SUPREME COURT
OF THE UNITED STATES

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TRANSUNION LLC,)

Petitioner,)

v.) No. 20-297

SERGIO L. RAMIREZ,)

Respondent.)

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Washington, D.C.

Tuesday, March 30, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

PAUL D. CLEMENT, ESQUIRE, Washington, D.C.;
on behalf of the Petitioner.
NICOLE F. REAVES, Assistant to the Solicitor General,
Department of Justice, Washington, D.C.;
for the United States, as amicus curiae,
supporting neither party.
SAMUEL ISSACHAROFF, ESQUIRE, New York, New York;
on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 20-297, TransUnion versus Ramirez.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

The class certified here suffers from two fatal defects: the absence of class member standing and typicality. Each and every member of this class stands to collect thousands of dollars in damages, but the first inkling that many of them will have that they were injured will be receiving a check in the mail.

The only thing the class members have in common is that they were sent their entire credit file in two envelopes rather than one and received a summary of rights only in the first mailing.

But simply receiving all the requisite information in a non-compliant format is not enough to inflict a concrete injury. And

Respondent fares no better on its claim that TransUnion failed to use reasonable procedures in preparing his credit report. Fully 75 percent of the class never had a credit report, which is distinct from the credit file sent home upon request prepared or disseminated during the class period.

The Ninth Circuit reasoned that there was a material risk that a report could be prepared and disseminated. But there is no evidence that the risk ever materialized for over 6,000 class members, and yet they all stand to receive a sizable check.

To be sure, Ramirez himself suffered significant injuries, but that just highlights the equally fatal typicality problem here. Ramirez had a credit report prepared and disseminated to a car dealer, was hindered in obtaining credit, humiliated in front of family members, and canceled a planned vacation. That makes him entirely atypical and unrepresentative of the average class member, who simply received her credit file in two envelopes in the privacy of her own home.

Ramirez suggests that only his legal

claims need to be the same. But typicality means something different from commonality, and the typicality requirement precludes a class representative with wholly atypical injuries. A contrary rule would run counter to the basic promise that a class action is representative litigation and would violate the Rules Enabling Act to boot.

CHIEF JUSTICE ROBERTS: Mr. Clement, could each of the class members have sued TransUnion before TransUnion removed the OFAC designation from their reports?

MR. CLEMENT: I -- I don't think so, Mr. Chief Justice. I mean, obviously, if this was a suit that was filed while the policy was still in place, we would probably be governed by the certainly impending standard of the Clapper case, and I think, since the evidence in this case suggests that the average class member only had a 25 percent chance that their report would be disseminated, I think that probably means that they did not have a sufficiently impending injury.

So I don't think it would matter if this were brought prospectively.

CHIEF JUSTICE ROBERTS: Well, doesn't that seem a little odd? I mean, they're injured by having their names mistakenly or misleadingly on a report that might be disseminated. They just want to take that off to avoid that risk, whether it's 25 percent or 98 percent. I don't know why they don't have sufficient standing to at least clear that up.

Maybe their damages aren't terribly significant if, you know, no one else has seen the report, but it's kind of a surprising thing that somebody with misleading information about someone, that -- the whole point is they hope somebody asks for it because that's when they get paid, and you can't do anything about it.

MR. CLEMENT: Well, Mr. Chief Justice, what you can do about it and what the statute specifically envisions to deal with this situation is you can ask for a copy of your credit file before your credit report is ever disseminated to a third party.

And the way the statute envisions this works is you get your credit file, you see the information that you believe is inaccurate or misleading, and then there's a process you can

initiate to get it cleared up in -- before it ever gets disseminated to a third party.

CHIEF JUSTICE ROBERTS: Well, but they've got no reason --

MR. CLEMENT: So there is --

CHIEF JUSTICE ROBERTS: -- they've got no reason to ask for a credit report. You know, they've -- they've never bounced a check in their life. They've got perfect credit. Why would they even do that?

MR. CLEMENT: Well, if they have no reason to think they have any problem, then I'm not sure how they would even know that they were suffering a -- a risk of injury in a practical sense.

But, in all events, whatever the rule is prospectively, I think, when you're talking about a retrospective action like this and a challenge to a policy that has been discontinued, then I don't think a risk really matters.

I mean, if the risk didn't materialize, at that point, I -- I think that's a cause to sort of break out the champagne, not to break out a lawsuit.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

Mr. Clement, if one of Petitioner's clients contracted to get the same OFAC in for -- designation information in a credit report and did not receive that for -- in any reports over a period of time, would that client have standing to sue Petitioner?

MR. CLEMENT: Justice Thomas, I think that that client would have standing to sue because I think contracts are different for the following reason: Just by virtue of having a contract action, I think that means that you gave consideration in exchange for the promise.

So I think, when you think about a breach-of-contract case, you can think of the injury-in-fact being supplied essentially by the consideration that you gave up in exchange for the promise that people would do whatever they contracted to do even if that was relatively trivial.

JUSTICE THOMAS: Well, I understand

that that's different from a private right that's in a statute, but I don't see that that difference or distinction -- the distinction between those makes any difference. They're both private rights.

MR. CLEMENT: Well, I disagree with you on that, Justice Thomas. I do think this involves a classic public rights regime, and I think you can see that from the structure of the statute. This is not a situation where the statute gives the plaintiff a very specific private right to enforce a very specific promise, as in the contract.

If you look at the enforcement provision, 1681n and o give the consumer a cause of action for any violation of this subchapter with respect to the consumer.

And there's 100 different requirements that are imposed on the regulated parties by the subchapter, which is the classic structure for a public rights regulatory regime, and that becomes unmistakable if you look at 1681s, which is the public enforcement provision of the statute, which equally gives the FTC the right to bring an action for any violation of a

requirement of the subchapter, and they can even do that in front of the FTC itself, which, of course, is the hallmark of a public right. So I think this is a public rights regime.

JUSTICE THOMAS: Well, I -- the -- I'll let that go for a minute. I -- you know, maybe with the FTC you're right. I don't necessarily agree with you, as I suggested in Spokeo on the other part.

But let's go -- what would be your definition of your test for typicality?

MR. CLEMENT: So my -- I would start by saying that for typicality, the named plaintiff for the class representative has to have injuries and experience that are typical of the class. It's not just a matter of having the same claims. I think, if you just laid down that rule of law, you would go a long way to sort of solving the problem.

JUSTICE THOMAS: What would that leave for commonality and predominance then?

MR. CLEMENT: Oh, I think they have definitely -- definitely have a role to play, but they're independent roles. I can have a common issue in a case, but I can still be a

very atypical representative to litigate the common issue or even if that common issue predominates. So I think all three of those provisions work together in a complementary fashion.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: I'm interested in Justice Thomas's last question, thinking of typicality.

I mean, all of these plaintiffs, in respect to every one of them in the class, the -- they -- they didn't in the first letter get all the information, they didn't get about the terrorist related. And they said that the company didn't follow reasonable procedures. And they said in the second letter they didn't get the summary of rights.

So they were all typical in that respect. But Ramirez also went out and tried to buy something and got into a lot of trouble, it was all complicated, dah-dah-dah.

So, when the trial took place, would it have been possible for the lawyer for the

company to have objected to the introduction of all that separate and special information about Ramirez on the ground that it had nothing to do, and was prejudicial, it had nothing to do with the typical injury suffered by the class?

MR. CLEMENT: So, Justice Breyer, I don't think that that would have been a proper objection to raise, and -- and -- and I think the reason is that, you know, particularly with respect to the reasonable procedures claim, what Ramirez would be testifying about is information that would be highly relevant in his own individual action.

And I think the Rules Enabling Act doesn't allow you to fundamentally change the rules of the road when the person is testifying in a class action versus an individualized action. And so I think the right way to handle this problem is to pick a class representative who is, in fact, typical.

JUSTICE BREYER: No, I know what you think is the right way. But I'm just wondering why, in a class action, where the individual who is the named plaintiff, say, suffers a head injury, and nobody else suffers a head injury,

and he wants to introduce that because it had something to do with the injury, you know, it's a relationship.

But -- but can't you object to that? Why not? You say, look, that -- that might have been okay in an individual action to bring that in, but this isn't that. This is a class action. Let's stick to what the class action harms were. Why can't you say that?

MR. CLEMENT: Well, I don't think that's the right way to do it, and you can't do it --

JUSTICE BREYER: Why?

MR. CLEMENT: -- in part because of the Rules Enabling Act. I don't think the evidence that comes in as to the named plaintiffs is supposed to be fundamentally different.

But, if you look at the Ninth Circuit brief that my friends on the other side filed, they specifically said they needed to put forth the experiences of Ramirez at the Nissan dealership in order to lay the foundation for all of their claims, the reasonable procedure claims and the disclosure claims.

