2021 WL 859701 (U.S.) (Appellate Brief)
Supreme Court of the United States.

TRANS UNION LLC, Petitioner,

v.

Sergio L. RAMIREZ, individually and on behalf of all other similarly situated individuals, Respondent.

No. 20-297.
March 3, 2021.

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

Brief for Respondent

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***i QUESTIONS PRESENTED**

1. Whether a party can challenge trial evidence and jury instructions that it did not oppose in the district court to manufacture an Article III or typicality argument on appeal.

2. Whether Article III was satisfied where class members all sought statutory damages based on the facts that (a) **TransUnion** indisputably disregarded warnings by the Treasury Department and the Third Circuit, (b) falsely branded every class member as a terrorist, and (c) violated the Fair Credit Reporting Act's explicit protections that Congress gave to consumers.

3. Whether Rule 23(a)(3) typicality was satisfied where the class representative pursued the identical statutory damages claims that all other class members pursued based on **TransUnion's** uniform conduct.

***ii PARTIES TO THE PROCEEDING**

The Respondent adopts the listing of the parties submitted by the Petitioner.

***iii** TABLE OF CONTENTS

*v TABLE OF AUTHORITIES

CASES

***1 INTRODUCTION**

This case is about 8,185 people who were all falsely labeled terrorists by Petitioner (hereafter **TransUnion**), a credit reporting company. At trial, class members did not seek prospective injunctive relief on the theory that their credit files might be compromised in the future; rather, they sought the damages remedy that Congress specifically created for victims of inaccurate credit reporting practices. Plaintiffs proved that **TransUnion** was a repeat violator of applicable law-a company that, in the ten-year period in which it rushed to sell data about terrorists, could not identify a single time when its application of such a damning label to an individual was accurate. By contrast, **TransUnion** sought to persuade a jury that it had mended its ways by adding the word "potential" to the terrorist label. No wonder it lost.

Now **TransUnion** comes to this Court seeking protection from its wrongful conduct and unsuccessful trial gambits under the guise of Article III and Rule 23. Seeking to posture this case as the logical sequel to *Spokeo, Inc. v. Robins,* 136 S.Ct. 1540 (2016), **TransUnion** belittles the harms caused by pariah status on credit reports as little more than mere procedural violations of the Fair Credit Reporting Act of 1970 (FCRA), 15 U.S.C. § 1681 *et seq.,* no different than a false zip code or incorrect marital status. To support this cramped reading of the statute, **TransUnion** argues that harmed individuals cannot even enter the courthouse unless they first prove actual damages, and then must do so on a one-by-one basis.

Nothing in FCRA or this Court's jurisprudence supports these claims. Unlike in virtually every case invoked by **TransUnion**, here Congress prescribed a cause of action with a consumer-specific remedy for ***2** violations of what is, in effect, the modern incarnation of traditional reputational harms that constituted defamation *per se* at common law. Thus, **TransUnion** quickly pivots away from *Spokeo's* "material risk" inquiry and attempts to force this case into the mold *of Clapper v. Amnesty International USA,* 568 U.S. 398 (2013), an inapposite case about future injunctive relief for claimants without any express statutory cause of action.

In so doing, **TransUnion** must cast aside the findings of the two courts below. First, the rapid, automated dissemination of credit files created a material risk of harm to all class members. Second, strong trial evidence created the inference that every class member had a terrorist designation communicated into the marketplace and was denied, despite their requests, the statutorily-mandated information needed to redress that inaccuracy effectively.

The brute fact is that trials matter, and the evidence-which **TransUnion's** brief ignores-persuaded the jury that **TransUnion** willfully disregarded its obligation to prepare and disclose accurate credit reports. The record also shows that **TransUnion** knowingly consented to the very trial evidence and jury instructions that it now uses to manufacture posttrial arguments under Article III and typicality. **TransUnion** plainly saw tactical trial advantages in not differentiating class members, and it is now bound by those decisions.

Moreover, **TransUnion** never engages the consequences of its "trial-first, jurisdiction-later" approach to Article III and Rule 23. The logic yields an untenable result that, had **TransUnion** won at trial, the verdict would have been a nullity either because there was never Article III standing or because there was ***3** never a class to be bound to the verdict. Only a blinkered sense of reality could envision that outcome. At bottom, the trial context of this case forecloses all of **TransUnion's** arguments.

STATEMENT OF THE CASE

A. TransUnion's OFAC Product.

Under the USA PATRIOT Act, [1] the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) maintains a list of Specially Designated Nationals (SDNs) who pose threats to national security and are thus barred from participating in the U.S. financial system. J.A.436, 441-42. [2] A rogue's gallery, OFAC SDNs have included Osama bin Laden, Joaquin "El Chapo" Guzmán, and other such terrorists, narcotraffickers, and notorious criminals. J.A.437-38. Financial institutions and

other businesses must pay special attention to the OFAC list. J.A.50-51, 416-418. If a business transacts with an SDN, it risks significant criminal and civil penalties. *See* 31 C.F.R. § 501 app. A.

TransUnion is one of the "big three" credit reporting agencies. It collects personal and financial information about American consumers and then sells credit reports to end-users, such as banks, car dealerships, employers, landlords, and credit report "resellers." J.A.368, 376-78; Resp.App.5a. Following the PATRIOT Act, **TransUnion** in 2002 introduced an add-on product ***4** to its credit reports that matched consumers' names against the OFAC list. J.A.50-51, 384-88, 416-17.

Rather than examine the OFAC list itself, **TransUnion** engaged a third party, Accuity, Inc., to develop and operate the software for compiling its OFAC product. Pet.App.24. **TransUnion** had no quality control mechanisms to assure the accuracy of its product, even though its customers expected the information to be accurate, relied upon it, and some entities had "a blanket policy to just decline to do business with possible SDNs"; unsurprisingly, they would "freak out once they hear[d] that they [had] a possible match." J.A. 449-50, 482-83.

Contrary to industry practice, **TransUnion** employed an error-prone methodology of name-only "matching logic,"J.A.413-14, which compared consumer names to the government's OFAC list solely by searching for a consumer's first and last names, or just first initial and last name. J.A.194-95, 447-48, 463-65. Although each entry on the government's OFAC list recorded at least two items of information-the SDN's name plus at least one other item, such as physical and email addresses, nationality, birthdate, and Social Security and passport numbers, J.A.125-51, 439, 480-the only inputs of **TransUnion's** OFAC searches were names, registering a "hit" for every SDN whose name contained those inputs. J.A.194-202; 463-65. There was no further check on SDN designations, resulting in large numbers of false positives. By contrast, superior screening by other credit reporting agencies did not associate the lead plaintiff with an OFAC record. *Compare* J.A.59-60, 83-85, *with* Pet.App.64.

5** *B.* ***Cortez.

Only three years into its marketing of its OFAC product, **TransUnion** was sued over the harm caused to consumers, ultimately resulting in an adverse jury verdict and severe condemnation in *Cortez v. Trans Union, LLC,* 617 F.3d 688 (3d Cir. 2010). In facts stunningly parallel to those of Respondent Ramirez, Sandra Cortez was denied a car loan because the credit report the dealership obtained from **TransUnion** stated that she matched an SDN on the OFAC list. *Id.* at 697-98. When Cortez called **TransUnion**, it denied that her credit report contained an OFAC alert and refused to investigate her claim. *Id.* at 699-700. Cortez sued, alleging that **TransUnion** had violated two of the same FCRA provisions at issue here: § 1681e(b) by failing to follow reasonable procedures to assure that her credit report was accurate, and § 1681g(a)(1) by failing to disclose her OFAC alert to her. *Id.* at 707, 711. A jury found for Cortez on both counts and awarded compensatory and punitive damages. *Id.* at 705-06. To underscore its outrage, the jury handwrote on its verdict form, "The **TransUnion** business process needs to be completely revamped with much more focus on customer service and the consumer." Resp.App.2a.

On appeal, the Third Circuit held that the OFAC designation based solely on name-matching supported the jury's verdict that **TransUnion** had failed to adopt reasonable procedures to assure the accuracy of its OFAC product: "The jury could reasonably conclude that [**TransUnion**] could have taken steps to minimize the possibility that it would erroneously place an OFAC alert on a credit report, such as checking the birth date of the consumer against the birth date of the person on the SDN List." *Cortez,* 617 F.3d at 709.

***6 C. This Litigation.**

1. Claims and Class Certification.

Despite *Cortez,* "**TransUnion** made surprisingly few changes to its practices regarding OFAC alerts." Pet.App.12. It added no cross-check between its simple name search and any other piece of identifying information. Officials at the Treasury Department subsequently informed **TransUnion** that they "continued to hear from **TransUnion** customers and individual consumers who had been adversely affected by false OFAC alerts on **TransUnion** credit reports." Pet.App.13. They expressed concern that name-matching services such as **TransUnion's** OFAC product lacked "rudimentary checks to avoid false positive reporting," thereby causing "harm to innocent consumers." *Id.* (quoting J.A. 66). Nonetheless, **TransUnion** took no steps to ensure greater accuracy of its product.

Moreover, **TransUnion** continued its *pre-Cortez* practice of not including OFAC alerts in its disclosures to consumers. When consumers with an OFAC match requested copies of their credit file, **TransUnion** sent (as it had *pre-Cortez*) a credit report with no mention of an OFAC alert, even though the credit report sold to **TransUnion** customers *would* include the alert. **TransUnion** obviously understood that OFAC alerts were part of a credit report. And while the credit file consumers received included the summary of rights required by FCRA, the summary was irrelevant because without the alert on the face of the report there was nothing for the consumer to dispute. Resp.App.3a-6a.

