No. 20-297

In the Supreme Court of the United States

TRANS UNION LLC,

Petitioner,

v.

SERGIO L. RAMIREZ,

Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DARYL JOSEFFER
JONATHAN D. URICK
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062

KAREN R. HARNED
ELIZABETH G. MILITO
NFIB Small Business Legal Center
555 12th Street, NW
Washington, DC 20004

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
CARMEN N. LONGORIA-GREEN
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.[1]

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. To fulfill its role as the voice for small

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. All parties have filed blanket consents to the filing of *amicus* briefs.

business, the NFIB Small Business Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

Amici have a significant interest in the Article III standing and class certification issues presented in this case because their members face putative class action lawsuits, including lawsuits alleging violations of, and seeking to recover statutory damages under, the Fair Credit Reporting Act (FCRA) and other statutes.

Article III requires plaintiffs to allege concrete, or "real," harm—bare statutory violations do not satisfy Article III's injury-in-fact requirement. *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016). But many of the members of the class certified by the district court in this case cannot satisfy that standard for either of the two categories of claims at issue. That problem alone should have barred certification.

The district court compounded that error by certifying a class despite stark differences between the circumstances of the named plaintiff and those of the remaining members of the putative class, notwithstanding Rule 23's requirement that a named plaintiff be typical of the class he seeks to represent.

Despite these glaring problems, the Ninth Circuit affirmed the certification order and upheld most of the class-wide damages award. If that decision stands, other class-action plaintiffs' lawyers will be encouraged to follow its roadmap to transform what should be an individualized dispute between a uniquely sympathetic plaintiff and a defendant into a multimillion-dollar class action. And businesses will find them-

selves mired in massive lawsuits over alleged technical statutory violations that have not caused actual harm to the vast majority of the class.

Amici therefore have a strong interest in this case and in reversal of the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article III limits federal courts' power to grant relief, requiring that a plaintiff prove that he or she suffered concrete harm or certainly impending harm. And the Federal Rules of Civil Procedure, including Rule 23, cannot be used to circumvent that constitutional limit.

But the district court in this case certified a class that included large numbers of uninjured persons, holding that the standing of absent class members is irrelevant, so long as the named plaintiff himself has standing. The Ninth Circuit recognized that ruling was erroneous; this Court should likewise take the opportunity to hold squarely that absent class members must have Article III standing before they may recover damages.

The divided Ninth Circuit panel then committed two fundamental errors in proceeding to endorse the certification of the class and the class-wide damages award. The panel (1) found that all absent class members had Article III standing based on flimsy rationales that fail to comply with this Court's precedents; and (2) brushed aside the fact that the experiences and injuries of the named plaintiff were atypical in violation of Rule 23(a)(3)—which had predictably allowed that plaintiff's idiosyncratic situation to become the focus at trial.

The named plaintiff here, Sergio Ramirez, suffered difficulty in obtaining an auto loan and embarrassment in front of his wife and father-in-law because an automobile dealer received a credit report saying that Ramirez's name matched a name on the Treasury Department's Office of Foreign Asset Control (OFAC) Database. Ramirez also canceled a planned vacation out of concern about the alert.

But Ramirez did not seek to represent a class of individuals who shared those experiences—or even anything remotely similar. Instead, he sought and obtained certification of a much broader nationwide damages class including every individual who received a letter from TransUnion informing them that they were potential OFAC matches. Yet it was undisputed that, for the overwhelming majority of those individuals, the information was not disseminated to any third party.

Ramirez and the class members also claimed that TransUnion violated the FCRA's disclosure requirements because it informed class members of the potential OFAC match in a separate letter from their credit report and the statutorily mandated summary-of-rights form that accompanies it. Pet. App. 14-15. But there was no evidence of any real-world harm to any class member from the receipt of the disclosure in that format.

Neither of the statutory violations alleged in this case—the bare receipt of disclosures in two envelopes rather than one or the mere existence of inaccurate information that was *not disseminated*—suffices to demonstrate a concrete injury sufficient to confer standing.

This Court has recognized that "'Article III standing requires a concrete injury even in the context of a statutory violation.'" *Thole* v. *U.S. Bank N.A.*, 140 S. Ct. 1615, 1620-21 (2020) (quoting *Spokeo*, 136 S. Ct. at 1549). Whether in the context of an alleged statutory violation or not, the injury must be "concrete"—that is, it must be "real" rather than "abstract," *Spokeo*, 136 S. Ct. at 1548—and the injury must either have already occurred or must be "certainly impending," *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

The Ninth Circuit's standing analysis fell far short of satisfying these standards. It stated that the mailings were "inherently shocking and confusing" (Pet. App. 32 n.10) and upheld standing based on speculation about "material risk of harm," resting on the theoretical possibility of dissemination of inaccurate information (Pet. App. 26-27). But for the overwhelming majority of class members, that theory was completely unsupported—indeed, it was contradicted—by the evidence.

