he advances a brand-new theory that never surfaced below. He now claims that every class member has standing because TransUnion's own employees and vendors had access to the credit files in the course of mailing them to class members' homes.

That novel "internal-publication" theory has no grounding in the common law or the record. It also has little to do with the statutory violations, which do not mandate protocols for working with printers, but address the disclosure of credit files and the procedures for assembling credit reports. In short, Ramirez's late-breaking theory of Article III injury is as flawed as the Ninth Circuit theory he abandons.

Ramirez's efforts to deny the glaring typicality problem are equally futile. He does not and cannot deny that his own experiences were atypical in the extreme. Instead, he insists that as long as the class shares his legal claims, the atypicality of his injuries and experiences is irrelevant. But that would render typicality and commonality duplicative. He then advances the extreme position that typicality is a one-way ratchet that protects only absent class members, not defendants. That is plainly wrong. Having a class representative with unrepresentative injuries and experiences—whether atypically severe or benign—denies the basic promise of Rule 23 that class actions will be representative litigation. That denial is no less grave when a home-run plaintiff represents a class of single hitters than when a single-hitter represents a home-run class. Here, Ramirez's extreme and atypical experiences explain the outsized award for each and every class member and require decertification.

ARGUMENT

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

Ramirez never denies that each and every class member must suffer a concrete and particularized

Article III injury to collect a monetary award. That was *not* the law of the Ninth Circuit when this case began, which explains some of Ramirez's tactical decisions and stipulations. But it is the settled law of this Court, *see Town of Chester v. Laroe Ests., Inc.*, 137 S.Ct. 1645, 1650 (2017), and Ramirez does not suggest otherwise. Nor does he meaningfully defend the Ninth Circuit's theories that every class member suffered an Article III injury just because they received all the disclosures in two envelopes and were at *risk* of having an incorrect credit report disseminated. The decision to abandon those theories is understandable. Simply receiving all required disclosures in two envelopes rather than one is neither inherently shocking nor a concrete injury. And a risk that fails to materialize is insufficient to support a claim for retrospective damages and fails to distinguish the class members from consumers who never requested their credit files. Ramirez's newfound "internal publication" theory of injury is a misfit for the common law, the record, and his statutory claims. Thus, Ramirez is left acknowledging that every class member must suffer a concrete injury, but without a viable theory as to how the record here supports such a conclusion.

A. The Disclosure Claims.

The lone thing that unites this misguided class is that TransUnion sent each member their entire credit file in two mailings, rather than one, with the second mailing indicating that the class member's name was a "potential match" to someone on the OFAC list. On behalf of that class, Ramirez brought claims that the mailings failed to comply with FCRA's disclosure provisions—because TransUnion did not send the

entire credit file in a single mailing and included a summary of rights in only the first mailing—and FCRA's reasonable-procedures provisions designed to ensure that credit reports sent to third parties are as accurate as possible.

The class definition is a better fit for the disclosure violations, as most of the class never had a credit report with Name Screen information disseminated to a third party during the class period. J.A.48. But the disclosure violations boil down to a complaint that class members received all the requisite information in two envelopes rather than one. The Ninth Circuit held that "inherently shocking and confusing" and sufficient for Article III. Pet.App.32 n.10. As Judge McKeown explained, that holding is indefensible, for "whether any … absent class member … even opened the letter[] is pure conjecture." Pet.App.57. Apparently Ramirez now agrees, as he makes no effort to defend that holding. In fact, he never even acknowledges it. Nor does he defend the Ninth Circuit's untenable effort to liken sending the requisite information in the wrong format to failing to disclose information at all. Pet.App.32 n.10. Ramirez does not so much as cite this Court's informational injury cases.[1]

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[1] The government, by contrast, goes all in on the "informational injury" analogy. U.S.Br.21-26. But it never confronts the absence of evidence that class members read the mailings or the presence of evidence that the non-compliant format actually increased contact rates. Pet.App.57; J.A.611. Moreover, class members requested information, not particular formatting, so if they obtained that information in the wrong format, they suffered no injury akin to being denied requested information altogether. Finally, the class necessarily includes individuals who requested

Instead, Ramirez faults Judge McKeown for failing to consider a *different* theory under which the disclosure violations purportedly "could justify Article III standing without any showing of confusion or additional adverse consequences," Resp.Br.21—namely, that class members were injured when TransUnion "published" their credit files "to employees within TransUnion" and to "vendors" that "printed and mailed the letters" in the process of sending consumers their credit files. Resp.Br.29. One can hardly blame Judge McKeown (or the majority, or the district court, or the Solicitor General) for not considering that unlikely theory; this marks the first time Ramirez has advanced it.