***7** Post-Cortez, **TransUnion** began sending "as a courtesy" a flawed and confusing second mailing. Pet.App.66; J.A.92. Although **TransUnion** now characterizes two-mailings-versus-one as a mere "hypertechnical violation []," Pet.Br.30, the trial evidence showed-and both courts below found-that the two mailings were inherently confusing and misleading. Indeed, **TransUnion** knew that its two mailings were not FCRA-compliant; it blatantly misrepresented to the Treasury Department the contents of the second mailing. J.A.73.

Respondent Ramirez was one of thousands of individuals who had OFAC alerts erroneously placed in their credit files using the name-only match procedure, and who, after requesting their credit information, received **TransUnion's** two flawed mailings. He described at trial how he discovered the OFAC alert when he was denied credit while attempting to purchase a Nissan Maxima. J.A.329-49; Pet.App.4-8.

However, the relevant facts for the claims asserted are the same for all class members. Pet.App.65-66. Ramirez was falsely labeled a terrorist, like all other class members, and received the same two confusing mailings after requesting his credit file. Neither Ramirez's claim, nor those of any other class member, turned on consequential damages from credit denial or receipt of inferior credit terms. Ramirez, like all other class members, sought statutory damages, not actual damages. J.A.276.

On February 9, 2012, Ramirez filed a class action lawsuit alleging that **TransUnion's** OFAC-related practices violated FCRA. The class definition encompassed Ramirez and 8,184 other consumers to whom **TransUnion** sent the same separate OFAC letters between January 1, 2011, and July 26, 2011. Class ***8** members, like Ramirez, (1) were falsely associated with an OFAC record based on name-matching; (2) requested their credit file from **TransUnion**; and (3) received a "personal credit report" from **TransUnion** with no mention of the OFAC record, and a separate form letter containing the OFAC record but omitting any statement of FCRA rights. Pet.App.64-66. The class definition encompassed all persons requesting their credit files during the period who, according to **TransUnion's** files, received the same two mailings. After July 26, 2011, **TransUnion** abandoned the procedures it defends before this Court. J.A.269.

Throughout this case, **TransUnion** has confused the distinction between the class definition, which identifies who is in the class, and the class period, which identifies the period for which harm can be claimed. The seven-month class definition encompasses the 8,185 individuals who received the two misleading mailings during that timeframe.

The harm, however, was not just the use of the two confusing mailings for seven months but also **TransUnion's** much longer use of the flawed namematching logic, which falsely labeled all 8,185 class members as terrorists. The duration for the class to assert the latter harm is 46 months, as determined by FCRA's statute of limitations.

Specifically, under FCRA § 1681p-a provision **TransUnion** ignores-an action must be brought "not later than ... 2 years after the date of discovery by the plaintiff of the violation that is the basis for ... liability; or ... 5 years after the date on which the violation ... occurs." **TransUnion** was using its flawed name-matching logic on February 1, 2010, the earliest possible date under the statute of limitations. It did not cease using that flawed approach until December ***9** 2013. J.A.257-59, 464-65. **TransUnion** tried to secure a jury instruction limiting the period for seeking damages to seven months, but the court disagreed, and **TransUnion** did not appeal that ruling. J.A.592. Thus, the period for claiming injury is 46 months, not 7 months as **TransUnion** asserts.

TransUnion never argued in the district court that the case should have been dismissed in its entirety for lack of Article III injury-in-fact to unnamed class members. Rather, **TransUnion** argued, in opposing class certification, that proof of specific damages was a threshold individualized issue for class-member standing. The district court rejected that argument, reasoning that the class was seeking statutory-not actual-damages, and that proving individualized damages "is not an element of the disclosure claims or statutory damages." J.A.281.

Regarding typicality, the court found that, although **TransUnion** referred to what it claimed were "a litany of unique facts involved with [Ramirez's] claims," including his interaction with the Nissan dealer, he was nonetheless typical under Rule 23(a)(3). J.A.275-76. His claims for statutory damages were identical to those of all class members. All of the claims centered on two elements of **TransUnion's** uniform conduct with regard to all class members: (1) the false OFAC designation, and (2) the failure to provide statutorily-mandated disclosures. *See* Pet.App.88 (post-trial order, quoted *infra,* noting that every class member was "falsely identified ... as a potential match" and received the deficient mailings). With respect to the § 1681g(a)(1) and § 1681g(c)(2) claims, "Plaintiff and the putative class all received a claim file disclosure that failed to include any OFAC information," and instead received "a nearly identical separate ***10** form letter with the same OFAC notification ...." J.A.275. The court emphasized that "Plaintiff is not seeking any actual damages for what happened at the Nissan Dealer" and "would have the same claims even if he had never visited the Nissan Dealer or been denied credit." J.A.276.

Likewise, "[Ramirez's] disclosure claims are based on what was in-or more precisely, what was not in-the consumer file Trans Union disclosed to Plaintiff along with the separate letter," and accordingly, none of the purported " 'unique facts' makes Plaintiff atypical for the reasonable procedures claim either." *Id.* He received the same two mailings as all other class members, and since he was "seeking statutory damages and not actual damages," it was irrelevant "whether he was actually denied credit or received inferior credit terms ...." *Id.* Thus, the specifics of Ramirez's ordeal at the Nissan dealership are "not the basis for his claim; rather, the willfulness comes from Defendant's conduct even after losing the *Cortez* case." J.A.278.

Having rejected **TransUnion's** various arguments, the court certified the class. J.A.260.

2. Trial.

The six-day, class-wide jury trial took place in June 2017. Although **TransUnion** contends that "the [trial] focus [was] on Ramirez and his unique experience," Pet.Br. 18, the trial transcript shows that the evidence focused overwhelmingly on **TransUnion's** improper conduct. [3]

***11** The jury learned that, even after *Cortez,* **TransUnion** adhered to name-only matching, which falsely labeled thousands of American consumers-including every single class member-as terrorist threats to national security. By contrast, **TransUnion** matched every other item of information to the consumer about whom the information was sold using more than just her name. Pet.App.64; *see* J.A.389-92, 460-61.

Only after *Cortez* did **TransUnion** claim to start adding the word "potential" to describe a match to an SDN on the OFAC list, although **TransUnion** never introduced a credit report bearing that change into the trial record. Pet.App.84. [4] Regardless,

the term "potential" had no material impact on the behavior of **TransUnion's** customers, who refused to do business with "potential" terrorists. J.A.449-50. The jury rejected **TransUnion's** argument that inserting an adjective could eliminate the risk that consumers would suffer hatred, contempt, or ridicule, Pet.Br.42-just as one could not credibly argue that calling someone a "potential" child molester or "potential" murderer is harmless.

TransUnion did not and could not dispute that every OFAC designation of class members was false. Indeed, **TransUnion** could not identify a single instance since it began marketing OFAC alerts in 2002 in which its matching logic had correctly flagged a genuine SDN on the OFAC list. Pet.App.65; J.A.484. In fact, **TransUnion** permanently stopped including ***12** terrorist-labels in the files of all OFAC-designees who complained about their file and received a manual review. Pet.App.65.

Contrary to the claim that its matching methodology was the state-of-the-art, trial evidence established that **TransUnion's** own manual checks could have eliminated erroneous designations. Beginning in 2010, **TransUnion** instituted a manual review process for resolving disputes of OFAC flags brought by consumers who had the wherewithal to overcome **TransUnion's** failure to explain how to do so. J.A.407-08. The process was simple: a **TransUnion** employee would compare the available information about the consumer with the OFAC list on the Treasury Department's website. *Id.* Every OFAC flag reviewed in this way was determined to be a false positive. J.A.412-13. As the trial court noted, the jury had ample grounds to conclude that **TransUnion's** "nameonly matching protocol was not a reasonable procedure designed to ensure the maximum possible accuracy of consumer information ...." Pet.App.62.

The obstacle to accuracy was not technology but **TransUnion's** desire to cut corners. **TransUnion's** third-party OFAC vendor, Accuity, had the capability to cross-check the OFAC list using superior identifiers such as address, passport number, Social Security number, and birthdate. J.A.194-95. **TransUnion** chose not to use this function. J.A.194, 479. **TransUnion's** own research showed that the addition of even one other identifier could drive the false positive rate to zero. J.A.106. Yet, as the jury heard, **TransUnion** made a deliberate choice to adhere to its manifestly inaccurate, name-only matching. J.A.479. Meanwhile, **TransUnion's** competitors, who also sold OFAC services, sold credit reports for Ramirez based ***13** on a different methodology, and those reports contained no OFAC designation. J.A.86, 109, 219-20.

In addition, trial evidence established that all class members had personally initiated the processes anticipated by FCRA by formally requesting a disclosure of their credit file, and that each had received information from **TransUnion** in two misleading mailings. J.A.613-14.

The first mailing contained an ordinary credit file disclosure, identified as a "Personal Credit Report." J.A.88. The first page warned consumers to "alert us immediately" if they believed any information to be "incomplete or inaccurate" and gave instructions on how to do so. J.A.88-89. It included the statutory summary of rights, including the right to "dispute incomplete or inaccurate information," and **TransUnion's** corresponding duty to "correct or delete inaccurate, incomplete, or unverifiable information." Resp.App.4a-5a. Nowhere did this credit report contain any reference to an OFAC alert being in the consumer's file, thus rendering the included summary of rights irrelevant for that purpose. J.A.88-91.