These Article III deficiencies should have precluded certification of any class and any class-wide damages award, because Article III forbids a federal court from awarding relief to persons without standing and, in conjunction with Rule 23, does not permit a federal court to certify a class that includes more than a trivial number of persons who lack standing.

In addition, the class certification order failed to satisfy Rule 23's requirement of typicality. The Ninth Circuit panel majority dismissed the unique nature of Ramirez's injuries as irrelevant, saying all that mattered was "the class-wide theory of liability" and dismissing Ramirez's unique injuries as at most "slightly

more severe than some class members' injuries." Pet. App. 39-40.

But as Judge McKeown explained in dissent, "[t]he only asserted uniform classwide experience was the existence of TransUnion's internal terrorist watch list alerts and the mailing of separate letters—faint allegations that strain Rule 23's typicality requirements." Pet. App. 52 (McKeown, J., concurring in part and dissenting in part). Accordingly, "[a]bsent class members simply rode Ramirez's coattails, while his stark atypicality as the lone class representative ensured that he would become the focus of the litigation." *Ibid.* (quotation marks omitted). And the trial here in fact bore out these very concerns that Rule 23(a)(3)'s typicality requirement is designed to guard against. See *id.* at 53.

The decision below thus reflects an approach to Article III standing and Rule 23 that, if left uncorrected by this Court, will carry significant consequences for businesses and the judicial system. The hydraulic settlement pressure that class actions place on defendants—pushing them to settle claims regardless of the merits—will encourage enterprising lawyers to try to turn every dispute, no matter how individualized, into a statutory-damages class action. An affirmance would embolden such lawyers to seek out atypical clients in order to leverage their uniquely sympathetic experiences into a multimillion-dollar damages award or settlement—all based on technical statutory violations and all without having to show that the class they represent has suffered concrete injuries that the members could have brought in court themselves.

ARGUMENT

I. Absent Class Members Must Demonstrate Article III Standing.

A. Class Members Must Establish Standing Prior To Obtaining Relief From The Defendant.

As Chief Justice Roberts has explained, "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring). To provide clear direction to the lower courts, the Court should hold expressly in this case that absent class members must demonstrate—prior to the entry of class-wide relief—that they have Article III standing.

That conclusion follows from two basic principles.

First, "when there are multiple plaintiffs" in a lawsuit, each plaintiff "must have Article III standing" to pursue "a money judgment" against the defendant in his or her own name. *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). While *Town of Chester* involved a litigant who joined the lawsuit as an intervenor, the same principle necessarily applies in Rule 23 class actions as well.

Second, as this Court recognized over four decades ago, the class action is merely a procedural device, "ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980); see also *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins.*, 559 U.S. 393, 408 (2010) (plurality opinion) (a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged").

The class certification rule must be applied in a manner consistent with the Rules Enabling Act, which states that procedural rules cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); see also *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("[N]o reading of [Rule 23] can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.") (quotation marks omitted); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with * * * the Rules Enabling Act").[2]

Awarding damages to class members who lack standing impermissibly "enlarge[s]" absent class members' rights—and correspondingly "abridge[s]" defendants' rights—by permitting those uninjured absent class members to recover statutory damages on claims that they could not pursue as individuals because of their lack of concrete harm.

Thus, whether in a class action or not, a plaintiff who has not suffered a concrete injury has no right to relief, because standing is "an indispensable part of [a] plaintiff's case." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

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[2] Similarly, due process precludes use of the class action mechanism to alter the substantive rights of the parties to the litigation, and Rule 23's requirements must be interpreted to avoid that result. See *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 367 (2011); see also *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers) (noting the due process concerns raised when "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action").

B. Federal Courts Must Take Account Of The Standing Requirement At The Class Certification Stage.

The Ninth Circuit recognized, correctly, "that each member of a class certified under Rule 23 must satisfy the bare minimum of Article III standing at the final judgment stage of a class action in order to recover monetary damages in federal court." Pet. App. 17. But deferring consideration of Article III standing until "final judgment" is too late, because if "many claims of the absent class members" are "not justiciable," then "whether absent class members can establish standing" should be "exceedingly relevant to the class certification analysis required by" Rule 23. *Cordoba* v. *DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019). This Court should take this opportunity to explain that a rigorous assessment of standing must take place at the class certification stage.

First, the court should not certify a proposed class when it is clear from the nature of the claims, the proposed class definition, and the undisputed evidence at the class certification stage that the proposed damages class includes more than a trivial number of individuals who would lack standing regardless of the evidence adduced at trial (or on summary judgment). After all, "[c]lass certification is the thing that gives an Article III court the power to 'render dispositive judgments' affecting unnamed class members." *Flecha* v. *Medicredit, Inc.*, 946 F.3d 762, 770 (5th Cir. 2020) (Oldham, J., concurring) (quoting *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995)). It is the event that turns absent members of a potential class into parties who can invoke and are subject to the court's judicial power. *Cf. Devlin* v. *Scardelletti*, 536 U.S. 1,

10-11 (2002) (holding that absent class members are considered parties for purposes of appeal because they are bound by the judgment).