JUSTICE BREYER: Thank you.
CHIEF JUSTICE ROBERTS: Justice Alito.
JUSTICE ALITO: The class members whose information was disclosed to third parties certainly had reason to worry about that, wouldn't you say?
MR. CLEMENT: Well, yes or no, Justice Alito. I don't mean to resist it, but I think given that, you know, we know that, you know, roughly 1500 people had their reports disseminated and nobody other than Ramirez complained, I -- I do think there are a lot of people in this class who had it disseminated and maybe the person on the other end took a quick look at the birth dates, saw that they were radically different, went ahead with the transaction, having no harm/no foul.
JUSTICE ALITO: Well, is there really no harm? Suppose someone gets this information, asks for the credit report, gets the information, and sees that the person has been flagged as someone whose name resembles the name of a person who's on this list. Doesn't that inflict some psychological injury on the person who gets that information?

MR. CLEMENT: I don't think so, Justice Alito. I mean, you know, I -- I read a report that -- that late Senator Kennedy ended up being on the No Fly List or some list associated with the No Fly List for secondary screening.

You know, I think he managed to get it cleaned up, and I'm sure it was a little bit of an inconvenience for him to be on the list. But the bare fact of knowing that you're on a list or share a name with somebody who's on a list, I -- I -- I don't know that that really is injury-in-fact. Of course, even if it is, that's only 25 percent of the class.

JUSTICE ALITO: All right. Let me shift to a different subject.

If we were to agree with you -- and this is an if -- that the district court should have certified only a narrower class, only those whose information was disclosed to third parties, can that be remedied simply by precluding recovery for those not in the class, or did that possibly overbroad certification hurt your client in some other way that can't be untangled?

MR. CLEMENT: I think it did hurt my client in ways that can't be untangled. I think it may have even prejudiced the plaintiff a little bit, given that the jury may have sort of thought about the size of the class in -- in -- in making the award. It's a little hard to completely unpack it.

JUSTICE ALITO: Well, how -- if -- how -- in what ways might it have hurt your client or did it hurt your client?

MR. CLEMENT: Well, the -- the -- the -- the jury did hear evidence that, you know, suggested that we did this to, you know, thousands of people, when, you know, that's actually not the case based on the premise of your -- of your question.

So I do think that's quite prejudicial to us. You know, there's also sort of a theoretical problem that I'm not sure that when a court proceeds on the assumption that it is exercising jurisdiction over all the absent class members, that you just sort of, you know, at the end just say, well, never mind, we'll just sort of fix that by sort of sticking this to the 25 percent.

I would also just add we don't think that Mr. Ramirez was typical even as to the 25 percent.

JUSTICE ALITO: All right. Thank you.

MR. CLEMENT: So we think that those are the typical -- yeah.

JUSTICE ALITO: Thank you. My time is up. Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

JUSTICE SOTOMAYOR: Counsel, I read Rule 23(a)(3) as requiring typical claims and defenses. Mr. Ramirez's claims were not subject to any unique defenses, and they were identical to every class member's claims. Everyone in the class was designated a potential match with someone else on the OFAC list because of the same unreasonable process, and everyone received the same two mailings in response to requests for their credit files.

Now you object to Mr. Ramirez's atypical harms or potential individual damages. But I don't see where Rule 23(a)(3) requires typical damages, number one, so how do you square your argument with the text of the rule?

But, number two, when you raised this issue before the district court, it suggested a verdict form that would let the jury award different statutory damages for class members who experienced different harms. That seemed like a very reasonable way to handle the situation. But TransUnion didn't ask for such a form. It didn't object to Mr. Ramirez's testimony or seek discovery from absent class members.

I -- I just see this as a trial error, not as an error in certifying the class, and the trial error was invited by you. So I -- not by you personally but by counsel below.

MR. CLEMENT: So, Justice Sotomayor, let me respond to both pieces of the question.

First of all, I think, textually, on Rule 23(a)(3), it requires the claims and defenses to be typical. I don't think it answers the question of whether that means that, with respect to the claim that needs to be typical --

JUSTICE SOTOMAYOR: Well, don't you --

MR. CLEMENT: -- you look at the various elements --

JUSTICE SOTOMAYOR: -- think that this is a typical claim? Meaning this is exactly what this law was intended to avoid. He's as typical a claimant as one could imagine with respect to the law at issue. This is exactly why the law was passed, to protect people from exactly this situation, the situation he faced.

MR. CLEMENT: With respect, I don't think his claim is typical of the claim of the average class member. I mean, I would liken it to if -- if my fingernail is broken, and I represent a people -- a class of people with broken fingernails, but my fingernail was broken in the process of having my hand mangled, I don't think I have a typical claim. I don't think I'm a typical class representative.

And I think you would -- you would say that textually by saying I just -- my claim is different. It's not typical. It may be the same legal claim, but it's not a typical one. And typicality asks for something more than commonality.

As to the trial error, with all due respect, I think, if you look at the -- we actually proposed a jury form that allowed the

jury to say that with respect to the statutory damages, you couldn't find that every member of the class was entitled to statutory damages.

We -- that, you know, it was -- it was Ramirez or no one or -- and -- and under our proposal, you can't say one -- you know, one or all. That was rejected. And throughout this case, the other side was the one saying that we can just get one number for the statutory damages award, and that's why individualized damages don't predominate.

So I don't think this was a trial error, with all due respect. And we certainly prepared -- proposed a case --

JUSTICE SOTOMAYOR: Thank you, counsel. I've run out of time.

MR. CLEMENT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan.

JUSTICE KAGAN: Mr. Clement, suppose that there's a carcinogen which, when it is in your drinking water, you have a 50 percent chance of getting cancer, and suppose Congress passes a law that everybody exposed to that carcinogen can sue and obtain statutory damages, and suppose that there's a class action of

people exposed to that carcinogen.

Does that satisfy Article III?

MR. CLEMENT: I think it probably would, Justice Kagan, but if this were a weird carcinogen that worked in such a way that, like, a year later, you could tell whether you were in the 50 percent risk or the 50 percent safe category, and then you sued for statutory damages retrospectively on behalf of the people who averted the risk, I think you might have a different result but certainly worth thinking --

JUSTICE KAGAN: Yeah, so that's interesting, Mr. Clement, because that takes us back to the question that you and the Chief Justice were talking about.

Now, in my hypothetical, unlike with the Chief Justice's question, you agree that retrospectively that there -- there is standing, right? So, if you -- if you just, you know -- you're -- you're within a five-year period, let's say, nobody knows who's going to get cancer, you're agreeing that everybody could be in that class action and that there would be standing, correct?

MR. CLEMENT: I -- I think so, Your

Honor. I mean, just to be clear, I think so because I think a 50 percent exposure to cancer, when you haven't figured out whether or not you are going to get it because of the exposure, I think that's an injury-in-fact under, you know, the common law. It would probably be the kind of thing that --

JUSTICE KAGAN: Okay. Well, now let's suppose --

MR. CLEMENT: -- someone would --

JUSTICE KAGAN: -- let's suppose that this cancer works so that you either get it or you don't in five years, and let's say that this suit is brought in the sixth year, still within the statute of limitations that Congress has prescribed, and it's still the same claim, the -- the same class. There are both people who have gotten it, and there are people who haven't gotten it.

Now I would have said that if you're willing to give me that everybody has standing within the five years, it should be that everybody has standing in the sixth year as well because you have standing if you suffered harm in the past.

And your concession is a concession that you have suffered harm in the past, isn't it?

MR. CLEMENT: No, I don't think so, Justice Kagan, but let me add one thing to the hypo to try to explain why I'm taking the position I'm taking. I'm assuming that the people who are suing in the sixth year, like, they didn't even really know about the exposure until they found out they were in the claim. That's this case. And those people, I think, don't get to recover. I mean, if -- if you only --

JUSTICE KAGAN: Even though they could have recovered in the fifth year, even though they didn't know, because Congress, you know, said that they should get to recover regardless of their state of knowledge?

MR. CLEMENT: But even in the process of filing the lawsuit during the five-year period, they essentially would know. And so I -- I -- I think, you know, if -- if you were sort of subject to a risk that you didn't even know about and the risk never materialized, at that point, I don't think you can bring a

retrospective action for damages.

JUSTICE KAGAN: I mean, it -- it seems as though it's a material risk of harm in the language that Spokeo used. No?

MR. CLEMENT: In your hypo, it might be, but that's in part because it's 50 percent and it's cancer. And I think, you know, I -- I don't want to go all Learned Hand on you, but I think you sort of think about both the risk and the consequences. And I think --

JUSTICE KAGAN: Thank you.

MR. CLEMENT: -- as it's here -- I'm sorry.

CHIEF JUSTICE ROBERTS: Justice -- Justice Gorsuch.

JUSTICE GORSUCH: Mr. Clement, why don't you go ahead and finish your answer. I'm -- I'd be curious.