That alone is reason to reject it, for it is far too late for Ramirez to devise new theories that have no basis in the record and did not surface until after top-side amici briefs were filed. Because this theory was never raised below, Ramirez did not substantiate it or give TransUnion a chance to submit evidence to refute it. Ramirez points to a document identifying the TransUnion employee who processed his credit-file request, J.A.97, and some snippets of testimony mentioning third-party vendors, J.A.161-62, 545. But there is zero evidence that TransUnion's employees or vendors read, as opposed to merely processed, the mailings. Moreover, had Ramirez timely raised this fanciful theory, TransUnion could have responded with evidence that the process is largely automated

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their credit files for reasons unrelated to the OFAC "potential match." They presumably received all the information they wanted in the first envelope.

and its employees and vendors operate under strict confidentiality obligations.[2]

Ramirez disclaims the need to prove that these "internal publication[s]" caused anyone (let alone every class member) *actual* injury, because he says they amount to defamation *per se*. Resp.Br.28. But his analogy suffers from multiple flaws. First, the general common-law rule is that intra-company disclosures do *not* count as publication. *See, e.g.*, *Chalkley v. Atl. Coast Line R.R. Co.*, 143 S.E. 631, 638-40 (Va. 1928) (collecting English and early American decisions). And as the use of third-party printing vendors has become prevalent, courts have concluded that merely sharing information with them likewise does not constitute publication. *See, e.g.*, *Mack v. Delta Air Lines, Inc.*, 639 F.App'x 582, 586 (11th Cir. 2016) (applying Georgia law). Moreover, even Ramirez's authorities require proof that the defendant actually "brought an idea to the perception of another," *Restatement (Second) of Torts* §559 (1977), and thus generally require proof that the document was *read*, not just processed, *see, e.g.*, *Ostrowe v. Lee*, 175 N.E. 505, 505-06 (N.Y. 1931) (Cardozo, J.). That proof is absent here.

Second, none of Ramirez's authorities involves a context like this, where the internal publication is part of a process to provide a recipient with information to confirm its accuracy or correct it. In that context, the

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[2] To the extent Ramirez claims that TransUnion "published" Name Screen information to Accuity, Resp.Br.29, that gets things backwards. TransUnion communicated with Accuity so that Accuity could inform *TransUnion* whether a name was "potential match" to a name on the OFAC list.

possibility of the consumer or an intermediary seeing some inaccurate information is inherent, not defamatory *per se*.

That underscores the broader disconnect between Ramirez's newfound "internal-publication" theory and the disclosure violations: They really have nothing to do with each other. Nothing in FCRA discourages the use of third-party vendors to get consumers their credit files expeditiously. If Ramirez were suing for the violation of such a hypothetical statutory restriction, then this theory might have occurred to him earlier. But the disclosure violations turn on whether the complete credit file and requisite summary of rights came in one envelope or two. That has nothing to do with whether the credit files were accurate, inaccurate, or processed by a vendor. Thus, Ramirez's defamation analogy and internal-publication theory are non-sequiturs when it comes to the disclosure claims.

Finally, what Ramirez maintains was "published" was not defamatory in the first place. No matter how many times he claims that "every class member was falsely labeled a terrorist," Resp.Br.24 (capitalization omitted), that does not make it true. The mailings sent to class members did not label them either a terrorist or a potential terrorist, but instead informed them that their "name" was a "potential match" to a name on the OFAC list. That information, just like learning that a court judgment is recorded as unsatisfied, may be unwelcome and require action, but it is neither false nor defamatory. To the contrary, the whole point of the statutory right to request a credit

file is to learn of such information and have it addressed before it is disseminated in a credit report.

No one has ever disputed that each class member in fact has a first and last name that "exact[ly] match[es]" the first and last name of someone on the OFAC list. Pet.App.13. Publishing that information thus could not constitute defamation for the simple reason that it is true. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 151 (1967). And publication of that true information (which anyone could confirm from the publicly available OFAC list or by typing a class member's name on OFAC's website, *see* Petr.Br.41 n.5) certainly is not the equivalent of labeling them a potential terrorist. Contrary to Ramirez's claim, the jury was never asked to "determine" whether "the message" "TransUnion's OFAC flags communicated" "was false." Resp.Br.25-26. Falsity has nothing to do with the disclosure claims; even someone on the OFAC list could complain about not getting a full credit file and summary of rights in a single mailing.