Accordingly, before certifying a class, and thereby exercising jurisdiction over the merits of the claims of absent class members, the district court must ensure that it has a basis to do so. If it is apparent at the class certification stage that the proposed class includes more than a handful of uninjured members who could not pursue their claims in federal court on an individual basis, those same individuals should not be permitted to assert their claims through the expedient of the class device.[3]

That approach makes practical sense as well. Enforcing Article III's requirements at the class certification stage ensures that parties do not needlessly expend time and money—and defendants are not faced with unwarranted settlement pressure—litigating a certified class action through trial only for a court to conclude at final judgment that significant portions of the certified class lack standing.

Second, sometimes it will not be clear at the class certification stage whether the class as defined contains uninjured members, because resolving that question will require further factual development concerning whether absent class members suffered the necessary concrete injury. Under such circumstances, Rule 23(b)(3)'s predominance requirement demands

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[3] If the number of uninjured class members is *de minimis*, the constitutional concern is lessened at the class certification stage because those uninjured individuals can more likely be weeded out prior to final judgment—assuming that the identification process is consistent with defendants' due process rights.

that the proponent of a damages class demonstrate either: (a) that standing can be demonstrated on a classwide basis; or (b) if the injury issue requires individualized determinations, that there is a manageable plan to identify and weed out uninjured class members prior to final judgment. That plan must be consistent with defendants' rights under due process and the Rules Enabling Act to challenge each class member's standing—and courts must ensure that such an individualized issue does not preclude certification on the ground that common issues do not predominate over individualized ones.[4]

Thus, for example, the Eleventh Circuit recently vacated certification of a damages class for lack of predominance when "each plaintiff will likely have to provide some individualized proof that they have standing," creating a key "individualized issue." *Cordoba*, 942 F.3d at 1277. As the Eleventh Circuit explained, district courts "must consider under Rule 23(b)(3) before certification whether the individualized issue of standing will predominate over the common issues in the case." *Ibid.* Or, as the First Circuit explained in a case where there were "apparently thousands" of putative class members "who in fact suffered no injury":

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[4] This Court explained in *Dukes* that, in light of the Rules Enabling Act, "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims." *Dukes*, 564 U.S. at 367 (citations omitted). Nothing in *Dukes* limits its logic to "*statutory* defenses"; the same rationale applies equally to constitutional defenses, including the defense that a claim must be dismissed because a class member lacks Article III standing.

"The need to identify those individuals will predominate and render an adjudication unmanageable absent * * * [a] mechanism that can manageably remove uninjured persons from the class in a manner that protects the parties' rights." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53-54 (1st Cir. 2018).

These cases demonstrate that, where injury in fact is an individualized issue, plaintiffs will rarely be able to satisfy Rule 23(b)(3) predominance. Without a "reliable means of proving classwide injury in fact," it will often be the case that "[c]ommon questions of fact cannot predominate." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013).

II. The Class Certified Here Contained Numerous Individuals Who Lack Article III Standing.

A. Article III Standing Requires Concrete Harm Or A Substantial Risk Of Certainly Impending Future Harm Resulting From The Alleged Statutory Violation.

The "'irreducible constitutional minimum'" of Article III standing is that "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547 (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

A plaintiff must "'[f]irst and foremost'" demonstrate that he has suffered "an 'injury in fact'" that is both "particularized" and "concrete." *Spokeo*, 136 S. Ct. at 1547-48 (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998)). This constitutional

obligation does not change when a plaintiff asserts a violation of a statute. "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo*, 136 S. Ct. at 1549. The Court's "decision in *Spokeo* abrogated" the view of some lower courts "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).

Three considerations are critical in applying the *Spokeo* standard.

The first two considerations aid in determining whether an "intangible" actual or threatened injury resulting from a statutory violation can satisfy Article III's concrete-injury standard. *Spokeo*, 136 S. Ct. at 1549.

First, "it is instructive to consider whether an alleged intangible harm has a *close* relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549 (emphasis added). Thus, the analysis compares the claimed "intangible harm" with the "harm" that was required to maintain an action at common law. 136 S. Ct. at 1549; see also *Muransky* v. *Godiva Chocolatier, Inc.*, 979 F.3d 917, 926 (11th Cir. 2020) (*en banc*) (Grant, J.) ("The fit between a new statute and a pedigreed common-law cause of action need not be perfect, but we are called to consider at a minimum whether the harms match up between the two.").