MR. CLEMENT: Thank you, Justice Gorsuch. What I was just going to say is that, you know, here, you have a 25 percent risk based on the information in the -- in the record, and then the consequences of that for everybody other than Mr. Ramirez have not been anything like getting cancer. In fact, nobody else has

registered essentially any complaint about what happened to them and being denied credit.

JUSTICE GORSUCH: Is it -- is it that there's no material risk that these people faced, or is it that they didn't know about it? Which is the key to you, your argument in response to Justice Kagan?

MR. CLEMENT: I don't want to evade the question. I think it's the combination of the two. So I -- I -- but just to be clear, if you ask me did -- did people in this class suffer material risk, I would say no, not a material risk, because materiality has to take into account the consequences, and given that no one other than Mr. Ramirez suffered any -- any -- any consequences, I don't think that it's a material risk.

I -- I also think, if you're thinking that, you know, well, maybe it's not like the risk of injury so much as it is sort of a fright that you might have, like, at common law --

JUSTICE GORSUCH: Right.

MR. CLEMENT: -- for a mere battery or something like that, that requires knowledge.

JUSTICE GORSUCH: So -- okay. So your

-- so your argument as I understand it then is with respect to those in the -- the group that didn't -- that didn't have their information sent to third parties, that they need to have some knowledge of the information in order to have any material risk of injury. Is that -- is that a fair summary of what you're saying?

MR. CLEMENT: I think it is, Your Honor. The only thing I would add is I'm -- I'm thinking that -- you know, the other side is trying to argue that what makes the material risk an injury-in-fact here is at least in part the idea that it would kind of, you know, ruin your whole day, you would be obsessed about it and concerned about it. That requires some knowledge of it in order for you to suffer an injury-in-fact.

JUSTICE GORSUCH: In order to have emotional distress, you have to have knowledge of the thing that would cause the emotional distress?

MR. CLEMENT: Exactly. And I think you have to -- the other side, not me, with all due respect, has to have a theory as to how the material risk translates into an injury-in-fact,

unless you think that a material risk just standing alone is an injury-in-fact, and, if you think that, I think it's got to be a lot higher than 25 percent.

JUSTICE GORSUCH: Okay. And then, with respect to the 1800 who did have their information published, when I look at, you know, the common law defamation, publication was presumed to give rise to injury, the idea of, if something bad is said about you in public, these are the -- the common law would presume an injury. Why wouldn't the same hold true here?

MR. CLEMENT: Well, I think, Your Honor, the key thing is -- and, you know, I can try to quibble about whether it had to be defamatory per se or false, but, here, I don't think what is actually published is, in fact, false because, if you go to the OFAC website today and type in the Respondent's name, you will get a hit.

So what was communicated is this name is a potential match to somebody with the same first name and the last name --

JUSTICE GORSUCH: I -- I -- I --

MR. CLEMENT: -- on the OFAC list.

JUSTICE GORSUCH: -- I got it. My time's expired. At some point, though, if you get a chance, if you could assume that it's substantially false, then what? But I -- I'm afraid my -- my -- my time's expired.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Thank you, Chief Justice.

And good morning, Mr. Clement. To pick up on Justice Gorsuch and Justice Kagan's questions, let me make sure I understand the risk of harm.

As I read your brief, you said the risk of harm is likely -- risk of harm alone is likely not enough for damages as opposed to injunctive relief. At least that's how I read Footnote 4 of your brief.

In response to Justice Kagan and Justice Gorsuch, I think you were saying -- but tell me if I'm wrong -- that the risk of harm is still not enough for damages unless the risk of harm is itself a separate harm, in other words, the risk of harm is not cancer, in other words, you don't have the cancer, but the risk of harm

may create emotional injury.

Is that an accurate way to summarize what you're saying?

MR. CLEMENT: I think that's right, Your Honor. And I guess the only other thing I would add is I suppose there might be certain risks of harm that are so high that maybe you think that the material risk is itself an injury-in-fact even if it doesn't manifest itself in emotional harm or some other injury-in-fact, but I don't think that's 25 percent chance of a dissemination of a credit report.

JUSTICE KAVANAUGH: Even for damages claims?

MR. CLEMENT: Even for damages claims, but, as we said at the outset, I -- I do think the Footnote 4 point is very important, which is whatever your risk was ex-ante that might have been enough to get injunctive relief to stop a practice, if you're in the 75 percent that were fortunate and didn't actually suffer an injury-in-fact because the risk didn't materialize, I don't think you have injury-in-fact at that point.

JUSTICE KAVANAUGH: To pick up on Justice Alito and also Justice Gorsuch, if we agree with you on the six -- 6332 people but don't agree with you on the 1853 people, exactly what should we say in terms of what should happen on remand?

MR. CLEMENT: So I would say that what you should say on remand is that the -- that the courts below should decertify the class, because, remember, from the very beginning, we said the reason you can't have a class here is because the issue of injury is not common to the class. And so I think you'd essentially be vindicating the point.

And I think it's also worth recognizing that I think what you'd be saying about the 6,332 is not that they absolutely positively don't have injury. It's just you'd be saying, if they have any injury, they've got to come in and show it individually. And that just underscores that this class of 8,000-plus was wrong from the beginning for the reasons that we pointed out from the beginning.

JUSTICE KAVANAUGH: And then, in response to Justice Thomas, I think you're

saying that the problem here is that Congress is setting up, in essence, a shadow government of private attorneys general to enforce prohibitions on certain activities by certain entities, and that's an Article II/Article III problem, and your test is no harm/no foul.

But -- but how would you succinctly describe how we determine whether there is sufficient harm as a general matter, or can that be done in a -- in a general way?

MR. CLEMENT: I'm not sure that's capable of generalization. I just think, you know, you do have to have -- the best I can do would just be to repeat what I think is the gist of the Spokeo decision, which is you need injury-in-fact. Injury in the law won't do it.

And then the one thing I would add -- and I think this speaks particularly to people that are focused on the public rights/private rights distinction -- when you have a statute like the one at issue here or like the one at issue in Fohl, where the structure of the statute is to give certain individuals, whether they be consumers here or plan participants in Fohl a right, essentially, to enforce any

violation of the subchapter, that is a strong indication that Congress has not actually made the judgment that this is a very specific private right.

JUSTICE KAVANAUGH: Thank --

MR. CLEMENT: Instead, they basically --

JUSTICE KAVANAUGH: -- thank you, Mr. Clement.

MR. CLEMENT: Sure.

CHIEF JUSTICE ROBERTS: Justice Barrett.

JUSTICE BARRETT: Mr. Clement, I want to ask you a follow-on to Justice Kagan's hypothetical about the people who drink water exposed to a carcinogen, they're at 50 percent risk of cancer.

She asked you to distinguish between what would happen if they filed within the five-year period in which they would know whether the risk had materialized or outside the five-year period, say in the sixth year.

I want to know what would happen, say, if they filed in year two, but the litigation drags on and on and on and the case doesn't come

to its conclusion until year six.

So, if I understand your response to Justice Kagan, it would essentially mean that people had standing at the outset of the suit. But, if they were in the 50 percent that were home-free, they would lose their standing by the end?

I mean, that just seems like an odd way to think about it since we normally judge standing at the outset, and when something dissipates over the course of a suit, we think about it in terms of mootness, not that the injury isn't concrete. Or is this a merits determination that they didn't suffer damages? How do -- how do you think about that?

MR. CLEMENT: Well, I -- I think you probably would in your hypo, which is, you know, a little different from every other hypo I've gotten, I think mootness might be the right framing. And I also think you're probably right that at that point in the case, they would probably also lose because they wouldn't be able to sustain their cause of action at that point.

The only thing I would add, Your Honor, is, you know, this Court has made very

clear in cases like Lujan that you do have to maintain your standing at every stage of the case.

And so, you know, in -- in -- in your hypo, I think what happens is sort of the clock runs out on the injury. But, if the evidence that ultimately emerges at trial makes clear that, as to a discrete group of people, a risk absolutely positively did not materialize, I do think you could say at that point, based on the evidence in the record at that juncture, that they don't have standing.

JUSTICE BARRETT: Okay. Let me ask you about material risk of harm. So, as I read Spokeo, you know, and it cites Clapper after that language, it preserves, you know, the possibility of standing in a prospective suit where harm is imminent but hasn't yet happened.

And then, for slander per se, you know, there are some harms that were recognized at the common law, as we have discussed during this argument, that were presumed to cause harm because, even if you didn't have to prove that you lost a job over it, you know, that the risk was so great that in and of itself the common

law tort proposed it.

And it seems like this case is about whether, even going beyond that, a big risk that the tort would actually happen to you is itself a tort. And I -- I haven't heard you disclaim that as a proper reading of Spokeo.

Instead, it seems like you're talking about quantifying the risk, accepting that that could be an injury under Spokeo but only if it's an 85 or 90 percent chance of happening.

Am I understanding you correctly?