In the end, Ramirez's strained analogy to defamation finds no support in law, logic, or the record—which likely explains why he never previously advanced it. The disclosure claims have nothing to do with whether the information in the credit file was accurate or inaccurate or whether anyone at TransUnion or a vendor read the contents. They have everything to do with whether the information came in two envelopes or one. That is not to denigrate the claims; that is just to describe the disclosure claims Ramirez chose to advance and the only thing all 8,185 class members have in common. Concluding that simply receiving the requisite information in two

envelopes does not give rise to Article III injury does not second-guess Congress' decision to provide a cause of action or statutory damages. After all, most plaintiffs complaining about a non-compliant disclosure will have never received their credit file or summary of rights at all, just as most plaintiffs complaining about an inaccurate report will complain about something more than an incorrect zip code. But when someone seeks to recover tens of millions of dollars based on the functional equivalent of a mistaken zip code, standing is lacking whether or not a printing vendor saw the mistaken zip code.

B. The Reasonable-Procedures Claim.

Ramirez's effort to prove that *all* class members were injured by the reasonable-procedures violation suffers an even more daunting problem: While all class members were mailed their credit file, Ramirez stipulated that, for the vast majority of class members, TransUnion never disseminated a credit report with Name Screen information to anyone during the class period. J.A.48. The Ninth Circuit suggested that everyone in the class suffered a *risk* that such a credit report would be disseminated. Pet.App.26-27. Here too Ramirez largely abandons the lower-court theory in favor of his newfound argument that *somebody* internally may have seen misleading information. But, in addition to all the problems discussed above, that conflates the credit *file* sent to the consumer on request and the credit *report* disseminated to third parties. As to over 75% of the class, there is no evidence that any credit *report* with Name Screen

information was seen by anyone internally or externally. J.A.48.[3]

Unable to render that stipulation legally irrelevant, Ramirez tries to minimize its scope. He first claims that the stipulation covers less than meets the eye by suggesting that the phrase "potential credit grantors" in the stipulation does not preclude disseminations to "existing creditors, insurance companies, landlords, credit report reseller, and employers." Resp.Br.15-16, 30. That is wrong. The stipulation was based on TransUnion's records of *the entire universe* of third parties to whom it furnished a credit report during the class period; "potential credit grantors" was just the stipulation's shorthand to describe that universe. *See* J.A.238-39.[4]

Ramirez next suggests that the stipulation may be underinclusive because TransUnion failed to keep relevant records of how often credit reports were disseminated. Resp.Br.29. Wrong again. TransUnion told Ramirez exactly how many class members' credit reports with Name Screen information were disseminated to a third party "during the class period

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[3] Once again, the government works harder to defend the Ninth Circuit's reasoning than Ramirez, but to do so it must invent the novelty of an "intended dissemination." U.S.Br.16. That concept is entirely alien to the common law—no one has ever been injured or defamed by an "intended" letter that was never sent.

[4] Ramirez ominously claims that "subscribers to TransUnion's system[] … had instantaneous, on-demand access to the entire class's OFAC data." Resp.Br.16. But all he means by that is that Name Screen subscribers could (with the consumer's permission) submit requests to TransUnion online. As Ramirez stipulated, that never happened for 6,332 class members during the class period.

of January 1, 2011 through July 26, 2011": 1,853 counting Ramirez. J.A.48. TransUnion could have provided comparable information for other periods had Ramirez asked. Ramirez's problem is not that there was some recordkeeping gap. His problem is that TransUnion's records plainly reveal that the vast majority of class members never had a report with Name Screen information disseminated during the class period. That is why he stipulated to that fact. That stipulation was not fatal in the Ninth Circuit, but it is fatal under any fair conception of what Article III and Rule 23 require.