Second, if Congress tries to "identify intangible harms that meet minimum Article III requirements,"

Congress's judgment is "instructive and important." *Spokeo*, 136 S. Ct. at 1549. But it is not conclusive; the mere creation of a "cause of action does not affect the Article III standing analysis." *Thole*, 140 S. Ct. at 1620. The Court cautioned that "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 136 S. Ct. at 1549. In explaining Congress's ability to elevate a *de facto* harm to the status of injury in fact, this Court cited (*ibid.*) "Justice Kennedy's concurrence" in *Lujan*, which in turn explained that "Congress must at the very least *identify the injury* it seeks to vindicate and *relate the injury to the class of persons entitled to bring suit*." 504 U.S. at 580 (Kennedy, J., concurring) (emphasis added).

Third, although *Spokeo* explained that a "*de facto*," "real," and "not abstract" injury does not have to exist prior to the filing of a lawsuit, Article III requires (at minimum) a substantial "risk" that "real harm" will occur in the future. *Spokeo*, 136 S. Ct. at 1548-49 (quotation marks omitted).

But some lower courts have erroneously concluded that the injury-in-fact standard can be satisfied by remote risks that harm will actually occur. For instance, the Ninth Circuit's analysis here diluted the concrete-injury requirement to the point where a tenuous and speculative possibility of harm—as opposed to a significant risk of certainly impending real-world consequences stemming from the statutory violation—was sufficient to establish standing. See pages 16-23, *infra* (explaining why the Ninth Circuit erred for both of the

claims at issue); see also *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 637-38 (3d Cir. 2017) (interpreting *Spokeo* to hold that plaintiffs need not show a "material risk of harm" stemming from a statutory violation to establish Article III standing).

That speculative approach to harm cannot be squared with *Spokeo*'s holding. This Court did not write on an empty slate in *Spokeo* when it referred to the role of "risk" of anticipated harm in an injury-in-fact analysis. As the Court had already explained in the very case *Spokeo* cited, the risk of future harm must be "substantial" and the harm "certainly impending" (*Clapper*, 568 U.S. at 414 n.5) in order to be sufficiently concrete to support Article III standing. See also *Thole*, 140 S. Ct. at 1622 ("substantially increased the risk"); *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2565 (2019) ("'a substantial risk that the harm will occur'") (quoting *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 158 (2014)). And plaintiffs seeking to demonstrate that they face a significant risk of harm may not rely on an "attenuated chain of inferences" or "speculation about 'the unfettered choices made by independent actors not before the court.'" *Clapper*, 568 U.S. at 414 n.5 (quoting *Lujan*, 504 U.S. at 562)).

In short, *Clapper* and this Court's subsequent decisions create a "high standard for the risk-of-harm analysis, and a robust judicial role in assessing that risk." *Muransky*, 979 F.3d at 927.

B. The Vast Majority Of Class Members Lack Standing To Bring Either Of The Claims At Issue Here.

This case involves two sets of alleged violations of FCRA's requirements. First, Ramirez asserted that TransUnion violated FCRA disclosure requirements, 15 U.S.C. § 1681g(a)(1) and § 1681g(c)(2), because it informed consumers of the potential OFAC match in a separate letter from the mailing containing their consumer file and summary of rights (the "disclosure claims"). Second, Ramirez contended that TransUnion failed to maintain "reasonable procedures to assure maximum possible accuracy" of consumer reports, in violation of 15 U.S.C. § 1681e(b) (the "reasonable procedures claim").

1. The Disclosure Claims.

With respect to the disclosure claims, the Ninth Circuit determined that TransUnion's practices "exposed all class members to a material risk of harm to their concrete informational interests" and described the mailings as "inherently shocking and confusing." Pet. App. 31-32 & n.10. But that attempted analogy to the types of informational injuries that have satisfied Article III was wildly off the mark. Moreover, there is no congressional judgment that mere receipt of two mailings rather than one rises to the level of a concrete injury.

1. The "informational injury" cases cited in *Spokeo* involved plaintiffs' *inability* to obtain information that the government was required by statute to disclose—and "real world" harm to the plaintiffs resulting from the lack of the information. See 136 S. Ct. at 1549-50 (citing *Fed. Election Comm'n* v. *Akins*, 524

U.S. 11 (1998); *Public Citizen* v. *Dep't of Justice*, 491 U.S. 440 (1989)).

For instance, the *Akins* Court stated that "the information [not provided] would help [plaintiffs] (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election." 524 U.S. at 21. Because of these effects, the Court explained, the plaintiffs' "injury consequently seems concrete and particular." *Ibid.*; see also *id.* at 24-25 (the denial of information necessary to cast an informed vote is a deprivation "directly related to voting, the most basic of political rights," and therefore "sufficiently concrete and specific"). And in *Public Citizen*, the deprivation was of information the interest groups needed to scrutinize the "workings" of government in order to "participate more effectively in the judicial selection process." 491 U.S. at 449.