A second mailing, sent a day after the first, J.A.547-48, *cf.* Pet.Br.13, compounded the confusion by notifying class members that, "[a]s a courtesy," their respective names were "considered a potential match to information listed on the ... [OFAC] Database." J.A.92. That database, the letter explained, "contains a list of individuals and entities that are prohibited by the U.S. Department of Treasury from doing business in or with the United States." *Id.* The letter did not identify *who* "considered" the consumer to be a match to an SDN, only that "this information may be provided to such authorized parties" as "financial institutions." J.A.92-93. The letter did not disclose that the ***14** OFAC designation was already part of the recipient's credit file and omitted the statutorily mandated summary of rights-including the recipient's right to dispute and correct the OFAC alert. J.A.92-94. It made no mention of FCRA, the consumer's rights, or **TransUnion's** duties. It did not state that the consumer could dispute the OFAC alert (or how to do so), but instead merely stated that **TransUnion** could be contacted if the consumer had "additional questions or concerns." J.A.94.

Moreover, the second mailing stated that a "**TransUnion** credit report" had been "mailed to you separately," J.A.92, giving the misleading impression that OFAC data were not a part of one's "Personal Credit Report," nor a part of the "credit report [s]" that **TransUnion** regularly sold to third parties. Even **TransUnion** acknowledged that its two-mailing approach was confusing with respect to a consumer's right to dispute an OFAC "hit." J.A.543-44, 617. And Ramirez testified that he was personally confused by the two mailings. Pet.App.7; J.A.341-43.

When confronted by the Treasury Department, **TransUnion** dissembled. In October 2010, following up on discussions held in July 2007 and May 2008, the Department wrote expressing concern that it "continues to hear" from consumers "who have been adversely impacted by screening products" like **TransUnion's** OFAC service. J.A.66. The Department admonished **TransUnion** to undertake "rudimentary checks to avoid false positive reporting ...." *Id.*

In February 2011, **TransUnion** told the Department that, in response to *Cortez,* it had "initiated a practice" that would provide instructions on "how to request [that] **TransUnion** block the return of a potential ... OFAC Name Screen match before it happens, and to ***15** take steps to prevent it." J.A.73. That was false: the OFAC letter never contained any such instructions. J.A.489-91.

In addition, the evidence allowed a reasonable conclusion that each class member's wrongful OFAC label had been published to third parties who had purchased class members' credit reports. First, the parties stipulated before trial that in just the sevenmonth period that defines class membership (January 1, 2011 to July 26, 2011), nearly a quarter of the class (*i.e.,* 1,853 class members) had OFAC flags sold to *"potential creditgrantor[s]."* J.A.48 (emphasis added). But because, as noted above, the operative harm period covered 46 months, it was more than reasonable for the jury to infer publication of credit reports regarding the other 6,332 class members at some point during the full 46-month class period. And the jury had ample basis to do so, since all class members had written **TransUnion** seeking their credit files, a cumbersome process that could include disclosure of a Social Security number and other personal data. Resp.App.3a-4a.

Consumers typically request credit files in anticipation of a transaction that would trigger a credit report, such as a mortgage, as **TransUnion** itself recommended. J.A.552-53. As **TransUnion's** corporate representative acknowledged at trial, consumers who request disclosure of their credit file are usually planning a large purchase or another transaction that would trigger a third party's request for their credit report. *See* J.A.552-53. Such a transaction would increase the likelihood of third-party dissemination.

Moreover, the universe of potential credit report purchasers was far broader than the "potential credit grantor[s]" specified by the parties' stipulation, since ***16** it included existing creditors, insurance companies, landlords, credit report resellers, and employers. J.A.368, 376; Resp.App.5a. As subscribers to **TransUnion's** system, they too would have had instantaneous, on-demand access to the entire class's OFAC data. J.A.50-51, 354-55. Not surprisingly, there were millions of requests for OFAC searches. For example, in July 2012 alone, **TransUnion** fulfilled more than 2.7 million customer requests for OFAC searches, resulting in **TransUnion's** dissemination of 17,557 OFAC flags to its customers in that month alone. J.A.104.

Further, **TransUnion** was solely to blame for the absence of more direct evidence regarding publication to customers outside the seven-month class-definition period. **TransUnion** conceded during discovery that its recordkeeping practices prevented total and reliable identification of when, and to whom, it had sold OFAC alerts. **TransUnion** acknowledged in an interrogatory response that it was "unable" to electronically search its database, and that undertaking a manual search, "if it is possible to do so at all," could not yield a reliably correct answer due to "changes in the database and potential differences in inquiry input between the report and disclosure." J.A.114-15.

Additionally, **TransUnion's** two-mailing practice left no doubt as to third-party publication. **TransUnion** neither generated the OFAC mailing itself nor kept it in its desk drawer. **TransUnion** published to its third-party "print vendor[s]" the information prepared for the two mailings; the print vendors would then print[] it out," "put[] it in an envelope," and mail[] it" to each class member. J.A.161-62, 175, 545. Moreover, the information was published to employees within **TransUnion**, who processed the

class members' ***17** requests for their credit information. J.A.97; *see also* Pet.App.24 (noting that "**TransUnion** and Accuity communicated about the database information and OFAC matches").

3. Verdict.

At the close of the class's evidence, the district court denied **TransUnion's** motion for judgment as a matter of law. **TransUnion** alternatively moved to decertify the class, arguing Ramirez's experience was unique. The court denied that motion as well, concluding that any differences were immaterial to liability or damages. J.A.514-22.

In summation, **TransUnion's** attorney told the jury that "[y]ou have seen no evidence that any class members [other than Ramirez] were harmed ... [or] even faced any significant risk of harm or hardship." J.A.629-30. And he chastised class counsel for not offering testimony from even "one, two, three, [or] four" other class members. J.A.629. He did not explain, however, why *he* chose not to call such class members as part of his defense.

Prior to instructing the jury, the district court held a hearing to discuss jury instructions and the verdict form. Instead of requesting a verdict form that allowed different damages to be awarded for different class members, **TransUnion** stipulated to a verdict form that called for "a number that [would] apply to each class member," no doubt planning to argue that trial testimony yielded an across-the-board defense verdict. J.A.583-84, 690-91.

Pursuing this strategy, **TransUnion** agreed that the class would be entitled to damages if the jury found liability on any of the three FCRA claims asserted. J.A.690-91. By so agreeing, **TransUnion** ensured that ***18** each class member could only recover for one FCRA violation, even if three separate violations (justifying three separate awards) were proven.

The jury found **TransUnion** liable on all three claims. It awarded each class member $984.22 in total statutory damages, J.A.691, and $6,353.08 in punitive damages. Resp.App.16a.

All of **TransUnion's** post-trial motions were rejected because, "[i]f anything, the trial evidence demonstrated that class treatment of these claims is even more appropriate than appeared at the class certification stage." Pet.App.88. The court noted, "**TransUnion** falsely identified every class member as a potential match and every class member received an incomplete disclosure which failed to properly advise them of their rights to challenge the OFAC information in their file." *Id.*

4. Appeal.

A divided Ninth Circuit panel affirmed. It held that each of the 8,185 class members had Article III standing. Regarding the § 1681e(b) claim, the majority reaffirmed that "**TransUnion** inaccurately identified and labeled all class members as potential terrorists, drug traffickers, and other threats to national security," as opposed to "inaccurately report[ing] a zip code or a minor discrepancy." Pet.App.23. **TransUnion's** "careless procedures for identifying OFAC 'matches' ... ran a real risk of causing the uncertainty and stress that Congress aimed to prevent in enacting the FCRA." *Id.* **TransUnion's** OFAC matches were housed "in a separate database operated and maintained by [third-party] Accuity," thus "compound[ing] the risk of harm to all class members' privacy and reputational interests." Pet.App.24-25. ***19** And the court noted that "class members' reports [were] available to potential creditors or employers at a moment's notice ...." Pet.App.25. Consequently, plaintiffs had "show[n] a material risk of harm to the concrete interests of all class members." Pet.App.27.

Regarding the § 1681g(a)(1) and § 1681g(c)(2) claims, the court found that "Congress [had] enacted [those provisions] because they are the only practical way to protect consumers' interests in fair and accurate credit reporting." Pet.App.31. These provisions "resemble other reputational and privacy interests that have long been protected in the law." Pet.App.30-31 (citation omitted). **TransUnion's** statutory violations "put every class member at a risk of real harm: not knowing that they were falsely being labeled as terrorists, drug dealers, and threats to national security." Pet.App.32. Further, **TransUnion's** practice of sending two

mailings "posed a serious risk that consumers not only would be unaware that this damaging label was on their credit reports, but also would be left completely in the dark about how they could get the label off their reports." *Id.*

Because **TransUnion** disregarded the Third Circuit's warnings in *Cortez,* the jury had ample grounds to find willfulness. Pet.App.38; *see also* *Safeco Ins. Co. of Am. v. Burr,* 551 U.S. 47, 70-71 (2007) (prior court or administrative action relevant to determining willfulness under FCRA). **TransUnion** "ran an unjustifiably high risk of error." Pet.App.38.