Seeking to blunt the force of his stipulation/concession, Ramirez disputes the ordinary meaning of "class period" and suggests that what really matters is a much longer 46-month "harm period" that begins in February 2010 and extends until December 2013. Resp.Br.8-9. There are multiple problems with that submission, starting with the reality that words have meaning. The class period is plainly the time period that defines the class of individuals who stand to recover damages. That is the standard definition. *See* Fed. Jud. Ctr., *Manual for Complex Litig. (Fourth)* §21.222 (2004). But there is no need to speculate about how the parties used and understood the phrase, because the stipulation itself refers to the "1,853 consumers" who had a credit report delivered to a third party "during the class period of January 1, 2011 through July 26, 2011." J.A.48.[5]

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[5] Having deviated from the ordinary meaning of class period, Ramirez cannot quite settle on what to call it or how long it lasts. In his brief in opposition, Ramirez described the relevant period

Moreover, tacking on another 39 months would not help Ramirez fill the evidentiary gap, as he presented no evidence that class members had reports disseminated during those other periods.[6] Of course, even if some of the 6,332 had a credit report disseminated after July 26, 2011, it is not clear why that would be legally relevant. Ramirez cut off the class definition at that point for a reason: That is when TransUnion changed its mailing format and provided the entire credit file and summary of rights in a single mailing.[7]

In the end, Ramirez is left speculating that class members' credit reports "*could have been* sold or otherwise disclosed to third parties" especially because "class members *were likely to be close* to making some major purchase" since they requested their credit files. Resp.Br.30-31 (emphases added).

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as extending backwards for two years, BIO.3, 17 n.1, while his latest brief claims a 46-month period that extends both backwards and forwards from "the class period of January 1, 2011 through July 26, 2011." J.A.48.

[6] In fact, TransUnion's records revealed only 1,853 disseminations from February 2010 to July 2013. *See* J.A.231, 238-39.

[7] Attempting to sow confusion, Ramirez cites the district court's rejection of "TransUnion's proposed instruction" regarding "'[t]he relevant time for determining whether TransUnion willfully violated FCRA.'" Resp.Br.32 (quoting J.A.592). That instruction obviously had nothing to do with the time frame for determining whether each class member suffered injury-in-fact. Nor has TransUnion "waived" any argument about the stipulated class period. Resp.Br.32. Every time Ramirez has tried to improperly expand it (including now), TransUnion has countered that the class period is as Ramirez defined it and the parties stipulated. *See, e.g.*, Cert.Reply.4; CA9.Reply.9-10.

That speculation relies on an intuition that is contradicted by the conceded fact that only 25% of the class members actually had a report disseminated during the seven-month class period even though all requested their files. That low percentage may reflect that consumers request their files for manifold reasons, including ones having nothing to with impending purchases, or that some class members consummated purchases with sellers who did not subscribe to the *optional* Name Screen service. Whatever the reason, the 25% figure makes clear that requesting a credit file does not pre-figure the dissemination of a credit report with Name Screen information.[8]

Even if Ramirez's speculation were well-grounded, it would remain speculation, which does not suffice. Article III requires plaintiffs to prove that their injury-in-fact has already happened or is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409-10 (2013). Ramirez insists that "*Clapper* does not control" because "TransUnion's violation" had "already occurred at the time of the lawsuit." Resp.Br.32-34 (capitalization omitted). Ramirez may have a point, but not one that helps prove an injury for over 75% of the class. A plaintiff who seeks *retrospective* relief may well need to prove that his risk of injury was not just real or certainly impending, but actually materialized. *See* Petr.Br.39

[8] Nor does Ramirez account for the possibility that someone contemplating a major purchase who requested their credit file contacted TransUnion and cleared up any OFAC-related issue before the transaction. After all, the only record evidence shows that contact rates increased with the two-envelope format.

n.4. After all, even if some past practices once posed a significant risk of harm, if that harm never materialized, the party who escaped harm generally cannot show injury-in-fact. Similarly, class members who were only at risk of having their credit files disseminated cannot demonstrate injury-in-fact without proof that the risk materialized. Absent emotional trauma or other concrete injury, a near miss is cause for celebration, not for filing suit.

Ramirez seems to think that his retrospective statutory-damages remedy excuses the need to show injury-in-fact. But this Court has squarely rejected the notion that "the violation of a statutory right automatically satisfies the injury-in-fact requirement whenever a statute authorizes a person to sue to vindicate that right." *Frank v. Gaos*, 139 S.Ct. 1041, 1046 (2019) (per curiam). That remains true when the statutory violation involves willful conduct. *See Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547-48 (2016). And this Court has not hesitated to reject efforts to obtain "retrospective damages," Resp.Br.34, for a statutory violation that caused no injury-in-fact. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 514-16 (1975).