As the Fourth Circuit explained in rejecting an informational injury theory for an alleged violation of Section 1681g(a)'s disclosure requirements, "it would be an end-run around the qualifications for constitutional standing if any nebulous frustration resulting from a statutory violation would suffice as an informational injury." *Dreher* v. *Experian Info. Sols., Inc.*, 856 F.3d 337, 346 (4th Cir. 2017). Instead, "a constitutionally cognizable informational injury requires that a person lack access to information to which he is legally entitled *and* that the denial of that information

creates a 'real' harm with an adverse effect." *Id.* at 345.[5]

Alleging only that information was not presented in the proper *format*—in two mailings instead of one—is different in kind from those informational injury cases. First, it is undisputed that all members of the class *did* receive the information to which they were entitled—they simply received it in two, close-in-time mailings instead of one. Second, Ramirez made no showing that, by receiving this information through two mailings, rather than one, any class members were actually confused, constructively denied access to information, or suffered real-world, adverse effects because of the manner in which the information was conveyed. And in the absence of such evidence, common sense suggests that no such real-world adverse effects occurred because of the manner in which the information was presented.

2. There also is no congressional "judgment" (*Spokeo*, 136 S. Ct. at 1549) that each and every failure to provide information in the precise format mandated by the FCRA constitutes a cognizable "concrete" harm, even when not accompanied by any "real" injury. To be sure, Congress created a private cause of

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[5] See also, *e.g.*, *Spuhler* v. *State Collection Serv., Inc.*, 983 F.3d 282, 286 (7th Cir. 2020) ("The failure to provide information that is required under the FDCPA inflicts a concrete injury only if it impairs a plaintiff's ability to use the withheld information for a substantive purpose that the statute envisioned.") (quotation marks omitted); *Groshek* v. *Time Warner Cable, Inc.*, 865 F.3d 884, 887 (7th Cir. 2017) (plaintiff lacked a cognizable injury after potential employer provided him with a FCRA disclosure form with extraneous information because he alleged no "concrete harm or appreciable risk of harm" resulting from his receipt of the additional information).

action for *every* violation of the FCRA (see 15 U.S.C. § 1681*o*(a)); and it subsequently authorized statutory damages for *every* willful violation (see *id.* § 1681n(a)(1)). But this Court explained in *Spokeo* that "Congress' role * * * does not mean that a plaintiff *automatically* satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." 136 S. Ct. at 1549; accord *Thole*, 140 S. Ct. at 1620. There is no evidence whatsoever that Congress focused on the question and determined that every violation of the statute's disclosure provisions would necessarily inflict concrete harm—and that is what *Spokeo* requires.

To the contrary, it is hard to imagine a more obvious example of a "bare procedural violation, divorced from any concrete harm" than the receipt of information in two mailings rather than one. *Spokeo*, 136 S. Ct. at 1549.

The Ninth Circuit noted that Congress enacted FCRA's disclosure provisions "to protect consumers' interests in having access to the information in their credit reports upon request and understanding how to correct inaccurate information in their credit reports upon receipt." Pet. App. 30.

But the analysis could not stop there. Indeed, this Court specifically cautioned in *Spokeo* that some violations of the FCRA could "result in no harm," even if they involve alleged conduct that violates the law *and* Congress' purpose in enacting that law. 136 S. Ct. at 1550; see also*, e.g.*, *Hancock* v. *Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016) (explaining that, under *Spokeo*, "some statutory violations could 'result in

no harm,' even if they involved producing information in a way that violated the law").

The Ninth Circuit's resort to broad statements of the statute's purpose was especially inadequate because there was no evidence that the particular violations alleged in this case interfered with Congress' purpose. Ramirez and the class members failed to demonstrate that the two-mailing format hindered their ability to monitor and correct information in their credit files. Indeed, TransUnion submitted evidence showing that the two-mailing format actually encouraged class members to contact TransUnion regarding OFAC alerts. See Pet. Br. 32-33. Finally, most of the class members did not have any false information about them disseminated to others—further underscoring that any shortcoming in disclosure did not inflict real world harm.

2. The Reasonable Procedures Claim.

The Ninth Circuit also erred in concluding that all of the class members had Article III standing to recover for TransUnion's alleged failure to maintain "reasonable procedures to assure maximum possible accuracy" of consumer reports. 15 U.S.C. § 1681e(b).

As this Court has explained, Congress, in enacting the reasonable procedures provision of the FCRA, "plainly sought to curb the *dissemination* of false information by adopting procedures designed to decrease that risk." *Spokeo*, 136 S. Ct. at 1550 (emphasis added). The Ninth Circuit should therefore have considered whether there was a "substantial risk" that the allegedly inaccurate information would be disseminated and whether such dissemination would cause

"certainly impending" injury. *Clapper*, 568 U.S. at 410.