Regarding Rule 23(a)(3) typicality, the court held that, even though Ramirez's experiences may have been " 'somewhat more colorful' than other class members' experiences," his "injuries still arose 'from the same event or practice or course of conduct that [gave] rise to the claims of other class members and ***20** [his claims were] based on the same legal theory.' " Pet.App.39-40 (alterations in original) (citations omitted).

The court upheld the damages awarded as "proportionate to **TransUnion's** offenses and reasonable in light of the evidence," Pet.App.43, but reduced punitive damages. Pet.App.48.

In dissent, Judge McKeown noted that the jury heard only from Ramirez and did not hear "evidence about absent class members ...." Pet.App.54. She did not acknowledge that the evidence focused overwhelmingly on **TransUnion's** conduct, which was identical as to all class members. Nor did she note that evidence about other class members could have been offered by **TransUnion**. She also failed to acknowledge that the jury *did* hear "evidence about absent class members"-that all were falsely included in **TransUnion** OFAC alerts, all asked for their credit files, and all received the two misleading mailings.

With respect to the § 1681e(b) claim, Judge McKeown accepted **TransUnion's** representation that for most class members, the inaccurate credit report was never published. She did not acknowledge that the stipulation regarding publication for a portion of the class was for only seven months, whereas the period for recovering damages was 46 months. Nor did she consider the evidence regarding the rate of OFAC publication, or the fact that it was **TransUnion's** flawed recordkeeping that caused any lack of additional evidence of publication. And she did not consider publication to third-party print vendors, or within **TransUnion**.

With respect to the § 1681g(a)(1) and § 1681g(c)(2) claims, Judge McKeown found the evidence deficient ***21** because it was "pure conjecture" whether class members other than Ramirez were "confused, suffered the adverse consequences that befell Ramirez, or even opened the letter ...." Pet.App.57. She did not consider the possibility that the violation of a private right to information established by Congress could justify Article III standing without any showing of confusion or additional adverse consequences.

SUMMARY OF ARGUMENT

TransUnion relies on the *evidence at trial* to challenge Article III standing. Indeed, it never filed a pretrial motion to dismiss claiming lack of Article III injury. Yet, even now it does not dispute the standing of 1,853 members of the class whose OFAC-files were documented as having been disseminated. Similarly, **TransUnion's** entire typicality argument is trial-based. It does not dispute that it would have no typicality argument had Ramirez not testified at trial (or if other class members had testified in addition to Ramirez). But **TransUnion** ignores the fact that it squarely agreed to exactly how the trial played out. It did not object to Ramirez's testimony, did not move *in limine* to cabin his testimony, did not offer testimony of other class members, and agreed to a process in which the jury awarded a single amount of statutory damages to every class member.

Neither Article III nor Rule 23 is a vehicle to request a do-over for strategic choices that went awry. But wholly apart from **TransUnion's** failure to grapple with its deliberate trial strategies, as recounted *infra,* **TransUnion's** Article III and typicality arguments are unfounded.

Article III. **TransUnion's** entire Article III argument rests on this Court's acceptance of two similes, ***22** neither of which is supported by the record. The first is that the terrorist designation in a credit file is like a letter sitting unmailed in a desk drawer of old. The second is that not receiving the clear disclosure mandated by Congress for correcting a false terrorist designation is like getting all the required information in two envelopes instead of one. Each is factually and legally erroneous.

In *Spokeo,* the Court reaffirmed that intangible injuries are more likely to satisfy Article III's "concreteness" requirement if they are closely related to a harm that provided a basis for suit under the common law. 136 S.Ct. at 1549. The injuries asserted by the class here-being falsely labeled as OFAC terrorists or other criminals-are indistinguishable from the harms constituting defamation *per se* (and thus presumed damage) under the common law. In contrast to the desk drawer analogy, trial evidence establishes (1) publication to third-party print vendors; (2) publication within **TransUnion**; and (3) inferences based on **TransUnion's** admitted publication regarding 1,853 class members during just a seven-month period, especially in light of the company's failure to maintain relevant business records for the full 46-month period. *See* *Tyson Foods, Inc. v. Bouaphakeo,* 136 S.Ct. 1036, 1047-48 (2016).

Of course, publication is not even arguably required for the § 1681g(a)(1) or § 1681g(c)(2) claims. The jury found that **TransUnion** violated all three statutory provisions, and each is independently sufficient to affirm the judgment.

Under FCRA, a credit reporting agency that willfully fails to comply with the relevant requirements is "liable *to that consumer."* 15 U.S.C. § 1681n (emphasis ***23** added). Congress's determination that a statutory violation with respect to particular individuals constitutes injury is "instructive and important." *Spokeo,* 136 S.Ct. at 1549. This Court has never held that a plaintiff seeking retrospective personal damages lacks Article III standing (per *Spokeo*) as not sufficiently concrete or particularized. **TransUnion** confuses the distinction between a ruling on the merits and an Article III violation. Failure of proof at trial should mean only that the plaintiff loses on the merits, not that Article III is violated.

Typicality. **TransUnion** argues that the testimony of class representative Ramirez defeated typicality under Rule 23(a)(3). Putting aside the fact that **TransUnion** waived this argument, it is legally flawed. Typicality is designed to protect *class members.* There is no legal support for **TransUnion's** theory that a defendant can exclude a class representative who has a strong or sympathetic case. As both courts below found, and textually following Rule 23(a)(3), all claims arose from **TransUnion's** uniform course of conduct with respect to all class members. The typicality requirement has been applied with little difficulty by federal courts for 55 years to cases that focus on defendant's uniform course of conduct. The Court should decline **TransUnion's** invitation to upend settled law.

ARGUMENT

I. ALL CLASS MEMBERS SUFFERED A LONG-RECOGNIZED COMMON LAW HARM.

Although **TransUnion** does not dispute Article III standing for the 1,853 class members subject to the stipulation, it nonetheless maintains that the only thing class members had in common was that they received two envelopes instead of one. *See, e.g.,* ***24** Pet.Br.22. Of course, what unifies the class is that they were all falsely designated terrorists by **TransUnion**. But this two-envelope mantra is oftrepeated and is coupled with the extraordinary claim that the "information **TransUnion** provided was not false," Pet.Br.41, and the astounding argument that being labeled a terrorist is not within "the narrow set of false statements that expose individuals" to social opprobrium. Pet.Br.42. **TransUnion's** attempt to trivialize its conduct explains the outcomes here and in *Cortez.*

A. Every Class Member Was Falsely Labeled a Terrorist.

Under *Spokeo,* intangible injuries are more likely to be concrete if they bear "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." 136 S.Ct. at 1549. Lower courts have allowed claims arising from statutory violations based on analogies to the common law, even when the underlying conduct would not have been precisely recognized at common law. *See, e.g., Robins v. Spokeo, Inc. (Spokeo III),* 867 F.3d 1108, 1115 (9th Cir. 2017) (O'Scannlain, J., on remand) ("Congress has chosen to protect against a harm that is at least closely similar *in kind* to others that have traditionally served as the basis for [a] lawsuit."); *In re Horizon Healthcare Servs. Inc. Data Breach Litig.,* 846 F.3d 625, 638-41 (3d Cir. 2017) (upholding "close relationship" of new tort to conduct that would have been actionable at common law). [5]

***25** But unlike the inconsequential errors in *Spokeo,* **TransUnion's** conduct here amounts to a fully realized injury as to every class member under traditional common law. The common law has recognized a cause of action "for damage to a person's reputation by the publication of false and defamatory statements" since the 16th century. *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 11 (1990); *see also* Van Vechten Veeder, *The History and Theory of the Law of Defamation,* 3 Colum. L. Rev. 546, 555-58 (1903). Libel, which had developed into an independent tort by the end of the 17th century, provided a cause of action for written statements even when "no special harm or loss of reputation results therefrom." Restatement (First) of Torts § 569 (Am. Law Inst. 1938); *see also Gertz v. Welch,* 418 U.S. 323, 349 (1974) (in libel, "the existence of injury is presumed from the fact of publication"). The class members' injuries-being labeled as OFAC-designated criminals-are paradigmatic of this longrecognized common law tort, the polar opposite of an "incorrect zip code" that presents no material risk of harm. *Spokeo,* 136 S.Ct. at 1550. In line with *Spokeo,* the Ninth Circuit correctly found that FCRA-created rights "resemble other reputational and privacy interests that have long been protected in the law." Pet.App.30-31 (citation omitted); *see* Pet.App.30-33.

TransUnion's communications regarding the class members were indisputably "false and defamatory." It was the jury's function under § 1681e(b) to determine what message **TransUnion's** OFAC flags communicated ***26** and whether the message was false. *See* Restatement (First) §§ 614, 617 (noting the jury's role to make such determinations).

Notably, **TransUnion's** brief does not argue that any OFAC alert regarding class members was accurate. Not a one. And **TransUnion** cannot identify any instance since 2002 in which its OFAC alerts correctly identified anyone. J.A.484.