MR. CLEMENT: I -- I think you are, Your Honor, but I -- I guess I would take this opportunity to sort of disclaim the idea that just, you know, a pure risk of injury in -- you know, a real risk of injury, you know, in and of itself without any link to some emotional injury or a -- a property right of the type that I think you would have, you know, that might be one way to understand the defamation cases, I -- I don't think that gets it done.

I mean, you know -- you know, at the point that you, you know, are -- are -- you know, there's a real risk that you might be injured, but you're not injured, I suggest the

way I see that is you're not injured.

JUSTICE BARRETT: Okay. So you're talking about a distinct injury that precedes it, like emotional distress?

MR. CLEMENT: Sure. And -- and that's why I got into the discussion about sort of whether you'd know about it, because, obviously, you know, I think, if you don't know -- know about it at all, then you can't be distressed about it, and so you can't suffer the injury-in-fact, whereas, with certain injuries, you know, somebody trespasses on my property and I find out later, but, at the time, I had no idea --

JUSTICE BARRETT: I'm going to have to stop you, Mr. Clement, because I'm out of time. Thank you very much.

MR. CLEMENT: Sure.

CHIEF JUSTICE ROBERTS: A minute -- a minute to wrap up, Mr. Clement.

MR. CLEMENT: Thank you, Mr. Chief Justice.

In the end, there's no getting around the two fatal flaws that the class certified here. The district court recognized from the

outset that proof of an actual de facto injury would require individualized proof and refused to certify certain state law claims on that ground. But he excused the class from making an individualized showing of de facto injury for the FCRA claims because Ninth Circuit law did not require it at the time.

But, under any proper understanding of Article III, each class member must have injury-in-fact, and this class must be decertified. Decertification also follows because Ramirez is a radically atypical class representative. He suffered serious injuries that would have allowed him to seek actual damages in an individual action, but, instead, he sought statutory damages at the top of the range, plus punitive, for a class that shared few of his experiences.

Rule 23's typicality requirement guards against just that kind of abuse. The objections were repeatedly raised and rejected below. The certification order cannot stand.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Reaves.

ORAL ARGUMENT OF NICOLE F. REAVES
FOR THE UNITED STATES, AS AMICUS CURIAE,
SUPPORTING NEITHER PARTY

MS. REAVES: Mr. Chief Justice, and may it please the Court:

In Spokeo, this Court discussed a number of considerations that are relevant to whether a violation of a statutory right constitutes a concrete injury, all of which point the same direction here. The class members have standing to bring reasonable procedures claims.

By placing OFAC alerts on all class members' consumer reports, Petitioner recreated a real risk of harm that they would be denied credit, employment opportunities, or other benefits because they were wrongly labeled as potential matches to a terrorist list. That is precisely the type of harm that Congress sought to prevent by adopting the reasonable procedures provision, and defamation provides a common law analogue.

Congress also gave consumers rights to receive certain disclosures and summaries of their rights, and under this Court's

informational standing cases, all class members have standing to bring claims for violations of those rights.

But because Mr. Ramirez suffered atypical injuries, there is a significant question regarding whether Rule 23 was satisfied, and the Court should vacate and remand on that basis.

I welcome the Court's questions.

CHIEF JUSTICE ROBERTS: Ms. Reaves, putting aside the typicality questions, how, if -- if any way, is your position different from that of the Respondent's?

MS. REAVES: I think we view informational standing as providing the best basis for the second two violations that the class alleged in this case, that is, the summary of rights violation and the disclosure requirement. We don't think the Court needs to go through the multi-step factor process it laid out in Spokeo when considering those two.

And I think, in addition, we look at a few different factors when considering the reasonable procedures requirement. We don't really focus on potential of any emotional

distress but look at just the risk of dissemination as to these class members.

And, similarly, we haven't taken a position on whether there was third-party publishing because of the activities that TransUnion engaged in within its own organization or with its third-party vendors.

CHIEF JUSTICE ROBERTS: You said in your opening that the class members were wrongly labeled potential matches to the OFAC list. But I don't see how that's true. They were potential matches, right? They had the same -- same name. "Potential" doesn't mean actual. And I don't see how -- it doesn't mean actual. And I don't see how it could be actual if they were accurately labeled potential matches.

MS. REAVES: Mr. Chief Justice, a couple of responses to that.

And, first of all, the statute doesn't require a showing of actual falsity. It requires consumer reporting agencies to follow reasonable procedures to assure maximum possible accuracy.

And one thing that's going on in this case is Petitioner has conflated in a lot of

ways the standing and the merits arguments here. So, under Spokeo, we have to look at whether that's a type of harm that Congress could legitimately identify and whether it has --

CHIEF JUSTICE ROBERTS: What is your -- I think I've got that. What was your -- your second point?

MS. REAVES: And -- and the second point is I think it's a stretch to say that that's not wrong. A mere first and last name match isn't matched to a first and last name on another list, but it's not a lot different than saying that John Smith and John Wayne are a potential match just because they have the first same name. Not necessarily --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

Counsel, just so I understand you, are you saying that the district court abused its discretion in certifying the class here?

MS. REAVES: We haven't quite gone that far, Justice Thomas, but we do think that

the court below viewed typicality through the long -- wrong legal framework, and that may have resulted in a improper certification of the class. But we haven't taken the position that it was certainly an abuse of discretion.

JUSTICE THOMAS: So -- but, if there isn't an abuse of discretion, on what basis would we send it back?

MS. REAVES: So we think that the court below did apply the -- an incorrect legal framework, but we're not sure that the ultimate outcome was incorrect. And so we think that the basis the Court would send it back would be to say that this was the wrong typicality framework. The court of appeals and district court should have considered the guidelines that we suggested in our brief that we think are tied to the legal standard that a claim or defense be typical and that the lower court should reconsider this in the first instance because there are open questions as to forfeiture and what Petitioner and Respondent did and did not agree to below.

JUSTICE THOMAS: So do you think that there's anything other than the level of harm,

what -- what is atypical about this claim?

MS. REAVES: Mr. Ramirez's injuries are atypical, we think. And, you know, a claim is not necessarily defined as just the elements that an individual needs to prove. Black's Law Dictionary, when it defines "claim," includes the relief that's requested.

And so a claim can consider the injuries that result from an individual's experiences that may well -- and while the defendant's actions may have been the same as to everyone, the plaintiff's experiences might have some impact on what is and what is not relevant for the purpose of proving a claim.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: I have the same question, just if you want to say more about Justice Thomas's last question. How is this different? I've always thought that a -- a -- a class of antitrust plaintiffs, all of whom have to pay higher prices as the result of price fixing, could be represented by a -- a consumer who, through an odd chance, bought a thousand

times more of the product than anyone else in the class. He just had higher damages.

Or a class action against somebody for doing something that would send a victim to an emergency room could be represented by a person who was not only sent to the emergency room but, through an odd set of circumstances, was actually sent to the operating room and had to be and had all kinds of bad -- it's the same basic harm; it's just a lot worse.

Well, how does this differ from that? In the examples I gave, are they not typical? Or is -- is the -- is the defendant allowed to say to the judge, Judge, don't take those non-typical things into account, the extra damages, at least not until we find liability; then you can have a class for damages, or don't consider -- I mean, how does it work?

MS. REAVES: A couple responses to that, Justice Breyer.

I think, as to the two hypotheticals you gave, the first hypothetical, the antitrust plaintiffs, there might not be a typicality problem there because any differences would be easily calculated, and the court could consider

that at the outside -- outset of the case and determine whether there's a viable damages model to separate different individuals out just based on kind of a mechanical mathematical calculation.

I think the second example that you gave, which kind of is a liability-type example, in actuality, a lot of courts don't allow product liability-type cases to proceed as a class because individualized damages tend to -- tend to make the named plaintiff not typical or run afoul of other Rule 23 considerations.

And, here, in the statutory damages context, the jury is charged with setting the amount of damages within a range. And plaintiffs' specific experience can be relevant to that. So, in a situation like this, where one individual, the class plaintiff, was placed on the stand and gave extensive testimony about his specific experiences, we think that there can be typicality problems there because that isn't indicative of what happened to other class members, and they might benefit from that in a way that they really shouldn't.

CHIEF JUSTICE ROBERTS: Justice Alito.

JUSTICE ALITO: In Spokeo, the opinion says, "not all inaccuracies cause harm or present any material risk of harm." Do you read that as -- in -- as saying that there is injury-in-fact whenever there is material risk of harm? Do you read that as setting out a legal test for injury-in-fact?

MS. REAVES: I don't read that as alone setting out a legal test for injury-in-fact. I think the Court in Spokeo set out a number of considerations that may be relevant to injury-in-fact when Congress defines a harm.

One of which is Congress's judgment; another of which is whether there's a common law analogue for the harm; and another of which is whether there was a material risk of harm, which might be necessary in some cases but not in all.

JUSTICE ALITO: You know, Spokeo's discussion of harm is quite clipped and it's potentially subject to different interpretations. But let me shift to something else and ask about the class members' standing to assert claims for failure to provide the information called for by Congress.