Had the lower court performed that analysis, it would have been plain that these standards were not met. Notably, Ramirez stipulated that for over three-quarters of the class, the potential OFAC match was never published or disseminated during the class period to anyone but the individual involved. Pet. App. 39. That stipulation alone conclusively demonstrates that the vast majority of class members could not demonstrate a "degree of risk sufficient to meet the concreteness requirement" of Article III. *Spokeo*, 136 S. Ct. at 1550.

The Ninth Circuit expressed concern that TransUnion makes class members' credit reports "available to potential creditors or employers at a moment's notice," and it sought to compare the claim to the alleged violation of the FCRA's "reasonable procedures" provision at issue in *Spokeo*. Pet. App. 25. But the comparison misses the mark. Even assuming that the plaintiff in *Spokeo* adequately alleged an injury, the purportedly inaccurate information there was already published on the Internet and therefore available to third parties. *Robins* v. *Spokeo, Inc.*, 867 F.3d 1108, 1117 (9th Cir. 2017). Indeed, the Ninth Circuit on remand expressly declined "to consider whether a plaintiff would allege a concrete harm if he alleged only that a materially inaccurate report about him was *prepared* but never *published*." *Id.* at 1116 n.3.

The Ninth Circuit overlooked this critical distinction and did not meaningfully consider the key question: The actual likelihood that any class member's credit report would be shared with others. Pet. App. 26-27. The court simply speculated that the possibility

that the credit report *could* be shared was sufficient—speculation which squarely conflicts with *Clapper*'s requirement that future injury be "certainly impending." 568 U.S. at 409.

By largely disregarding the absence of dissemination to third parties, the Ninth Circuit unmoored the claim from its closest common-law analogues: defamation and the false light privacy tort. As TransUnion's brief explains (at 38), those claims require dissemination to the public of false or damaging information. The D.C. Circuit made a similar observation in concluding that truck drivers lacked standing to sue based on the assertion that a government database contained inaccurate information about them without any showing that the information had been shared with anyone. *Owner-Operator Indep. Drivers Ass'n* v. *U.S. Dep't of Transp.*, 879 F.3d 339, 344-45 (D.C. Cir. 2018) (Tatel, J.). "[T]he mere existence of inaccurate information, absent dissemination," does not "amount[] to concrete injury." *Ibid*; accord Pet. App. 54 (McKeown, J., dissenting). In other words, without proof of dissemination, the relationship between the claims here and any potential common-law analogues is remote rather than "close," as *Spokeo* requires. 136 S. Ct. at 1549.

Moreover, because the class was defined simply as anyone who received a letter from TransUnion notifying them of a potential OFAC match, the class includes individuals who have already contacted TransUnion and had the potential match removed from their record. If the match was never disseminated to third parties and there is no longer any possibility of such dissemination in the future, those in-

dividuals would lack a concrete injury for the additional reason that a plaintiff does not have standing to sue if "he faced a risk of harm that never materialized and has since disappeared." *Nicklaw* v. *CitiMortgage, Inc.*, 855 F.3d 1265, 1267 (11th Cir. 2017) (W. Pryor, J., respecting the denial of rehearing *en banc*).[6]

III. The Class Should Never Have Been Certified Because It Fails Rule 23's Typicality Requirement.

This Court has repeatedly recognized that abuse of the class-action device imposes deeply unfair burdens on both absent class members and defendants, and the Court has therefore held that Rule 23 must be construed in a manner that protects against these abuses. *E.g.*, *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 33 (2013); *Dukes*, 564 U.S. at 363; *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 629 (1997). Because class actions are an "'exception to the usual rule'" that cases are litigated individually, it is essential that courts apply a "rigorous analysis" to the requirements governing class certification before a lawsuit is approved for class treatment. *Dukes*, 564 U.S. at 348, 351 (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979)).

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[6] The "certainly impending" future injury required by *Clapper* and *Spokeo* need not necessarily manifest prior to or during the pendency of the litigation in order to confer Article III standing. But when, as here, the risk of future harm has in fact disappeared altogether for some class members prior to trial, that provides a further basis to conclude that those class members necessarily have failed at trial to satisfy their burden of demonstrating the Article III injury in fact needed to recover damages. See *Lujan*, 504 U.S. at 561.

The Ninth Circuit's decision represents a stark departure from these principles. It allows a wholly idiosyncratic named plaintiff to serve as the standard bearer for a much broader class of individuals that do not share his injury—rendering the typicality requirement of Rule 23(a)(3) ineffectual.

1. Rule 23(a)(3) requires that "claims or defenses of the representative parties [be] typical of the claims or defenses of the class."

This Court has instructed that typicality requires the class representative to "possess the same interest and suffer the *same injury* as the class members." *Dukes*, 564 U.S. at 348-49 (emphasis added; quotation marks omitted). That requirement, like the other requirements of Rule 23(a), "ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Id.* at 349.

While the Court in *Dukes* decided the case on commonality grounds, it noted that both commonality and typicality require "the existence of a class of persons who have suffered *the same injury* as that individual [named plaintiff], such that the individual's claim and the class claims will share common questions of law *and fact* and that the individual's claim will be *typical* of the class claims." 564 U.S. at 353 (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 157-58 (1982)) (emphasis added).