Labeling someone a national security threat surely "blacken[s] the memory of one dead, or the reputation of one alive, and expose[s] him to public hatred, contempt, or ridicule." 2 James Kent, *Commentaries on American Law* 13 (1827); *see also* Restatement (First) of Torts § 559 (same). Such defamation *per se* could be accomplished by allegations of "some heinous crime" that would "impair or hurt their trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave." 3 William Blackstone, *Commentaries on the Laws of England* *123 (1768); *see also* William Prosser, *Libel Per Quod,* 46 Va. L. Rev. 839, 841 (1960) (same). Even more certainly than calling a lawyer a knave, being on the OFAC terrorist list would "render [someone] unworthy of employment." 2 Kent, *Commentaries on American Law* 13. The OFAC list identifies "terrorists, international narcotics traffickers, [and] those engaged in activities related to the proliferation of weapons of mass destruction," among other national security threats. [6] Third parties are on notice that designated persons' "assets are blocked and U.S. persons are generally ***27** prohibited from dealing with them." [7] The few U.S. residents who have actually been placed on the OFAC list have "suffered a virtual financial death penalty." Juan C. Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* 7 (2013). These individuals have been "bar[red] from participating in the society in which they live," and "cannot buy groceries, receive medical care, or engage in a simple financial transaction without a license from the Treasury Department." Jennifer Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention,* 99 Cornell L. Rev. 327, 339 (2014).

B. The Jury Could Have Reasonably Found Third-Party Publication. [8]

As prevalent as its "two-envelope" assertion is **TransUnion's** image of its OFAC flags being "no different from a defamatory letter left in a desk drawer, which injures no one unless and until it leaves the drawer." Pet.Br.36. While quaint, the desk-drawer ***28** image bears no resemblance to the automated, highvolume access allowed by today's credit data files.

TransUnion's desk-drawer image clearly did not apply to Ramirez; he was told by a car salesman that the **TransUnion** file the salesman effortlessly accessed electronically during a transaction placed Ramirez on "a terrorist list." J.A.336. And the trial record established that OFAC alerts were in fact published to third-party credit grantors (*i.e.,* new potential creditors) for 1,853 class members between January and July of 2011. J.A.48. [9] Under *Spokeo,* the fact that-by **TransUnion's** own admission-1,853 class members had their files accessed during onesixth of the damages period clearly suffices to establish material risk as to *all* class members.

And notwithstanding **TransUnion's** shopworn deskdrawer imagery, the evidence as to *all* class members goes beyond material risk and establishes the broad dissemination of OFAC alert information. At common law, publication is completed when the defamatory statement is read by *any* comprehending person, whether a telegraph operator, stenographer, or "the compositor in a printing house." *Ostrowe v. Lee,* 175 N.E. 505, 505 (N.Y. 1931) (Cardozo, C.J.); *see also* *Berry v. City of N.Y. Ins. Co.,* 98 So. 290, 292 (Ala. 1923) ("On principle a man is as much entitled to protection in the esteem of a stenographer as of any one else."). Many authorities also recognize that ***29** publication can occur through intra-corporate com-munications; *see, e.g.,* *Bacon v. Mich. Cent. R.R. Co.,* 21 N.W. 324, 326 (Mich. 1884); Restatement (Second) of Torts § 577 cmt.i (Am. Law Inst. 1977). Here, the defamatory OFAC alerts were published in multiple ways, all ignored in **TransUnion's** brief.

First, **TransUnion** transmitted the information to third-party print vendors, who in turn printed and mailed the letters to each class member. J.A.545-46. Moreover, "**TransUnion** and [third-party] Accuity communicated about the database information and OFAC matches." Pet.App.24. Further, the information was published to employees within **TransUnion**, who processed the class members' requests for their credit information. *See* J.A.97 (identifying employee Melissa Teears as compiling Ramirez's OFAC letter).

Moreover, when a defendant fails to maintain relevant business records, "the experiences of a subset of [class members] can be probative as to the experiences of all of them." *Tyson Foods,* 136 S.Ct. at 1048. Like the defendant in *Tyson Foods,* **TransUnion** admitted its failure to keep relevant records-i.e., that it was "unable" to generate the total number of individuals whose information had been sold to any third party containing an OFAC alert or how often these files had been accessed. J.A.114-15. Class members had "no alternative means" to prove this element than through the overwhelming representative evidence in the record. *Tyson Foods,* 136 S.Ct. at 1047. **TransUnion** and its amici mischaracterize the stipulation regarding the 1,853 class members to mean that no other class member's information was ever published to any third parties. That stipulation accounts only for the class members whose alerts were ***30** shared with *potential credit grantors* between January 1 and July 26, 2011. If that figure for only seven months is 1,853 class members, it is virtually certain that the figure would encompass all class members during the entire 46-month period (February 2010 through December 2013) in which **TransUnion's** sales to third parties were actionable. Indeed, the stipulation (and the rate of publication it reflects) strongly supports the conclusion that each class member had the OFAC information published *twice.*

Although all class members received the OFAC letter from **TransUnion** during this seven-month period in 2011, false information identifying them as SDN-listed individuals could have been sold or otherwise disclosed to third parties at any point during the 46-month class period. Indeed, by October 2010, the volume of false OFAC alerts published by **TransUnion** was so great that the Treasury Department was prompted to warn **TransUnion** about the "harm to innocent consumers" resulting from false OFAC alerts "disseminated broadly in conjunction with credit reports." J.A.66. Further, the universe of potential third-

party buyers was much broader than the "potential credit grantor[s]" covered by the stipulation, including employers, landlords, and existing credit grantors who routinely recheck their files. J.A.376, 381; Resp.App.5a.

The class is, by definition and by proof at trial, not a random compilation of persons in **TransUnion's** database. All class members *affirmatively sought out* their credit files from **TransUnion** during the sevenmonth period, making it likely that all class members were actively seeking credit from third parties. Few consumers request credit reports for no reason. **TransUnion** encourages consumers to request their ***31** credit files before making major purchases that would trigger third parties to request their information from **TransUnion**. J.A.552-53. And consumers may request a report after being surprised by a denial. J.A.552. Thus, the evidence at trial established that class members were likely to be close to making some major purchase or engaging in some other major financial transaction that would trigger a credit search.

TransUnion confuses the distinction between the class definition and class period. *See, e.g.,* Pet.Br.36. The class is defined as the 8,185 individuals who received the two mailings during the seven-month timeframe. The harm, however, consists not only of the receipt of those letters, but also of the dissemination of the false information during the entire 46-month period. The claims for failure to "follow reasonable procedures to assure maximum possible accuracy" under § 1681e(b) were pressed for the full 46 months authorized under § 1681p. Accordingly, the stipulation encompassing seven months is relevant to only about 15% of the actionable period.

With regard to publication, as noted, the jury could reasonably infer that, if **TransUnion** disseminated an OFAC alert to a subset of third parties regarding 25% of the class members within the seven months for which **TransUnion** had records, then over the course of 46 months, it is almost beyond dispute that all class members would have had their OFAC alert disseminated.

Unable to counter the implications of a 46-month limitations period, **TransUnion** continues to maintain in this Court that the period for asserting damages is only seven months. It fails even to cite FCRA's statute of limitations, § 1681p. Even more egregiously, **TransUnion** fails to disclose that it was rebuffed by the ***32** district court when it sought a jury instruction that "[t]he relevant time for determining whether **TransUnion** willfully violated FCRA is January 1, 2011through July 26, 2011." J.A.592. Class counsel countered that the identified seven-month period was only when the mailings to class members were sent, but "[t]hat doesn't mean that that's the only time that **TransUnion** could violate the law." J.A.592. The court rejected **TransUnion's** proposed instruction. J.A.592. **TransUnion** did not raise the district court's rejection of the jury instruction as an issue in the Ninth Circuit or in this Court. Thus, in addition to mischaracterizing the stipulation presented to the jury, **TransUnion** has waived any argument that the period for claiming injuries was only seven months.

II. DAMAGES FOR PERSONAL HARMS ALREADY SUFFERED ARE ACTIONABLE UNDER ARTICLE III.

A. *Clapper* Does Not Control.

Where a statutory violation gives rise to a "risk of real harm" to the interests that Congress sought to protect, *Spokeo* instructs that the concreteness requirement of standing is satisfied. 136 S.Ct. at 1549; *see also* *Strubel v. Comenity Bank,* 842 F.3d 181, 190 (2d Cir. 2016). Here the courts below properly concluded, Pet.App.20, 22, 31, J.A.286, that **TransUnion's** statutory violations created a "risk of real harm" to the interests Congress sought to protect through FCRA, namely, "curb[ing] the dissemination of false information." *Spokeo,* 136 S.Ct. at 1549-50.

TransUnion claims with no analysis that the governing test here is not *Spokeo's* "risk of real harm" test but the more onerous "certainly impending" test in ***33** *Clapper v. Amnesty International USA,* 568 U.S. 398 (2013). *See, e.g.,* Pet.Br.26. That argument is erroneous; indeed, the Solicitor General's (SG) amicus brief does not even cite *Clapper.*

Clapper instructs that "Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." 568 U.S. at 408. No such usurpation is presented when a claimant sues directly under a congressionally created cause of action for that individual. *See, e.g., Zivotofsky ex rel. Zivotofsky v. Clinton,* 566 U.S. 189, 196 (2012) (judicial obligation to enforce claims grounded in statutory rights).

In *Clapper,* the plaintiffs' theory of standing turned on the likelihood that a generalized surveillance law would harm them "at some point in the future." 568 U.S. at 401. *Clapper* was a facial challenge seeking future relief, not an as-applied lawsuit seeking damages for past harms. The *Clapper* plaintiffs' potential injury was contingent on "a highly attenuated chain of possibilities," including that the government would choose to surveil certain individuals, that it would use the challenged surveillance law to do so, and that the plaintiffs would be parties to the intercepted communications. *Id.* at 410. Moreover, the case did not involve a congressional enactment to protect the interests claimed by the plaintiffs. *Clapper's* "certainly impending" standard is inextricably tied to the plaintiffs' demand for prospective injunctive relief where Congress identified no remedy for the specific plaintiffs, nor had the conduct that might have caused injury even begun.