Ramirez thus must prove not only that FCRA was violated, but that the violation caused all of his fellow class members some injury-in-fact. Ninth Circuit precedent at the time of trial excused Ramirez from making such a showing, and his belated effort to conjure up a universal injury from internal communications and speculation falls far short.

Even assuming (contrary to fact) that all class members had credit reports with Name Screen information disseminated, that still would not show

that they all suffered injury-in-fact. While Ramirez inexplicably claims that "TransUnion does not dispute Article III standing for the 1,853 class members subject to the stipulation," Resp.Br.23, TransUnion in fact made perfectly clear in its opening brief (and every brief before it) that "Ramirez did not even meet his burden of proving that the 1,852 absent class members who *did* have a credit report with Name Screen information disseminated to a third party suffered" a "concrete injury." Petr.Br.40; *see also, e.g.*, Pet.20-21. Despite Ramirez's repeated refrain, it simply is not the case that those 1,852 were "labeled terrorists." And while Ramirez claims that even a "potential match" label would suffice for some businesses to "freak out," Resp.Br.4, the record is barren of evidence that any creditor took *any* adverse action against any of the 1,852.

Instead, the only evidence Ramirez presented concerned his own experience and that of the plaintiff in *Cortez v. Trans Union LLC*, 617 F.3d 688 (3d Cir. 2010). But their experiences, and even their credit reports, were outliers. While Ramirez's report (through a glitch in reseller reporting) and Cortez's report (based on practices discontinued before the class period) described their names as a "match," the vast majority of reports indicated (truthfully) that the names were a "*potential* match."[9]

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[9] While Ramirez discusses *Cortez* at length, that case involved practices that were discontinued before the class period. *Cortez* thus underscores that because FCRA authorizes compensatory and punitive damages, misguided class actions are not necessary to identify and prompt improvements. *Cortez* also demonstrates the dangers of Ramirez's position: While Cortez's experiences were even more atypical and unpleasant than Ramirez's, under

With nothing else left to offer, Ramirez makes the remarkable argument that standing cannot "turn on what actually happens at trial." Resp.Br.40. That is literally the exact opposite of what this Court has held: Proving injury-in-fact is the plaintiff's burden at every stage of the case, and thus "allegations of injury" "must be 'supported adequately by the evidence adduced at trial.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Indeed, mere weeks ago the Court reiterated that "a plea for compensatory damages [that] fails at the factfinding stage … can no longer support jurisdiction." *Uzuegbunam v. Preczewski*, No. 19-968, slip op.10 (U.S. Mar. 8, 2021). The trial here simply confirmed what TransUnion had been saying all along: There is no classwide injury that ensures that every class member who is poised to collect thousands in damages suffered an injury-in-fact. The trial confirmed that this class should never have been certified and now must be decertified. The alternative of allowing class members without Article III injury to collect damages would be unprecedented and unconstitutional.

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

Even if every class member were deemed to somehow just scrape over the Article III threshold, Ramirez would still remain an entirely atypical class representative in contravention of Rule 23(a)(3). Indeed, Ramirez all but concedes the typicality violation (at least) twice, first by emphasizing that

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the logic of Ramirez's position, someone like Cortez could have equally served as a class representative here.

"TransUnion's desk-drawer image clearly did not apply to Ramirez," Resp.Br.28, and then by faulting TransUnion for not trying to mitigate the typicality problem by limiting Ramirez's testimony or calling "other class members who did not have Ramirez's particular facts," Resp.Br.45.

Unable to deny that his injuries and experiences were radically atypical, Ramirez insists that all that matters is that he "is *identical* to all other class members" "[*w*]*ith respect to the claims*" he brought. Resp.Br.45. In other words, like the Ninth Circuit, he maintains that typicality is satisfied so long as the named plaintiff's "claims are based on the same legal theory" as the absent class members' claims. Resp.Br.45. That is not, and never has been, sufficient for Rule 23(a)(3). Typicality demands that the class representative "suffer *the same injury* as the class members." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011) (emphasis added). If typicality required only that the representative press claims that are common to the class, then it would be redundant of Rule 23(a)'s other requirements, Petr.Br.48—a point to which Ramirez tellingly never responds.