Consistent with the text of the Rule and this Court's precedents, lower courts, including the Ninth Circuit in prior cases, have recognized that the "test of typicality" includes "'whether other members have *the same or similar injury*'" as the named plaintiff. *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (quoting *Hanon* v. *Dataproducts Corp.*, 976

F.2d 497, 508 (9th Cir. 1992)) (emphasis added); see also, *e.g.*, *Doe* v. *Chao*, 306 F.3d 170, 184 (4th Cir. 2002), aff'd on other grounds, 540 U.S. 614 (2004).

Thus, in *Doe*, the Fourth Circuit held that the plaintiffs' decision "to pursue only the $1,000 minimum statutory damages" did not eliminate their "grave typicality problems" because none of the named plaintiffs could show actual damages, and therefore, "[a]ssuming that the claims of unnamed class members include a number of claims for which there is some evidence of adverse effect and actual damages, the putative class representatives have not suffered injuries similar to the injuries suffered by the other class members." 306 F.3d at 184 (quotation marks and alterations omitted). Similarly, in *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, class certification was inappropriate when at trial the defendant was "forced to defend against a fictional composite" "perfect plaintiff" that was "pieced together for litigation" from the circumstances of various absent class members and bore little connection to the claims of the named plaintiffs. 155 F.3d 331, 344-45 (4th Cir. 1998) (Wilkinson, J.).

A number of courts have held that typicality is not satisfied when the named plaintiff "is subject to unique defenses which threaten to become the focus of the litigation." *Hanon*, 976 F.2d at 508 (quoting *Gary Plastic Packaging Corp.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990), abrogated in part on other grounds by *Microsoft Corp.* v. *Baker*, 137 S. Ct. 1702 (2017)); accord *Beck* v. *Maximus, Inc.*, 457 F.3d 291, 300-01 (3d Cir. 2006).

This case presents the other side of the same coin, in which the named plaintiff and his counsel affirmatively made the plaintiff's unique circumstances the

"focus of the litigation." In either scenario, the named plaintiff's situation does not resemble the absent class members, and the adjudication of the class claims impermissibly focuses on the unusual circumstances of the named plaintiff rather than the circumstances common to the class as a whole.

2. The Ninth Circuit acknowledged these principles. But the panel majority held that it was enough to satisfy typicality that the named plaintiff's claims fit within a "class-wide theory of liability." Pet. App. 40.

That holding was wrong. A common legal theory is a necessary but not sufficient prerequisite for satisfying typicality. The Ninth Circuit's contrary holding defies this Court's instruction that typicality requires absent class members to have suffered the "same or similar injury" as the named plaintiff. *Dukes*, 564 U.S. at 348-49.

Indeed, this case underscores the important role that typicality plays in the required "rigorous analysis" of class certification. *Id.* at 351. If the *factual* circumstances of the named plaintiff are not representative of those of the class members, then the defendant is unfairly prejudiced by being forced to defend against an unusually sympathetic plaintiff at trial, even if the legal claims appear similar.

The trial here bore out that very concern, and the Ninth Circuit thus ignored reality in insisting that "the unique aspects of Ramirez's claims" did not "threaten to become the focus of the litigation." Pet. App. 40 (quotation marks and alterations omitted).

As the dissent explained, the trial centered on "'the story of Mr. Ramirez'" and his experiences at the car dealership, while "[t]he story of the absent class

members, in contrast, went largely untold." Pet. App. 53 (McKeown, J.) (quoting class counsel's opening argument at trial). Indeed, "the hallmark of the trial was the absence of evidence about absent class members, or any evidence that they were in the same boat as Ramirez." *Ibid.*

The result was that "[t]he jury was left to assume that the absent class members suffered the same injury" (*ibid.*), notwithstanding the uniquely troubling nature of Ramirez's injury. As a result, "TransUnion now owes 8,185 class members tens of millions of dollars based on the unfortunate and unrepresentative experience of a single plaintiff" (*id.* at 58)—an outcome that violates Rule 23 and would have been avoided with proper application of Rule 23 at the certification stage.

Indeed, cases of extreme atypicality like this one present the very problem the Court warned against in *Dukes*: They effectively deprive the defendant of its right under due process and the Rules Enabling Act to "litigate its * * * defenses to individual claims" of the class members. *Dukes*, 564 U.S. at 367. The trial's singular focus on Ramirez's unique experiences obscured that the vast majority of class members suffered no or at most marginal actual harm—which would have featured prominently in any individual trial of one of those class member's claims. Proper application of the typicality requirement ensures that the result does not change just because the claims are brought in a class action.