In contrast, *Spokeo's* "risk of real harm" standard is the proper test here. *See* Pet.App. 19-20. **TransUnion's** violation of its obligations to consumers under FCRA ***34** had already occurred at the time of the lawsuit. The jury could conclude not only that all 8,185 class members had been harmed, but that they bore the "real risk" of being harmed because of erroneous information identifying them as OFAC criminals-information that existed for the very purpose of being disseminated to third parties at a moment's notice. These class members were awarded retrospective damages created and defined by Congress for a realized harm-not prospective equitable relief. Accordingly, *Spokeo,* not *Clapper,* provides the correct test. *See, e.g., Trichell v. Midland Credit Mgmt., Inc.,* 964 F.3d 990, 1011 n.2 (11th Cir. 2020) (Martin, J., concurring in part and dissenting in part) (noting that *Clapper* was not applied in *Thole v. U.S. Bank N.A.,* 140 S.Ct. 1615 (2020), involving cause of action under ERISA); *Kamal v. J. Crew Grp., Inc.,* 918 F.3d 102, 113 n.4 (3d Cir. 2019) (declining to apply *Clapper* where Congress has created a cause of action); *Macy v. GC Servs. L.P.,* 897 F.3d 747, 759-60 (6th Cir. 2018) (distinguishing *Clapper* as applicable to future injury only); *Spokeo III,* 867 F.3d at 1117-18 (*Clapper* was "beside the point" where the challenged conduct had already occurred).

More generally, this Court has never held that a plaintiff seeking retrospective damages as opposed to prospective equitable relief lacks Article III standing. *See Spokeo,* 136 S.Ct. at 1552 (Thomas, J., concurring). To be sure, this Court has turned away damagesseeking plaintiffs who failed to satisfy the "zone-of-interests" test. *See, e.g., Holmes v. Sees. Investor Prot. Corp.,* 503 U.S. 258, 286-90 (1992) (Scalia, J., concurring in the judgment). However, such cases do not involve Article III at all, but address only whether the plaintiff "has a cause of action under the statute." ***35** *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 572 U.S. 118, 128 (2014); *see also Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,* 459 U.S. 519, 529 (1983).

B. FCRA Statutory Damages Were Appropriate Because TransUnion's Misconduct Was Willful.

The jury verdict rested on three independent statutory grounds under FCRA (§§ 168 le(b), 168 lg(a)(1), and 1681g(c)(2)), each of which separately justified the verdict. J.A.690-91. The statute is clear that the focus under § 1681g(a)(1) and § 1681g(c)(2) is entirely on **TransUnion's** conduct. For these claims, Ramirez is identically situated to all class members, a fact that **TransUnion** does not contest. This class's uniformityall were falsely labeled OFAC-designated criminalsstands in sharp contrast to the class in *Spokeo,* which had nothing in common with the lead plaintiff except being listed on Spokeo's website. *See* 136 S.Ct. at

1544. While *Spokeo* turned on the standing of the lead plaintiff alone, *id.* at 1547 n.6, here no challenge is raised to the standing or recovery of Ramirez.

TransUnion's two-envelope argument disregards the fact that Congress clearly specified the obligations of credit reporting agencies, and regardless of the number of envelopes, its file disclosures to the class were not clear and accurate, as § 1681g requires. The record here reflects the wisdom of Congress's requirements. All class members affirmatively requested a disclosure of their credit file. *See* J.A.92, 294, 607, 614. **TransUnion's** initial mailing nowhere reflected that the consumer had an OFAC alert, and thus the summary of rights included was rendered irrelevant because there was nothing to dispute.

***36** The second mailing only added to the confusion, telling consumers "as a courtesy" that their name was "considered a potential match" to an entry in OFAC's database. J.A.92. It failed to mention that this "courtesy" notice was in fact part of the recipient's credit file and omitted the statutorily-mandated summary of rights-including the recipient's right to dispute and correct the OFAC alert. J.A.92-94. The second mailing, despite *Cortez* and Treasury Department warnings, J.A.66-67, still failed to inform consumers "clearly and accurately" as § 1681g(a) requires. Instead, the new mailing disguised the information as something other than credit file information that consumers had the right to dispute. This explains **TransUnion's** effort to deceive the Department as to the true contents of its communications. J.A.73.

Moreover, the jury found that **TransUnion's** violations were willful. It justifiably rejected **TransUnion's** strained characterization of the two mailings as a salutary, consumer-friendly strategy to promote clarity. *See* Pet.Br.18-19, 32-33. Indeed, **TransUnion** acknowledged at trial that its two-envelope approach was confusing, and was ultimately abandoned. *See infra.*

TransUnion's extraordinary admission that it could not stand behind a single OFAC alert means that every class member was subject to the precise harm that concerned Congress: the risk of being falsely labeled as someone who should be barred from commercial transactions. **TransUnion** had already internalized the reality that it was labeling innocent persons as outlaws. After *Cortez* it confirmed the inaccuracy of *each OFAC designation* by always blocking it when challenged, but always after the horse had left the barn. Pet.App.65; J.A.406-13. In ***37** mandating specific disclosures, Congress sought to provide consumers a meaningful way to protect their reputations, and to correct the false reporting experienced by all class members. **TransUnion's** statutory violations caused the precise harm that Congress envisioned. [10]

In *Frank v. Gaos,* 139 S.Ct. 1041 (2019), the Court found Article III standing problematic where Congress had not expressed a judgment that the plaintiffs' alleged harm-Google's disclosure of their anonymized search terms to website operators-constituted a statutory injury. The Court followed the standing argument propounded by the SG, which contrasted the statutory scheme at issue in *Gaos* with that in FCRA, where § 1681n(a) "conveyed Congress's judgment that a statutory violation with respect to particular persons ... constituted an injury sufficient to justify a suit." No. 17-961, Supp. Br. of United States ***38** statutory and punitive damages. (Emphasis added.) As the SG brief noted, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is ... instructive and important." Supp. Br.10 (quoting *Spokeo,* 136 S.Ct. at 1549); *see also* SGBr.24.

Finally, by creating a system of presumed statutory damages from $100 to $1,000, Congress sought to provide a remedy to consumers for willful misconduct, even where actual damages are difficult to prove. Repeatedly, **TransUnion** asserts that the class suffered no actual damages. But this ignores this Court's recognition of the longstanding common law practice of allowing "an award of presumed damages for a nonmonetary harm that cannot easily be quantified ...." *Memphis Cmty. Sch. Dist. v. Stachura,* 477 U.S. 299, 311 n.14 (1986) (citing tortious denial of the franchise as "so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss"); *see also* *Carey v. Piphus,* 435 U.S. 247, 261-62 (1978) (common law allows recovery for proven harm, even if the damages are difficult to quantify).

Thus, statutory damages fill the role of presumed actual damages at common law and, under FCRA, are available only under the willfulness provisions of § 168 1n. The determination of the amount of statutory damages turns on the severity of **TransUnion's** conduct and not on the specific and difficult-to-quantify damages incurred by any individual. This is confirmed by the language of § 1681n(a)(1)(a), which uses the disjunctive "or" to distinguish between actual damages to a consumer and the statutory range of $100 to $1,000, which corresponds to the severity of the conduct at issue. *See* ***39** *Beaudry v. TeleCheck Servs., Inc.,* 579 F.3d 702, 705 (6th Cir. 2009) (describing statutory damages as an *"alternative* form of relief").

The statutory range addresses **TransUnion's** improper conduct toward every class member, and the jury reached its award on that basis. **TransUnion** tried the case on that basis and waived any objection to the jury instructions. Pet.App.72-73.

C. Article III Is Satisfied Where Private Retrospective Rights Are Asserted.

This Court's recent cases have addressed "standing" in the contexts of both public and private rights, a merging that has caused confusion in the courts below and "that needs fixing." *Muransky v. Godiva Chocolatier, Inc.,* 979 F.3d 917, 973 (11th Cir. 2020) (Jordan, J., dissenting); *accord, e.g., Bryant v. Compass Grp. USA, Inc.,* 958 F.3d 617, 624 (7th Cir. 2020) (Wood, J.) (distinguishing between public and private rights); *Huff v. TeleCheck Servs., Inc.,* 923 F.3d 458, 469 (6th Cir. 2019) (Sutton, J.) (same).

All cases denying standing based on insufficient injury have done so in the public rights context, not where suit is brought by a private individual against a private defendant to enforce a private right granted by Congress. For a statutorily-created private right, the Court's "contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement." *Spokeo,* 136 S.Ct. at 1552 (Thomas, J., concurring). Such a private right is "a legal right-one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Id.* at 1553 (quoting *Tenn. Elec. Power Co. v. TVA,* 306 U.S. 118, 137-38 (1939)); *see also* ***40** *Thole,* 140 S.Ct. at 1622-23 (Thomas, J., concurring); *Frank,* 139 S.Ct. at 1047 (Thomas, J., dissenting); *Springer v. Cleveland Clinic Emp. HealthPlan Total Care,* 900 F.3d 284, 290 (6th Cir. 2018) (Thapar, J., concurring).