Mr. Clement says all the information was actually provided, but it was just provided in the wrong form. You may not agree with that.

But is it your position that there is always injury-in-fact when information that Congress says must be disclosed in a particular form is not provided in that form but is provided in another form, and the recipient is well able to understand the information that's provided?

MS. REAVES: That's not our position, Justice Alito. The informational standing cases that we rely on here require -- rely on a denial of information that is statutorily required to be provided.

And what you've just described wouldn't be a denial of information. And so, if there's a statutory formatting requirement, that would kind of probably be back in the more general Spokeo analysis, where we'd have to look at the various factors that Spokeo lay out.

JUSTICE ALITO: All right. Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

JUSTICE SOTOMAYOR: Counsel, do you

think that everyone in this class is entitled to some measure of statutory damages?

MS. REAVES: Yes, Justice Sotomayor.

JUSTICE SOTOMAYOR: All right. So, really, the issue is how much for each class member, correct?

MS. REAVES: That is correct.

JUSTICE SOTOMAYOR: All right. And what I'm having a problem understanding is how Mr. Ramirez is not typical with respect to the legal claims. His legal claims are identical to everybody else's, right, the failure to have reasonable procedures in place and the erroneous disclosure, correct?

MS. REAVES: His claims are the same as --

JUSTICE SOTOMAYOR: All right. Now if you would just walk with me, okay? He's the same in terms of every other class member as to statutory damages.

And what you say, I think, is that he may be atypical with respect to the amount of statutory damages to which his particular type of harm would be entitled. Am I correct?

MS. REAVES: That's correct.

JUSTICE SOTOMAYOR: But why isn't that a trial issue? And why is that an issue for 23(a)? Wouldn't that be a predominance requirement under 23(b)(3)?

MS. REAVES: So, Justice Sotomayor, let me try to answer the couple of questions that you have in there, and starting with the last one, which is whether this is a typicality problem or not.

While I would agree and this Court has repeatedly said that there's overlap between typicality and predominance and commonality, here, it does seem that this problem fits best within the typicality bucket, and that's because typicality focuses on the named plaintiff and his claims, whereas the other requirements, commonality and predominance, focus on all the class's claims in a -- in a broader way.

And getting to the second kind of point, I think that this is not a trial issue because this Court has repeatedly said that a plaintiff needs to demonstrate that he or she meets requirements of Rule 23, and this may have to be done by an evidentiary showing at the outset of a case. So it's not as if, if that

isn't sufficiently done, it's the obligation of the defendant to try to fix any --

JUSTICE SOTOMAYOR: All right.

MS. REAVES: -- typicality problems that were introduced.

JUSTICE SOTOMAYOR: Thank you, counsel.

CHIEF JUSTICE ROBERTS: Justice Kagan.

JUSTICE KAGAN: Ms. Reaves, I guess I'm not quite understanding your typicality argument because you just said it wasn't a trial issue. But, in answering Justice Breyer, you said that the problem was that Mr. Ramirez had testified at trial.

So I guess the question that I have is, suppose he hadn't testified at trial, would there still be a typicality problem?

MS. REAVES: I think it's very likely that there would not be a typicality problem in that situation, and that's because a plaintiff is the master of their complaint and the master of the case that they put on at trial.

JUSTICE KAGAN: Well, it's a little bit odd to me to say that there wouldn't be a typicality problem in that situation, but still

it's a -- it's -- it's a -- it's a problem that's about class certification, because Mr. Ramirez could have brought this case as a class representative and not testified at trial or, alternatively, he could have had somebody else testify at trial, a different member of the class. I mean, there's no necessary relationship between who's the class representative and who testifies at trial.

I mean, still a third alternative is that Mr. Clement's client could have called a bunch of other class members to testify at trial.

The question of who testifies at trial really has nothing to do with who the class representative is, does it?

MS. REAVES: Not necessarily. You're correct as a matter of trial management that the named plaintiff wouldn't have to testify. But that doesn't absolve courts of the requirement to find out whether a putative named plaintiff is, in fact, typical at the outset.

JUSTICE KAGAN: I mean, suppose that -- suppose -- it's sort of a mismatch, your argument and your conclusion. Suppose that

there were a different class representative. It wasn't Mr. Ramirez. It was a class representative with a perfectly typical injury. But then you said I have this great idea, let's put Mr. Ramirez on the stand.

I mean, he could do that. There might be some evidentiary objection. But it wouldn't be a -- a class objection, a class certification objection.

So, again, the problem has nothing to do with class certification, does it?

MS. REAVES: I disagree, Justice Kagan. I think that what you just described, a class member who's not a named plaintiff, testifying to radically atypical injuries, that wouldn't be a typicality problem, but it could be a predominance or a commonality problem.

Here, it's a typicality problem because it was the named plaintiff. But, as this Court has laid out in cases like Dukes and Falcone, a plaintiff has to bear the burden of proof of demonstrating that they meet --

JUSTICE KAGAN: Thank you, Ms. Reaves.

MS. REAVES: -- Rule 23 class requirements.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

JUSTICE GORSUCH: Good morning. I -- I -- I want to return to Justice Alito's last question. I'm not sure I captured your answer.

So Congress has a statute that says notice needs to be provided in a particular form. This then provides it in a different form.

Is that alone enough to create an injury-in-fact under Spokeo, or do you agree that something more needs to be shown, some risk of harm, some actual harm, something befell the plaintiff because the form of the information was different?

MS. REAVES: Justice Gorsuch, I want to be clear on this here. We think that the -- a difference in form wouldn't fall under informational standing per se and, thus, would end up under Spokeo.

And in that instance, a court would need to look at Congress's judgment, whether there was a common law analogue and whether there was a material risk of harm.

JUSTICE GORSUCH: So some --
MS. REAVES: And --
JUSTICE GORSUCH: -- something more than a mere violation of the statutory form of notice?
MS. REAVES: I think that's likely there would not be harm there, although I'm obviously answering in the complete abstract without any -- any statute.
JUSTICE GORSUCH: Okay. All right. Thank you, counsel.
CHIEF JUSTICE ROBERTS: Justice Kavanaugh.
JUSTICE KAVANAUGH: Thank you, Chief Justice.
And welcome, Ms. Reaves. On the risk of harm, I want to make sure I understand your answer. My understanding was that a risk of harm that is not itself a separate cognizable harm does not give you standing to seek damages, as opposed to injunctive relief, because you haven't been harmed. Is that wrong?
MS. REAVES: We disagree with that, Justice Kavanaugh, in that I think what this Court suggested in Spokeo is that in certain

instances, a risk of harm alone can be enough to provide Article III standing.

And an example of that from the common law is libel, which is -- in which, in the common law, would allow a recovery of damages even if harm never actually materialized.

JUSTICE KAVANAUGH: Well, because there's been publication, though, and so there's been some kind of reputational injury, no?

MS. REAVES: So that -- that's part of defamation, but I don't think this Court suggested in Spokeo that we're forever limited to the types of common law harms that have only explicitly been identified.

JUSTICE KAVANAUGH: And then, on -- I just want to see how you see -- see this case fitting into the separation of powers more generally.

I think Mr. Clement is suggesting and, certainly, the amicus briefs are suggesting on his side that Congress is, in essence, delegating the private attorneys general to enforce federal law against a wrong committed by someone to try to deter that wrongful behavior.

And some of the amicus briefs say the

problem is that the executive branch enforces federal law and that private plaintiffs can't do that, can't be delegated that authority by Congress unless they themselves have a concrete injury.

Do you disagree with any of that?

MS. REAVES: I disagree. I think that suggesting that because this law can be enforced by the FTC, that that suggests that it can't also provide some individualized concrete rights. And specifically looking at the rights that are at issue here, you know, the cause of action provides a cause of action to any -- you know, when there's a statutory violation with respect to any consumer.

And what we're talking about here are mistakes made with an individual's consumer report about his or her own information. I just don't think that's a violation of executive power or prosecutorial power when it's an individual's right that Congress has given to that individual.

JUSTICE KAVANAUGH: Thank you. Very helpful, Ms. Reaves. Thank you.

CHIEF JUSTICE ROBERTS: Justice

Barrett.

JUSTICE BARRETT: Good morning, Ms. Reaves. I have a question about informational injury.

So, you know, Atkins and Public Citizen arise in the context of FOIA and -- and a right to information from the government. A lot of the courts of appeals who have recognized this idea of informational injury in the context of information to which a plaintiff is entitled from a private party also rely on Havens Realty. You don't. Why?

MS. REAVES: Justice Barrett, while we didn't cite Havens Realty in our brief, we do think it is relevant to the informational standing inquiry here.

JUSTICE BARRETT: Can you describe a little bit more? Because it seems to me that Havens Realty is -- the harm there is discrimination, not deprivation of information. And since it's kind of an obvious cite, because those are the three cases that the courts of appeals relied on, I was surprised not to see it there.