That a class representative's injuries cannot be either atypically weak or atypically strong is not some novel concept "invent[ed]" by TransUnion. Resp.Br.42. It is simply the necessary corollary of the requirement that the class representative have injuries "typical" of the class he purports to represent—as the United States recognizes, U.S.Br.30-31. By "screen[ing] out class actions in which the legal or factual position of the

representatives is markedly different from that of other members of the class," 7A Charles A. Wright, *Federal Practice & Procedure* §1764 (3d ed. 2005), the typicality requirement plays a critical role in ensuring that the representative litigation authorized by Rule 23 is truly representative. The whole point of the typicality requirement is to ensure that a trial of the class representative's claims is a fair proxy for the individual trials that a class action displaces. If the class representative is atypically strong or weak, such that trying his claims presents a distorted picture of the claims shared by the class, then the fundamental justification for the class action disappears.

Ramirez acknowledges the important function typicality can play in protecting absent class members, but makes the remarkable claim that typicality is a one-way ratchet that *only* protects absent class members from atypically weak representatives, while providing defendants zero protection from atypically strong ones. Resp.Br.23. That suggestion is meritless. No other provision of Rule 23 works in such a one-sided fashion, and there is not a shred of authority supporting the claim that typicality is atypical in this regard. To the contrary, this Court has emphasized that typicality and commonality overlap and share similar aims. *See Wal-Mart*, 564 U.S. at 349. And it is clear beyond cavil that commonality protects defendants and absent class members alike. Converting typicality alone into an exclusively pro-plaintiff rule would make no sense. After all, Rule 23 by its terms authorizes both plaintiff- and defendant-classes. *See* Fed. R. Civ. P. 23(a). Moreover, there is a much greater incentive for the proponent of a plaintiff-class to pick a class

representative with an atypically strong case than one with an atypically weak case. There is no reason why defendants cannot guard against such efforts to skew the proceedings, especially when "an incorrect class certification decision almost inevitably prejudices the defendant." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1053 (2016) (Thomas, J., dissenting). Finally, Ramirez's one-way ratchet would run afoul of the Rules Enabling Act, which ensures that the federal rules do not "abridge, enlarge or modify any substantive right" of any party. 28 U.S.C. §2072. The notion that typicality guards against abridging the rights of absent class members, but is indifferent to enlarging them at the expense of defendants, is a non-starter. That Ramirez advances such an anomalous argument is a testament to the seriousness of his typicality problem.

Ramirez insists that his atypicality is not "*relevant*" because he sought statutory, not actual, damages. Resp.Br.44. That gets matters backwards. The temptation to put forward an atypical class representative is greatest when a statute authorizes a range of statutory damages and punitive damages. Unlike a standard damages class, where each member must ultimately demonstrate the extent of their own injury to recover, every member of a statutory-damages class will receive the same award. And while most class members will suffer "harms that are small or difficult to quantify" (if not non-existent), a class representative who suffered real injuries but forgoes his right to seek compensatory damages can present an atypically sympathetic story that will be "highly relevant to a jury charged with th[e] task" of assessing damages for the entire class. *Stillmock v. Weis*

Markets, Inc., 385 F.App'x 267, 277 (4th Cir. 2010) (Wilkinson, J. concurring); *accord* U.S.Br.28-29. Recognizing that distinct risk with statutes that authorize a range of statutory damages and punitive damages is not a plea for a "separate typicality rule" for statutory damages. Resp.Br.46. It is simply a recognition that the ever-present temptation to pick an atypical representative is particularly acute in this context. *Accord* U.S.Br.28.

Ramirez revives his effort (*see* BIO.21) to blame TransUnion for not trying "to bar Ramirez from testifying or to limit his testimony." Resp.Br.45. But that only underscores the typicality problem. Rule 23 does not envision a process where the class forwards an atypical representative who then cannot testify truthfully about his actual experiences if the defendant objects. Such a process would ignore not only the requirements of Rule 23 but the basic promise of the Rules Enabling Act that the federal rules do not abridge substantive rights. That is exactly what would result from making evidence that would be unassailably relevant in Ramirez's individual action, *accord* U.S.Br.30-31, somehow out-of-bounds in a class action because it accentuates Ramirez's atypicality. Ramirez should not have to trim the sails on his own compelling testimony to make his story less truthful but more typical. Instead, a class representative whose experiences are actually typical should testify about his typical experiences in full.