Whatever the boundaries on prospective private claims based on public rights, this case does not implicate any public rights and is not the case for that definition. Where public injury is claimed, the plaintiff "must demonstrate that the violation of that public right has caused him a concrete, individual harm distinct from the general population." *Spokeo,* 136 S.Ct. at 1553 (Thomas, J., concurring). Distinguishing public from private rights "provide[s] a theoretically satisfying way to make sense of the Court's approach to statutory standing." William Baude, *Standing in the Shadow of Congress,* 2016 Sup. Ct. Rev. 197, 198 (2017).

Here the class falls squarely within the category of persons for whom Congress created a statutory private remedy and who are in turn asserting claims for retrospective harms under that statutory protection. That alone sufficed for Article III standing at the outset of litigation, and statutory recovery then became a matter of fact-finding at trial.

III. JURISDICTION CANNOT TURN ON TRIAL OUTCOMES.

In addition to the foregoing, **TransUnion's** approach to Article III is flawed because it makes jurisdiction turn on what actually happens at trial, thereby leading to anomalous consequences for finality and preclusion.

Only rarely is this Court presented with a class action that proceeded to ajury trial. With a trial, great deference is due the jury's factual determinations on ***41** "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401 (1971); *see also Dimick v. Schiedt,* 293 U.S. 474, 486 (1935)

("curtailment" of jury trial rights "should be scrutinized with the utmost care"). Appellate courts may overturn a jury finding only "when the record lacks 'substantial evidence'-that is, evidence sufficient to permit a reasonable jury to reach the verdict it did." *Biestek v. Berryhill,* 139 S.Ct. 1148, 1159 (2019) (Gorsuch, J., dissenting); *see id.* at 1154 ("the threshold for such evidentiary sufficiency is not high").

TransUnion invites this Court to scrutinize jury findings *not* to examine the verdict but instead to determine Article III standing. This stands the trial inquiry on its head. *See, e.g., Brownback v. King,* No. 19-546, 2021 WL 726222, at *5 (U.S. Feb. 25, 2021) (subject matter jurisdiction requires a plaintiff to "plausibly allege all jurisdictional elements"); *Lexmark,* 572 U.S. at 128 (distinguishing Article III standing from "whether [the plaintiff] has a cause of action under the statute."). This Court has condemned socalled "drive-by jurisdictional rulings" that conflate merits and jurisdictional questions, and lead to confused procedural and res judicata outcomes. *See, e.g., Arbaugh v. Y&H Corp.,* 546 U.S. 500, 511 (2006) (criticizing opinions that "have been less than meticulous" on "the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy"); *Huff,* 923 F.3d at 462-63 (same).

Subject-matter jurisdiction must "be established as a threshold matter," and thus "[j]urisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." ***42** *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 89, 94 (1998) (quoting *Bell v. Hood,* 327 U.S. 678, 682 (1946)). "[T]he failure of a cause of action does not automatically produce a failure of jurisdiction." *Id.* at 91. "A plaintiff properly invokes [federal question] jurisdiction when she pleads a colorable claim 'arising under' the Constitution or laws of the United States." *Arbaugh,* 546 U.S. at 513.

This issue comes up routinely not only in federal question cases (as here) but also in diversity cases. *See, e.g., St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283, 288 (1938) ("unless law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith"); *see also, e.g., Dart Cherokee Basin Operating Co., LLC v. Owens,* 574 U.S. 81, 87 (2014). As Judge Posner has observed, "[i]f a plaintiff merely fails to *prove* injury, his failure goes to damages ... rather than to jurisdiction. Otherwise the consequence of a failure to prove ... injury would ... be ... a dismissal on jurisdictional grounds that might allow the plaintiff to start the suit over again." *ACLU of Ill. v. City of St. Charles,* 794 F.2d 265, 269 (7th Cir. 1986). **TransUnion** ignores the confusion that would follow from having jurisdiction turn on proof at trial.

IV. TRANSUNION'S TYPICALITY ARGUMENT HAS NO SUPPORT.

TransUnion contends that class representative Ramirez is "as atypical as it gets" because "the vast majority of the class (>75%) never had a credit report containing Name Screen information disseminated to a potential creditor" and because other class members did not share his "distinctly unpleasant experiences." Pet.Br.43, 47. **TransUnion** invites this Court to invent a rule that neither "an atypically strong plaintiff" nor "an atypically weak plaintiff" can serve as a class ***43** representative, Pet.Br.44, or more colorfully, that "a home-run plaintiff" cannot represent "a class of single[s] hitters." Pet.Br.45. This argument is both legally flawed and unsupported by the facts.

No court has ever adopted **TransUnion's** "Goldilocks" approach to typicality-that a class representative cannot be too strong or too weak but must be "just right." Typicality serves as a guarantee that the class representative has "the same interest and suffer[s] the same injury as the class members." *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 156 (1982) (internal quotation marks omitted). That common interest is preserved if the claims of absent class members are "fairly encompassed by the named plaintiffs' claims." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 349 (2011).

Courts have repeatedly echoed these principles. *See, e.g.,* *Postawko v. Mo. Dep't of Corrs.,* 910 F.3d 1030, 1039 (8th Cir. 2018) (typicality "is fairly easily met so long as other class members have claims similar to the named plaintiff"); *In re Nat'l Football League Players Concussion Injury Litig.,* 821 F.3d 410, 428 (3d Cir. 2016) (class representatives "need not share identical claims" and can have "varying fact patterns" (internal quotation marks omitted)), *cert. denied,* 146 S.Ct. 607 (2016); *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.,* 222 F.3d 52, 59-60 (2d Cir. 2000) (class representative typical unless "subject to unique defenses"). Typicality is manifestly *not* a vehicle for defendants to exclude plaintiffs with strong or sympathetic facts. *See, e.g.,* *Marcus v. BMW of N. Am., LLC,* 687 F.3d 583, 599 (3d Cir. 2012) (finding typicality where class representative's strong facts may have put him "in a better position than other potential class members").

***44** Under **TransUnion's** rule, for example, in a class action lawsuit seeking refunds for defective tires, a class member who narrowly escaped an accident would be disqualified as a class representative, even if that person was seeking only a refund. Neither **TransUnion** nor its amici cite any case in which typicality was not satisfied because the plaintiff was "too strong." [11]

Even on **TransUnion's** own terms-that a class representative's facts must be no stronger than those of other class members-the *relevant* facts regarding Ramirez are identical to those of the class as a whole. Here again, **TransUnion** ignores the trial record. The district court explained in detail why Ramirez was typical: he was "not seeking any actual damages for what happened at the Nissan Dealer" or having been denied credit, and "[Ramirez] would have the same claims even if he had never visited the Nissan Dealer or been denied credit." J.A.276. Instead, Ramirez's claims were "based on what was in-or more precisely, what was not in-the consumer file Trans Union disclosed to Plaintiff along with the separate letter." *Id.* Because "Plaintiff is seeking statutory damages and not actual damages, whether he was actually denied credit or received inferior credit terms because of **TransUnion's** name-only matching logic is not at issue." *Id.* Per the express text of Rule 23(a)(3), Ramirez's "claims ... are typical of the claims ... of the class ...."

***45** The Ninth Circuit similarly reasoned that "Ramirez's injuries ... arose 'from the same event or practice or course of conduct that [gave] rise to the claims of other class members and [his claims were] based on the same legal theory.' " Pet.App.39. This is the standard test for typicality across the circuits: "A plaintiffs claim is typical if it arises from the same event, practice, or course of conduct that gives rise to the claims of other class members and if his or her claims are based on the same legal theory." William B. Rubenstein, *Newberg on Class Actions* § 3:29 (5th ed. 2011 & supp. 2020). *With respect to the claims actually asserted and tried in this case,* Ramirez is *identical* to all other class members. **TransUnion** and its amici simply ignore this critical point.

Ultimately, **TransUnion's** arguments focus on trial tactics and choices, not on class certification concerns. The heart of **TransUnion's** argument is that it was prejudiced because *the jury* heard only Ramirez's testimony. Pet.Br.46. **TransUnion** could have called other class members who did not have Ramirez's particular facts, but chose not to. [12] Neither in its class certification nor merits discovery did **TransUnion** seek discovery relating to unnamed class members. And **TransUnion** never sought to bar Ramirez from testifying or to limit his testimony in any of its five motions *in limine,* or with trial objections that would have preserved the issue for appeal.

Instead, **TransUnion** made a calculated trial decision to focus on advocacy, not evidence, in an effort to ***46** persuade the jury that there was no harm to other class members. In summation, **TransUnion** argued: "You have seen no evidence that any [absent] class members were harmed ... [or] even faced any significant risk of harm or hardship." J.A.629-30. **TransUnion** cannot credibly argue that it was denied the chance to show that Ramirez was unique. Its counsel made exactly that point in argument, but they also made the strategic choice not to call any class members themselves.

Nor can **TransUnion** complain about the jury's award of undifferentiated damages to the class. **TransUnion's** proposed jury verdict form aggregated the three FCRA damages claims as to the entire class. Pet.App.72-73. Even when specifically invited by the district court to propose a verdict form that allowed the jury to differentiate statutory damages awards within the class,

TransUnion failed to object to the composite verdict form. Pet.App.73. **TransUnion's** strategy was obvious: As the district court explained, **TransUnion** wanted to "argue that everybody gets a hundred," betting that an undifferentiated verdict form would result in a lower damages award for the class. Resp.App.15a. Because **TransUnion** elected not to object to the verdict form, it waived any objection to this issue. [13] Neither Article III nor Rule 23 offers a clean slate for a trial tactic that went awry.