Do you think Havens Realty is distinct

-- distinguishable?

MS. REAVES: I don't think it's distinguishable from this case. And I think it's helpful because while it was against the backdrop of discrimination, the Court there found that the Fair Housing Act conferred on all persons a legal right to truthful information.

JUSTICE BARRETT: Okay, let me --

MS. REAVES: And --

JUSTICE BARRETT: Let me switch gears for a second and go back to Atkins and Public Citizen. If in those cases those who are seeking information had said we want the information, we filed the FOIA request, we have no indication -- we have no plans of even opening the envelope with the information if you provide it to us, would they have had standing then?

MS. REAVES: I think it's certainly a closer question, but I don't think that informational standing, as this Court has viewed it, requires -- it -- I should say it solely requires the denial of information to which someone is entitled under Article III.

JUSTICE BARRETT: Then why is it a

close question? If the -- if the plaintiffs in those cases had disclaimed any intent to use the information or even look at it, why under your theory isn't it a -- a -- a straightforward yes, they had informational injury and, therefore, standing?

MS. REAVES: Well, I think the answer is yes. I think it's closer, just in that it might, you know, touch on the concreteness just a little bit, but at the end of the day, the denial of information alone is enough. And we think those cases are best read that way, and we think what happened here is also best seen as a denial of information, regardless of the fact that there's not proof potentially as to individual class members about having opened the envelopes.

JUSTICE BARRETT: Thank you, Ms. Reaves.

CHIEF JUSTICE ROBERTS: A minute to wrap up, Ms. Reaves.

MS. REAVES: Thank you, Mr. Chief Justice.

While we've discussed a number of hypotheticals today, it's important to keep in

mind the actual claims here. On these facts, the various Spokeo factors all cut in favor of finding standing for the reasonable procedures claims. The OFAC alerts were inaccurate as to a material issue, whether a party making a contracting decision could lawfully contract with a consumer.

And there was a substantial likelihood that all class members' reports with the alerts would be disseminated to third parties. Petitioner's business model depended on dissemination. Petitioner made the reports available at a moment's notice. The Petitioner had a high dissemination rate.

Congress made a clear judgment to protect consumers in this situation, and nothing in Article III prevents Congress from doing so. This case falls on the standing side of the line, regardless of where hypothetical cases involving other statutory provisions and other facts might come out.

And the disclosure and summary of rights claims fall squarely within this Court's informational standing precedents. But given the typicality positions, the Court should

vacate the decision below and remand the case.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Issacharoff.

ORAL ARGUMENT OF SAMUEL ISSACHAROFF

ON BEHALF OF THE RESPONDENT

MR. ISSACHAROFF: Thank you, Mr. Chief Justice, and may it please the Court:

Congress recognized both risks and benefits inherent in centralizing massive amounts of private credit information. It gave credit reporting agencies broad preemptive protection from tort liability but also the responsibility to ensure accuracy and to follow specific procedures to enable consumers to challenge this reporting.

Nothing in Article III restricts Congress's power to create those rights. The class alleged and proved invasion of particularized statutory rights granted to them, not the general public. The common law has long recognized a concrete interest in economic reputation and afforded an inferred remedy without proof of actual damages.

TransUnion created an explosively high risk of harm by placing OFAC designations, not in the secretive draft -- desk drawer, but in the readily acceptable credit files of innocent Americans. As the SG argued, TransUnion's business was dissemination of information to third parties. No dissemination, no profit.

Both courts below found the claims asserted were the same for all class members, following the text of Rule 23(a)(3). Mr. Ramirez's accuracy claim stems from TransUnion's systemic failure to ensure accurate OFAC reporting, and his disclosure claim stems from the same two non-FCRA-compliant letters sent to every class member. All class members sought statutory damages based upon the same willful misconduct of Petitioner.

But the heart of this case is the concrete harm established at trial. Being labeled a potential OFAC match is not a misreported ZIP code. It is the scarlet letter of our time. It banishes individuals from the marketplace. It is thus staggering that since 2002 Petitioner could not identify a single correct OFAC match despite issuing thousands of

OFAC alerts a year.

This is not Lujan or Coffer, not an attempt to constrain other branches, but of honoring the statutory scheme.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: And thank you, counsel.

Let -- let's suppose that Congress creates a cause of action for statutory damages for anyone driving within a quarter mile of a drunk driver. You were driving within a quarter mile, but you didn't know it until a few days later. You know, based on a highway camera, you got notice and it told you about the statute.

Can you bring a -- an action under that statute?

MR. ISSACHAROFF: I believe you could bring an action under that statute. The question would be whether you were harmed at all.

And Spokeo runs the inquiry about the risk of harm together with the scope of the congressional interest. And at that point, you would have a marginal -- a marginal case, Your Honor.

CHIEF JUSTICE ROBERTS: So you're saying that you would have standing to bring -- bring that suit?

MR. ISSACHAROFF: Yes, Your Honor. In footnote 6 of Lexmark, the Court distinguished between proximate causation and the standing inquiry and suggested as in cases like the hypothetical before me, that the better approach might be to dismiss this under Twombly or Iqbal or for summary judgment, but that it confuses the -- the statutory cause of action to address it in -- in jurisdictional terms.

CHIEF JUSTICE ROBERTS: Well, but Spokeo also said that Article III standing requires a concrete injury even in the context of a statutory violation. What is the concrete injury in my hypothetical?

You -- you didn't know -- you were exposed to risk, but you didn't know it, and by the time you found out about it, you weren't. I think Mr. Clement said, you know, you should be breaking out the champagne or -- or talking about how lucky you are, not -- not how much you've been injured.

MR. ISSACHAROFF: Well, Your Honor, I

think Spokeo addresses the question of material risk and does not do so in terms of your subjective knowledge. And so the question is whether you -- there was material risk of your being harmed and whether Congress sought to deter parties from engaging in that material risky behavior by creating a cause of action.

CHIEF JUSTICE ROBERTS: Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

Counsel, just a couple of quick questions. You -- you -- do you agree that every member of this -- of the class has to have standing?

MR. ISSACHAROFF: Yes, Your Honor.

JUSTICE THOMAS: The -- let me -- I'd like to just to explore something just briefly. Let's assume that in this case that -- that your client received a summary of -- of his rights on day one on a Monday, and the company admits that it inadvertently sent that out, immediately corrects it the next day with an explanation, so you have the two letters again with complete information.

Would you -- would you have a claim?

MR. ISSACHAROFF: You would have standing to bring a claim, Your Honor. I think you would lose on the merits, on the ground that there's no harm.

But the question in this particular case is whether these two letters sent -- sent at different times with different disclosures satisfied the statutory purposes. And even the drafter of these letters, an employee of TransUnion, testified at trial that there was confusion created here, as was the testimony of Mr. Ramirez.

JUSTICE THOMAS: So you would have standing even though there's certainly -- it doesn't appear to be any intention to deceive, no intention to send you the wrong letters and a total correction of the problem, or an explanation at least?

MR. ISSACHAROFF: Intentionality would come in on the damages side. And the statute is quite clear that it is the willfulness of the defendant that gives rise to a claim for statutory damages.

So, in this case, I think that there

would be standing, but there would be no remedy available. It would probably go to the redressability side, not the injury-in-fact side.

JUSTICE THOMAS: So you mentioned damages. That -- that leads me to this question with respect to typicality.

Here, obviously, there's statutory damages involved, so that makes it less difficult from my standpoint. But what if the damages available here were actual damages? Would that change the typicality analysis?

MR. ISSACHAROFF: It would, Your Honor, because the typicality analysis at that point would turn on the proven harm to the individual and the consequences of it. In that situation, there would be difficulty for class certification, let alone for the calculation of damages.

JUSTICE THOMAS: So you think that it would be -- it would really jeopardize your -- Petitioner's or Respondent's chance of being typical of the class?

MR. ISSACHAROFF: Not at -- not typicality, Your Honor, because the typicality

goes only to the claims. It would compromise predominance. It would compromise perhaps the adequacy of representation.

But so long as the claims asserted themselves, as this Court said in Falcone, that is what typicality has to ensure.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: Well, you want to say anything additional on that point, additional about, I mean, what I -- what I think must have come up often in -- or fairly often in class cases where damages differ, but there are the issues that you said are the same, someone goes in and tries to testify about the extra damages that he suffers, the higher, higher prices, or the many more widgets that they were charged on, or the special bad treatment he got in some hospital, et cetera, and the other side, I should think, would be able to object either that it's relevant, something like it's relevance is -- is small compared to the harm it's going to do to our case for these damages or not, really very typical.

They're especially egregious and it'll prejudice the jury. But am I on the right track there, the wrong track? What's actually happened?

MR. ISSACHAROFF: I think you are on the right track, Justice Breyer, and I would have two responses.