Ramirez also seeks to blame TransUnion for not calling absent class members to testify in an effort to give the jury a better sense of the experiences of a typical class member. But that once again ignores

that it is the plaintiff's burden to identify a typical class representative. And when (unlike here) that actually happens, there is generally no need to supplement the class representative's testimony with the experiences of more typical class members. Forcing the defendant to call absent class members (or serve discovery on them) not only would place an impractical burden on the defendant—the absent class members are represented by class counsel, after all—but would rob class actions of much of their efficiencies. Put simply, Rule 23 obviates the need for the class representative to trim his testimony or for absent class members to testify by requiring the proponent of class certification to put forward a truly typical class representative.

That requirement provides a complete answer to Ramirez's mistaken suggestion that TransUnion did not preserve its typicality objection. TransUnion raised its typicality objection early and often. *See, e.g.*, J.A.511-13, 636, 683-86; *see also* J.A.275-76. There is no dispute about that and no need for a remand to ascertain what the record makes clear. Having had its timely objections overruled, TransUnion was under no obligation to try to fix class counsel's selection of an atypical representative by limiting Ramirez's testimony or calling more typical class members. TransUnion did not try to limit Ramirez's testimony to some kind of least-common-denominator version of what he actually experienced because that is not how class actions are supposed to work. And TransUnion did not call absent class members because doing so is not its burden. It was class counsel's burden to put forward a typical representative. When it put forward

Ramirez, with his highly atypical story, TransUnion objected. That is all Rule 23 requires.[10]

Ramirez makes the puzzling claim that TransUnion's position "cannot be reconciled with Rule 23(c)(1)(A)'s mandate that the class certification decision be made 'at an early practicable time.'" Resp.Br.47. In fact, TransUnion's position is and always has been that this class *never* should have been certified, for it was obvious from the start that Ramirez was atypical of the class—as TransUnion explained in objecting to certification long before this case went to trial. J.A.511-13. What happened at trial only confirmed the wisdom of that early and consistent objection.

Ramirez tries to downplay the extreme prejudice of this typicality error by speculating that the jury awarded damages at the high end of the statutory range because it was asked to issue a single award covering three statutory violations—something he yet again inexplicably tries to chalk up to some "strategy" on TransUnion's part.[11] Resp.Br.48. That claim

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[10] Ramirez is even further off-base in claiming that TransUnion "waived" its oft-raised typicality objection by failing "to propose a verdict form that allowed the jury to differentiate" between Ramirez and his fellow class members when awarding statutory damages. Resp.Br.46. TransUnion *did* propose a verdict form that would have allowed the jury to do exactly that (only to have it rejected in favor of Ramirez's undifferentiated proposal), *see* Pet.App.72-73; Dist.Ct.Dkt.261, but that still would not have fixed the more fundamental typicality problem.

[11] In reality, Ramirez himself proposed that the jury make only a single award "of not less than $100 and not more than $1,000" per class member, *see* Dist.Ct.Dkt.253 at 2; J.A.691—presumably

strains credulity. Ramirez did not urge the jury to calibrate its award to the number of violations it found. He urged it to award Ramirez "the maximum penalty" regardless of whether it found one violation, two, or three. J.A.628. And after imploring the jury to "[l]ook what happened to Mr. Ramirez" and recounting his personal experience, he closed by reiterating that (contrary to the verdict form TransUnion had requested, *see* Dist.Ct.Dkt.261) "the law requires" "that your verdict must be the same for every class member." J.A.621-28. Efforts to capitalize on an atypically sympathetic class representative do not get more transparent than that.

In short, that "the trial focused on Ramirez and his unique circumstances" to the exclusion of virtually anything else, Pet.App.53 (McKeown, J.), was not the product of some tactical choice by TransUnion. It was the inevitable result of the district court's erroneous decision to allow a radically atypical plaintiff who suffered public humiliation and canceled his vacation plans to represent a class of thousands, most of whom simply received their credit files in a non-compliant format. No amount of revisionist history can lay the blame for that violation of Article III and Rule 23(a) at TransUnion's feet.

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because FCRA limits statutory damages to "not more than $1,000" per "consumer," not per violation, 15 U.S.C. §1681n(a).

CONCLUSION

For the foregoing reasons, the Court should reverse.

Respectfully submitted,

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