Moreover, the Ninth Circuit's approach to typicality invites problems far beyond this case. The statute invoked by the plaintiff class here—the Fair Credit Reporting Act—is only one of many federal statutes that authorize both statutory damages and punitive

damages. Many other statutes authorize minimum statutory damages for each violation, which "can add up quickly in a class action." *Barr* v. *Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2345 (2020) (plurality op.) (discussing the Telephone Consumer Protection Act); see also, *e.g.*, *Stillmock* v. *Weis Markets, Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring specially) (noting that "the exponential expansion of statutory damages through the aggressive use of the class action device is a real jobs killer that Congress has not sanctioned"). And class-action plaintiffs' lawyers will seek out—and often find—an especially sympathetic named plaintiff to serve as the representative plaintiff who will agree to recover damages authorized by statute for the broadest possible class—even when the vast majority or even all of the absent class members were not harmed at all, or were marginally harmed in a way that is (at most) superficially similar to the harm suffered by the named plaintiff.

This case amply demonstrates that combining minimum statutory damages with the class-action mechanism can create potential liability wildly disproportionate to the actual harm allegedly caused by the defendant's conduct. As the Second Circuit has noted, "the potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class, may raise due process issues." *Parker* v. *Time Warner Ent. Co.*, 331 F.3d 13, 22 (2d Cir. 2003). "Those issues arise from the effects of combining a statutory scheme that imposes minimum statutory damages awards on a per-consumer basis—usually in order to encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws—with the class action mechanism that aggregates many claims." *Ibid.* But these due process concerns can be

ameliorated if federal courts rigorously scrutinize whether Rule 23(a)(3)'s typicality requirement has been met.

IV. An Impermissibly Lax Approach To Standing And Class Certification Harms Businesses And The Judicial System.

The Ninth Circuit's approach to standing and Rule 23 gives enterprising class-action plaintiffs' lawyers a clear roadmap: Find an atypically sympathetic plaintiff to secure massive statutory damages awards on behalf of individuals who were unharmed or only minimally harmed. That inevitably will result in a flood of shakedown class actions. The consequences for businesses; their owners, customers, and employees; and the judicial system as a whole will be extraordinarily damaging and far-reaching.

Class-action litigation costs in the United States are huge. They totaled a staggering $2.64 billion in 2019, continuing a rising trend that started in 2015. See *2020 Carlton Fields Class Action Survey*, at 4 (2020), available at https://ClassActionSurvey.com.

Moreover, defendants in class actions already face tremendous pressure to capitulate to what Judge Friendly termed "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). This Court has long recognized the power of class-action lawsuits to induce settlement. As the Court explained over 40 years ago, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978); see also *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011) (noting "the

risk of 'in terrorem' settlements that class actions entail"); *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("[A] class action can result in 'potentially ruinous liability.'") (quoting Advisory Committee's Notes on Fed. R. Civ. P. 23).

It therefore is not surprising that businesses often yield to the hydraulic pressure generated by class certification to settle even meritless claims. Indeed, the pressures today are even greater than they were then. In 2019, companies reported settling 60.3 percent of class actions, and they settled an even higher 73 percent of class actions the year before. See *2020 Carlton Fields Class Action Survey*, *supra*, at 29.

The rare trial that occurred in this case only underscores why so many defendants choose to settle. The trial "compounded" the "certification error," "leading to a jury verdict of nearly $60 million based on the unenviable experience of a single, atypical class representative." Pet. App. 51-52 (McKeown, J.). If allowed to stand, that result will only ratchet up the coercive settlement pressure of future class actions. Settlement discussions will focus on the jury appeal of the named plaintiff's story rather than the experience of a proposed class as a whole—potentially forcing businesses to settle cases that are largely meritless in order to avoid the risks that a jury's passions will be inflamed through unjustified use of the class device.

In addition, class-action plaintiffs' lawyers will be emboldened to seek out unusually situated plaintiffs rather than legitimate class representatives and use them as the standard bearer for a class seeking millions or even billions of dollars in statutory damages. The allure of a class-wide payday, however unwarranted, is too great: "What makes these statutory

damages class actions so attractive to plaintiffs' lawyers is simple mathematics: these suits multiply a minimum $100 statutory award (and potentially a maximum $1,000 award) by the number of individuals in a nationwide or statewide class." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 (2009).

Defending and settling these lawsuits designed to extract lucrative settlements would require businesses to expend enormous resources. But the harmful consequences of this increase in costs would not be limited to businesses. Rather, the vast majority of the expenses likely would be passed along to innocent customers and employees in the form of higher prices and lower wages and benefits.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

DARYL JOSEFFER
JONATHAN D. URICK
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae *the Chamber of Commerce of the United States of America*

KAREN R. HARNED
ELIZABETH G. MILITO
NFIB Small Business Legal Center
555 12th Street, NW
Washington, DC 20004
(202) 314-2061

Counsel for Amicus Curiae *National Federation of Independent Business*

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
CARMEN N. LONGORIA-GREEN
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

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