The first is simply that centuries of experience with the trial practice has led the Federal Rules of Evidence to address exactly the questions Your Honor is -- is asking about, through Rule 403, the ability to object that the testimony is more prejudicial than probative, but also places the burden through Rule 103 on the objecting party to clarify the issues before the trial court and to set them up for appeal.

More broadly, I would -- I would say that if you look at the mechanics of class certification and the requirement under Rule 23(c) that it be done as early as practicable, at this point, at the point of class certification, it is unlikely that anyone has any idea what the nature of the trial testimony will be.

When Petitioner sought 23(f) review in

the court of appeals, it did not address the typicality point. It tried to disqualify Mr. Ramirez not because he was too strong but because he had no claim. They said that he had dissembled his application. They said that he had no damages. And they tried to disqualify him on summary judgment on the same basis.

It's only upon the retelling on appeal that Mr. Ramirez emerges as Hank Aaron. There was no evidence before the district court at the time of certification that there was anything atypical in the strength of Mr. Ramirez's claim.

JUSTICE BREYER: Thank you.

CHIEF JUSTICE ROBERTS: Justice Alito.

JUSTICE ALITO: Let's assume that TransUnion has a computer program, as I assume they did, that will flag anybody whose first name and last name corresponds to someone who is on this list.

Do you think that everybody who would be flagged if there were any sort of inquiry has suffered injury-in-fact even if there never was an inquiry regarding that person?

MR. ISSACHAROFF: I think they have under this Court's standard in Spokeo. There

was certainly material risk.

Mr. Clement relies heavily on the 75 percent number. But the fact is that one quarter of the class had their files accessed by one subset of potentially accessing parties within only seven of the 46 months of the class period.

So there is material risk here, but I think it goes beyond that, Justice Alito, that the testimony at trial was that over 98 percent of the people on the OFAC list are foreigners. They are not American citizens. The class was only American. And there were --

JUSTICE ALITO: Well, one of the -- let me -- let me interrupt you to try to get in an additional question.

One of the things we look for in determining whether there is Article III standing is whether there's any common law analogue, whether this was the kind of case that would have been recognized as an appropriate case in court at the time of the adoption of the Constitution.

What is the closest case you can think of where there -- where a suit could be brought

to recover for having been subjected to a risk in the past even though the person had no knowledge that the person had been subjected to that risk?

MR. ISSACHAROFF: I think that a defamation per se at common law, there was no requirement that the actual party testify to his knowledge of the risk. The question was whether there was dissemination of information of the sort that would cause damage.

And, here, under the facts presented, there are people like landlords who routinely check your credit files. Most Americans have no idea when their credit files are being accessed.

And so this is a -- this is an -- an imposition that would not have been recognized at common law.

JUSTICE ALITO: Well, suppose in -- in -- in 1786 someone was getting ready to publish a newspaper article defaming me. I had no idea that this was going to happen. And just before the person -- before this article was published, the owner of the paper said: No, we're not going to do that. And so it never was published.

Would I have been able to sue for defamation in that situation? Because I was at a serious risk at some point in the past of being defamed, but it never eventualized and I didn't even know that I was at risk.

MR. ISSACHAROFF: No, Your Honor. In that case, there would have been absolutely no risk of publication. It would have been Mr. Clement's desk drawer analogy.

However, there's a difference between that and being on readily accessible computer files that are downloaded on a routine basis, we have evidence in the record, millions of times per month.

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

JUSTICE SOTOMAYOR: Counsel, would you give me your best answer to both Mr. Clement and the government with respect to the typicality issue on the degree of harm in this case?

Both of them believe that under 23(a) that typicality often has to do -- has to address whether your -- your -- your damages claim are common to the class in some sway.

So give me your best answer.

MR. ISSACHAROFF: There have been decades of experience under Rule 23(a)(3), and there has never been a requirement of identity of damages among all class members.

In fact, when Congress passed PSLRA and determined that it would be best for the class to have the strongest claimant take the lead, there was no need to modify Rule 23 or in other -- or in any other fashion change the substantive law of class certification.

We have had experiences, as Justice Breyer suggested, with antitrust cases, where somebody bought a thousand times as many widgets as someone else, and that does not alter whether the claims or defenses are the same as are being asserted by the rest of the class.

There is no basis for distinguishing in the legal claims that are being asserted. There are questions, of course, about whether there can be common answers to the common questions, as this Court determined in Dukes versus Wal-Mart, or there can be questions as to predominance.

JUSTICE SOTOMAYOR: Thank you,

counsel.

CHIEF JUSTICE ROBERTS: Justice Kagan.

JUSTICE KAGAN: Mr. Issacharoff, I -- I get the harm from your procedures claim, but I'm wondering if I could press a little bit more on the disclosure claims.

I mean, what Mr. Clement says about those is that your clients are complaining about receiving two envelopes in the mail rather than one.

Why isn't that the right way to look at this, that this is a real -- really a sort of no harm/no foul situation?

MR. ISSACHAROFF: I believe that that's a factual question, Your Honor. And if, indeed, it was just two envelopes and they just -- there was just a mistake as to the mailing, that may mitigate any kind of disclosure claim.

But the evidence presented to the jury here -- and these were factual determinations as to the violation, the willful violation of the statute, by the jury. The evidence presented to the jury was that these were confusing not just as to Mr. Ramirez, but the drafter of the letters testified to that as well, and that they

did not serve the statutory purpose of giving the disclosure in a form that was tied to the specific risk of being on an OFAC match list.

JUSTICE KAGAN: And just -- just thinking about what a material risk is, a material risk of harm, as -- as -- as Spokeo described it, what do you take that to mean? I mean, how likely does a risk have to be? Of what kind of harm are we talking about? How should we think about that standard that we set out?

MR. ISSACHAROFF: Well, Spokeo runs together a number of different analytic strains. And I think that if you look at the cases that Spokeo addressed and relied upon and the cases that have been decided by this Court more recently, like Brownback and Uzuegbunam, I think that what you have is a divide between completed harms and injunctive relief.

Injunctive relief, a party has to establish standing in a more exacting way. I think that's one of the conclusions of Lujan. It is a -- it makes a difference whether the -- the claim is a facial challenge to a statute or an applied application to the particular

claimant. And, most significantly, I think it makes a difference whether these are generalized claims of the public at large or private claims or a private endowment of the right to sue by Congress.

So I think that the -- the answer to your question, Justice Kagan, is that Spokeo looks at all of these in the material risk of harm in trying to determine whether there's a sufficient allegation of actual injury.

I -- as we said in our brief, it may be better to disaggregate them and to focus primarily on whether these are private versus public rights, because that's a simpler analytic divide that helps explain the outcome in all of this Court's cases.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

JUSTICE GORSUCH: Counsel, in your brief at least, you seem to suggest that the 6,332 class members have standing in part because there was publication of their information at least within TransUnion and its agents who print up information for them.

And I guess my first question for you is, does that -- does that pose a problem in light of our intra-corporate conspiracy doctrine that normally suggests what happens within a corporation doesn't count for purposes of conspiracy, you need to have somebody outside of it, outside of it and its agents? And isn't it odd to speak of publication within a company?

MR. ISSACHAROFF: Your Honor, we were in that section of the brief addressing the question from Spokeo, whether there was a common law analogue to what happened here.

All we were arguing was not that this was the basis of recovery but, rather, that the common law did recognize intra-corporate communications as a form of publication, and that was carried forward in the Restatement First and Restatement Second.

Our claim for recovery and for harm is a statutory one, and so the question is whether Congress created the private right of action.

JUSTICE GORSUCH: No, I -- I -- I understand that point. I was just trying to clarify the first one. And I guess, on that, my -- my -- my follow-up to you is, would that view

of defamation law allow for individuals to sue newspapers and other media outlets who have shared false information internally but not actually published it externally?

MR. ISSACHAROFF: There are common law precedents for that, Your Honor, because, if it's communicated --

JUSTICE GORSUCH: Do you -- do you endorse that view of the law?

MR. ISSACHAROFF: We don't think it has any bearing on the outcome of this case, Your Honor.

JUSTICE GORSUCH: So this whole argument, we should just ignore that?

MR. ISSACHAROFF: No, the argument is to show that Congress was legislating against a -- a proximate common law baseline, an argument that had to be addressed in light of Spokeo.

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Thank you, Chief Justice.

Good morning, Mr. Issacharoff. I think you have a good argument with respect to

the 1,853 in terms of the reasonable procedures, but I'm more concerned about the 6,332, whose information was not, in essence, published.

Under -- in Spokeo, of course, the information was published, which is a big distinction, as I see it, between that case and this, as to the 6,332. And when Spokeo talked then about risk of harm, it was talking about harm beyond the publication, at least as I understood it, for example, publication of ZIP codes, which strikes me as a very different thing than risk, talking about risk of harm when there hasn't been publication to begin with. So that -- that's point one.