Nor is there any merit to **TransUnion's** suggestion, Pet.Br.46, that an entirely separate typicality rule should apply in the context of statutory damages. ***47** Nothing in Rule 23, the Advisory Committee Notes, or the case law supports such an approach. Statutory damages turn on the severity of the defendant's conduct, not on the facts of any particular plaintiff. Upon proper motions, courts have used their ordinary powers of trial management to address potential prejudice-not Rule 23. *See, e.g., Dreher v. Experian Info. Sols.,* 2014 WL 2800766, *3-5 (E.D.V.A. June 19, 2014) (holding that statutory damages awards hinge on defendant's conduct, and prohibiting class representative from testifying about his "horrible angst" to avoid confusing the jury); *Ashby v. Farmers Ins. Co. of Or.,* 592 F.Supp.2d 1307, 1318 (D. Or. 2008) (instructing jury to award statutory damages based on FCRA protections rather than individualized harm). By contrast, as noted, **TransUnion** waived every opportunity to limit Ramirez's testimony (*e.g.,* as more prejudicial than probative under Federal Rule of Evidence 403), introduce testimony of other class members, or propose a protective jury instruction. And it did not seek review in this Court based on any evidentiary or jury instruction rulings by the district court.

More fundamentally, **TransUnion's** trial focus cannot be reconciled with Rule 23(c)(1)(A)'s mandate that the class certification decision be made "[a]t an early practicable time." **TransUnion's** approach to typicality would instead depend on what transpired at trial. For example, **TransUnion** would have no basis to complain had Ramirez not testified at trial, and Ramirez was under no obligation to testify simply by virtue of being a class representative. Likewise, **TransUnion** admittedly would have no typicality argument had the class called "one, two, three, [or] four" other class members. J.A.629. **TransUnion** and its amici cite no cases holding that typicality turns on the evidentiary ***48** and strategic choices made by the parties at trial. But even if there were such a rule, it would not help **TransUnion**: Its deliberate waiver of any argument concerning aggregated damages awards in essence amounted to a stipulation that Ramirez was just like all other class members.

TransUnion wrongfully complains that the statutory damages awarded were "near the maximum" because of the impact of Ramirez's sympathetic testimony. Pet.Br.49. That assertion is incorrect. The jury found **TransUnion** liable on *all three claims*. It awarded each class member statutory damages of $984.22, but that amount covered *three* statutory violations, each of which legally justified a separate award. *See Spokeo,* 136 S.Ct. at 1545 (statutory damages provide "$100 to $1,000 *per violation"*) (emphasis added). In effect, **TransUnion's** strategy of having one identical award per class member covering all three claims meant that the damages awarded for each claim were only $328.07, clearly at the low end of the range.

Finally, **TransUnion** argues that Ramirez was allegedly atypical because the "vast majority" of other class members-"(>75%)"-never had their OFAC hits shared with anyone. Pet.Br.47. But the same evidence on publication (discussed *supra*) that establishes Article III standing also shows that all class members were victims of publication; and any purported gap in the evidence is entirely the result of **TransUnion's** flawed recordkeeping.

The SG, while forcefully arguing that Article III was satisfied, raises typicality concerns. But unlike **TransUnion** and its amici, the SG recognizes the serious waiver issues in the case and argues for a remand rather than a reversal so that the court of ***49** appeals can analyze the record on waiver. SGBr.32-34. But the SG misconstrues both class action law and the extensive evidentiary record.

First, like **TransUnion's** argument, the SG's typicality test would turn on the evidence actually presented at trial. *See* SGBr.27 ("[T]he named plaintiff testified to injuries that were unique."). Indeed, the SG essentially admits that she is making an evidentiary argument, noting that concerns about a strong plaintiff can be addressed by "limit[ing a plaintiffs] evidence and

arguments." SGBr.32. Like **TransUnion**, the SG cites no support for its argument that typicality should be determined based on plaintiffs trial evidence, or that Rule 23, rather than Rule 16 or evidentiary rules, should serve to manage trial presentation.

Second, like **TransUnion**, the SG fails to recognize-notwithstanding the findings of both courts below-that *for purposes of the claims actually pursued at trial,* Ramirez's situation is identical to that of other class members.

Third, although the SG purports to rely on three treatises, none of them even arguably supports her premise that typicality is designed to protect *defendants* against impressive or sympathetic plaintiffs. Indeed, those treatises flatly refute the SG's specific arguments. [14]

***50** In the end, **TransUnion** is stuck with its trial strategies. It cannot use the very trial it approved to argue that Article III and typicality were not satisfied.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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Appendix not available.

Footnotes

1 Pub. L. No. 107-56, 115 Stat. 272.

2 J.A. is Joint Appendix; Pet.App. is the Appendix to the Petition for Certiorari; Resp.App. is Respondent's Appendix. Briefs are identified as Br. with the party name.

3 Ramirez's testimony covered only 29 pages of the 956-page transcript, or just over 3%. Dist.Ct.Dkt.292 at 138-68; *see* J.A.328-48. **TransUnion** chose not to call other class members to show that Ramirez's experience was unusual.

4 Credit reports using **TransUnion**-provided data continued to state that consumers were an unqualified "match[]" to the SDN list. J.A.83.

5 Congress well understood the close proximity to the common law: FCRA preempts "any action ... in the nature of defamation" absent "malice or willful intent to injure such consumer." § 1681h(e). It would be untenable for Congress to have the Article I power to abrogate traditional common law remedies (and thereby protect a national industry from a patchwork of state laws), but be precluded by Article III from prescribing a corresponding remedy in federal court.

6 *See* U.S. Dep't of Treasury, Office of Foreign Assets Control, *Sanctions Programs and Information,* https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information (last visited Feb. 26, 2021).

7 U.S. Dep't of Treasury, Office of Foreign Assets Control, *Specially Designated Nationals and Blocked Persons List (SDN) Human Readable Lists,* https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists (last visited Feb. 26, 2021).

8 The Court need not decide whether, under § 1681e(b), thirdparty publication is necessary or must simply be a material risk because: (1) the evidence permitted the jury to infer that thirdparty publication occurred with respect to all class members, *see* J.A.50, 104, 162, 175, 354-55, 545, and (2) the jury's verdicts under § 1681g(a)(1) and § 1681g(c)(2), neither of which requires publication, are each sufficient to sustain the district court's judgment. And, contrary to **TransUnion's** contention, Pet.Br.5 n.1, it cannot be seriously disputed that the statutory definition of "consumer report" does not require third-party publication. *See* *Cortez,* 617 F.3d at 707 (quoting statutory definition of "consumer report" to encompass " *'any* written, oral, or other communication' ").

9 **TransUnion's** desk-drawer simile parallels the Ninth Circuit dissent's reliance on *Owner-Operator Independent Drivers Ass'n, Inc. v. United States Department of Transportation,* 879 F.3d 339 (D.C. Cir. 2018). In both scenarios, there is no chance that the underlying information will ever be published to anyone. *See* Pet.App.27-28 (refuting the dissent's reliance on *Owner-Operator*).

10 (Nov. 30, 2018). Under § 1681n, a credit reporting agency that willfully fails to comply with any requirement imposed by the subchapter "with respect to any consumer is liable *to that consumer"* for specified 10 Although **TransUnion's** disregard of *Cortez* and the Treasury Department's warnings undergirded the jury's willfulness finding, **TransUnion's** numerous amici *all* fail to cite or even mention *Cortez* or the Treasury Department's warnings. Moreover, the amici all ignore the facts that not a single OFAC match since 2002 was true; that every class member was falsely associated with the OFAC list; and that **TransUnion** cannot account for where and when the false information was disseminated. In addition, amici warn that the decision below, if not reversed, will force *innocent* defendants to *settle,* wreaking havoc on the business community. *See, e.g.,* PBSCBr.7; Home DepotBr.14. But the conduct here was anything but innocent, and the case did not settle but went to trial. Amici have submitted cut-and-paste briefing that ignores this case.

11 Home Depot's amicus brief, at 8-10, characterizes the argument as a due process right to a fair trial. Its cases are inapposite, but in any event, **TransUnion** did not preserve a due process argument in its Question Presented and or in the courts below.

12 *See, e.g.,* *In re Modafinil Antitr. Litig.,* 837 F.3d 238, 256 n.17 (3d Cir. 2016) (noting that "Defendants never asked for discovery from unnamed class members" and citing authority authorizing such discovery).

13 Contrary to the SG's contention, SGBr.33, the class expressly argued waiver in the Ninth Circuit. *See* J.A.801, 816-817 (noting **TransUnion's** failure to object to Ramirez's testimony and to the verdict form).

14 *See* 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4.16 (17th ed. 2020) (typicality requirement "is not exacting"); Rubenstein, *supra,* § 3:43 ("If different damage amounts defeated typicality, it would be almost impossible to maintain a class suit since ... class members have [often] suffered varying amounts of injury."); 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1764 (3d ed. 1998 & supp. 2020) (citing, *inter alia,* FCRA case for proposition that a "[r]epresentative's claims-frequently have been deemed typical ... in cases alleging ... [a] statutory violation").

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