And then, on -- on risk of harm, you heard me talk about damages versus injunctive relief. It strikes me that risk of harm, of course, is enough to get you injunctive relief. With damages, I -- I hadn't thought risk of harm would get you damages -- standing for damages claims unless the risk of harm was itself a harm.

Judge Tatel in the D.C. Circuit analogized it: If inaccurate information falls into a database, does it make a sound? And his

answer to that, applying Stoke -- Spokeo, was no. And I guess then-Judge Barrett talking about no harm, no foul, seemed to be picking up on the same thing.

So can you respond to the distinction between this case and Spokeo and then try to help me on risk of harm for the 6,332?

MR. ISSACHAROFF: Yes. Briefly, the distinction between this and Spokeo is that this is not a ZIP code or marital information, but this is a serious allegation which prevents individuals from being able to transact at all. So --

JUSTICE KAVANAUGH: But it hasn't been published, unlike in Spokeo.

MR. ISSACHAROFF: That -- that's the second -- that's the second prong of this, which is the publication. And we think that that's a fact record. We think that under Spokeo, material risk establishes the standing, and then the question is whether there has been publication, which would be an element of the event.

And I think that the evidence here is that with regard to the other 6,000, that there

was circumstantial evidence given the limitations on what the defendant provided to us. I would direct Your Honor's attention --

JUSTICE KAVANAUGH: In Spokeo, though, I think, you know, there's different language in there, of course, and we're going to have to figure that out, but I thought the publication itself was the key demarcation that helped support standing there.

And you don't have that here for the 6,332. If you can continue your answer to that.

MR. ISSACHAROFF: The Court remanded in Spokeo to determine standing given the -- the quality of the injury asserted and -- so that publication was not enough to get over the hurdle. And I don't think that at any point in Spokeo the Court said that it was a -- a -- by itself a necessary condition.

But even assuming the burden of publication, if the Court's attention could be directed to Joint Appendix page 104, where TransUnion did an internal audit of its OFAC claims and found that in one month, in July 2012, which is still within the statutory period, within the class period, there were over

17,000 OFAC alerts sent out. All of the class members were still on the list at that time.

And so you have a situation where a jury could reasonably infer, given the limitations on what TransUnion was able to generate from its files, that there was, indeed, publication --

JUSTICE KAVANAUGH: Thank --

MR. ISSACHAROFF: -- as to all.

JUSTICE KAVANAUGH: -- thank -- thank you very much.

CHIEF JUSTICE ROBERTS: Justice Barrett.

JUSTICE BARRETT: Good morning, Mr. Issacharoff. I have a question about whether you can ever have a bare procedural violation with respect to any of these consumer protection statutes like FCRA or the FDCPA. I mean, all of them have procedures that are designed to protect against a risk of harm. So, you know, whether it's to have information put clearly on two pages instead of one or, you know, whether it's to say that certain things must be in writing or whether it's -- I'm thinking of many of the cases that the lower courts have dealt

with -- not having so many numbers of your credit card receipt -- credit card number reflected on a receipt, all of these are designed to protect a consumer against the risk of some harm.

So is there any violation that you can think of -- and I'm talking about -- I'm not talking about the disclosure here. I mean I'm not talking about the reasonable procedures claim and the disclosure of private information. I'm talking about these procedural guardrails like this. Is there anything that you can think of that would count as a bare procedural violation that's not cognizable under Spokeo?

MR. ISSACHAROFF: I think Spokeo leaves that question open, Your Honor. I think that the best answer should be that, if it is trivial, if it would not have a common law analogue because of the nature of the disclosure or the nature of the procedural violation, that the Court could reject it as a matter of standing.

It remains a question whether the Court is best off handling the standing matters, meaning that the individual would then be free

to file in state court, or should handle it as a matter of part of the injury-in-fact and necessary as part of the statutory standing, and then simply rule against the plaintiff on the merits.

JUSTICE BARRETT: So then is it your position that the reason why there was standing for the things coming in the two envelopes and the OFAC envelope not having the specific information that was included in the first credit report, is it your position that the reason why that's not a bare procedural violation as opposed to something else, you didn't give an example, but something you say would be trivial, is it because of it being inherently shocking and confusing, like the Ninth Circuit said, is that what distinguishes it?

MR. ISSACHAROFF: That is part of what distinguishes. It is also the fact that they were called out on exactly these types of procedures by the Third Circuit in Cortez.

JUSTICE BARRETT: But that doesn't have anything to do with whether the plaintiff was injured. That might bear on how egregious

TransUnion's behavior was, but that doesn't bear on the injury, right?

MR. ISSACHAROFF: It bears on the injury on the willfulness claim for statutory damages --

JUSTICE BARRETT: But not the concreteness, right?

MR. ISSACHAROFF: No, not the concreteness to the individual plaintiff, that's correct, Your Honor.

JUSTICE BARRETT: Okay. Thank you very much.

CHIEF JUSTICE ROBERTS: A minute to wrap up, Mr. Issacharoff.

MR. ISSACHAROFF: Thank you, Your Honor.

The concern in this Court's Article III cases is protecting the domain of Congress. Never has this Court found Article III to remove jurisdiction for retrospective damage claims, when Congress has created the private cause of action, that's so the affected individuals have the right to bring suit, and then provided for statutory remedies to those individuals.

It is difficult to imagine a fact

pattern more at the heart of the statutory zone of interest or one that is more uniform across the class. There were only a total of 6,000 people on the OFAC list, and over 98 percent of them are foreigners.

Yet there are 8,185 class members. These are all Americans. The terrorists or drug kingpins on the OFAC list are not the people who apply for credit at Home Depot.

The name match system used here yielded not one Sergio Ramirez in the class of three, not to mention 99 people named Maria Hernandez. All were listed improperly.

Ramirez's claims are not only typical of the other Sergio Ramirez', but are identical to a group put in harm's way by TransUnion's uniform course of conduct.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Mr. Clement.

REBUTTAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

MR. CLEMENT: Thank you, Mr. Chief Justice and may it please the Court:

Just a few points in rebuttal. First, on falsity it's interesting to hear the

government to say that reporting this as a potential match is not -- is -- is false, because if you go to the OFAC web site today and type in the Respondent's name, you will get a hit. And so they think it's good enough for the government. I guess it -- they hold TransUnion to a higher standard.

The government also said that the information need not be false for there to be a statutory violation. And that's actually an important point because, if that's your position, that kind of destroys the analogue between the statutory violation and the common law violation, which is a point Justice Scalia made at argument in the Spokeo argument.

If I can move now to standing, on standing, I think that Respondent's counsel correctly answered the Chief Justice's hypo at least under Respondent's view that a material risk is enough under Spokeo.

But if a material risk is enough and the answer to the Chief Justice's hypo is, that's right, everybody can bring actions for traffic violations that didn't actually realize themselves in any harm, I mean, the Article III

courts could be open to all sorts of trivial injuries where everybody should be essentially toasting their good luck, not suing the person who posed a risk to them, but didn't actually injure them.

Another point on standing, I think it is worth recognizing why this issue is so important, is there are people in our system of government who do get to pursue violations of federal statutes without suffering injuries-in-fact. They are called prosecutors.

But if you're going to give a cause of action to an individual under our system, they can only actually bring that claim into federal court if they have suffered injury-in-fact.

On typicality, I want to make two points about that. First is typicality is required at the outset of the case because the class representatives, typicality is important from the beginning. It's not just a trial issue.

The -- the -- the defense has the right to depose the class representatives. So from the very beginning of the case, the class representative is essentially the embodiment of

the case.

It is true, I -- I suppose, as a technical matter that the class representative doesn't have to testify, but in practice they do. And that's why having a typical -- an atypical class representative is a bad idea from the beginning.

The antitrust cases are different, Justice Breyer, and they are different in an important way because it starts with the predominance question at the beginning of certification.

In an antitrust case or securities case, people will say, well, the individualized issues are -- of damages will predominate. People will say, no, we can deal with it with some kind of claim processing issue. And then the damages issue isn't that important.

But in a statutory damages case, particularly one seeking punitives, at the predominance issue what the plaintiffs say is, don't worry, we have one-size-fits-all statutory and punitive damages here.

And then if they turn around and say, we're going to find the least typical class

representative, we can, that's an abuse. That's an abuse this Court has to stop.

The other point I would make about this -- and this is really where the standing and the typicality arguments come together -- is if it really is going to be the case that you can have standing just by suffering a material risk, and you don't actually have to have the injury realized, then having somebody who suffered a real injury risk and had it materialize on them is a very atypical class representative for a class of people who only suffered a material risk.

And the last --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. CLEMENT: -- thing I'll say is --

CHIEF JUSTICE ROBERTS: You can say your last thing. Counsel?

MR. CLEMENT: I -- I'm sorry, I may have exceeded my time, in which case --

CHIEF JUSTICE ROBERTS: Okay. Thank you. Thank you, counsel.

The case is submitted.

(Whereupon, at 11:30 a.m., the case was submitted.)

S