

# SUPREME COURT OF THE UNITED STATES

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IN THE 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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Pages: 1 through 93  
Place: Washington, D.C.  
Date: March 30, 2021

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TRANSUNION LLC, )

Petitioner, )

v. ) No. 20-297

SERGIO L. RAMIREZ, )

Respondent. )

- - - - -

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.

1 APPEARANCES:

2

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10 on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

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

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

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

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

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

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

1 Respondent fares no better on his claim that  
2 TransUnion failed to use reasonable procedures  
3 in preparing his credit report. Fully  
4 75 percent of the class never had a credit  
5 report, which is distinct from the credit file  
6 sent home upon request, prepared or disseminated  
7 during the class period.

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

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

25           Ramirez suggests that only his legal

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

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

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

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

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

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

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

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



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

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

5 MR. CLEMENT: So there is --

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Justice Thomas.

4 JUSTICE THOMAS: Thank you, Mr. Chief  
5 Justice.

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

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

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

25 JUSTICE THOMAS: Well, I understand

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

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

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

18 And there's a hundred different  
19 requirements that are imposed on the regulated  
20 parties by the subchapter, which is the classic  
21 structure for a public rights regulatory regime,  
22 and that becomes unmistakable if you look at  
23 1681s, which is the public enforcement provision  
24 of the statute, which equally gives the FTC the  
25 right to bring an action for any violation of a

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

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

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

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

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

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

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

6 JUSTICE THOMAS: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Breyer.

9 JUSTICE BREYER: Good morning. I'm  
10 interested in Justice Thomas's last question,  
11 thinking of typicality.

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

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

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

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

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

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

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

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

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

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

13 JUSTICE BREYER: Why?

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

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

1 JUSTICE BREYER: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Alito.

3 JUSTICE ALITO: The class members  
4 whose information was disclosed to third parties  
5 certainly had reason to worry about that,  
6 wouldn't you say?

7 MR. CLEMENT: Well, yes or no, Justice  
8 Alito. I don't mean to resist it, but I think,  
9 given that, you know, we know that, you know,  
10 roughly 1500 people had their reports  
11 disseminated and nobody other than Ramirez  
12 complained, I -- I do think there are a lot of  
13 people in this class who had it disseminated and  
14 maybe the person on the other end took a quick  
15 look at the birth dates, saw that they were  
16 radically different, went ahead with the  
17 transaction, having no harm/no foul.

18 JUSTICE ALITO: Well, is there really  
19 no harm? Suppose someone gets this information,  
20 asks for the credit report, gets the  
21 information, and sees that the person has been  
22 flagged as someone whose name resembles the name  
23 of a person who's on this list. Doesn't that  
24 inflict some psychological injury on the person  
25 who gets that information?



1                   MR. CLEMENT: I don't think so,  
2 Justice Alito. I mean, you know, I -- I read a  
3 report that -- that late Senator Kennedy ended  
4 up being on the No Fly List or some list  
5 associated with the No Fly List for secondary  
6 screening, you know, that I think he managed to  
7 get it cleaned up, and I'm sure it was a little  
8 bit of an inconvenience for him to be on the  
9 list.

10                   But the bare fact of knowing that  
11 you're on a list or share a name with somebody  
12 who's on a list, I -- I -- I don't know that  
13 that really is injury-in-fact. Of course, even  
14 if it is, that's only 25 percent of the class.

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

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

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

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

11           MR. CLEMENT: Well, the -- the -- the  
12 -- the jury did hear evidence that, you know,  
13 suggested that we did this to, you know,  
14 thousands of people, when, you know, that's  
15 actually not the case based on the premise of  
16 your -- of your question. So I do think that's  
17 quite prejudicial to us.

18           You know, there's also sort of the  
19 theoretical problem that I'm not sure that when  
20 a court proceeds on the assumption that it is  
21 exercising jurisdiction over all the absent  
22 class members, that you just sort of, you know,  
23 at the end just say, well, never mind, we'll  
24 just sort of fix that by sort of sticking this  
25 to the 25 percent.

1 I would also just add we don't think  
2 that Mr. Ramirez was typical even as to the  
3 25 percent.

4 JUSTICE ALITO: All right. Thank --

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

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

9 CHIEF JUSTICE ROBERTS: Justice  
10 Sotomayor.

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

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

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

11           I -- I just see this as a trial error,  
12          not as --

13           MR. CLEMENT: So --

14           JUSTICE SOTOMAYOR: -- an error in  
15          certifying the class, and the trial error was  
16          invited by you, so I -- not by you personally  
17          but by counsel below.

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

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

1 JUSTICE SOTOMAYOR: Well, don't you --

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

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

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

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

1           As to the trial error, with all due  
2     respect, I think, if you look at -- we actually  
3     proposed a jury form that allowed the jury to  
4     say that with respect to the statutory damages,  
5     you couldn't find that every member of the class  
6     was entitled to statutory damages.

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

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

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

20           MR. CLEMENT: Thank you.

21           CHIEF JUSTICE ROBERTS: Justice Kagan.

22           JUSTICE KAGAN: Mr. Clement, suppose  
23    that there's a carcinogen which, when it is in  
24    your drinking water, you have a 50 percent  
25    chance of getting cancer, and suppose Congress

1 passes a law that everybody exposed to that  
2 carcinogen can sue and obtain statutory damages,  
3 and suppose that there's a class action of  
4 people exposed to that carcinogen.

5 Does that satisfy Article III?

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

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

19 Now, in my hypothetical, unlike with  
20 the Chief Justice's question, you agree that  
21 retrospectively that there -- there is standing,  
22 right? So, if you -- if you just, you know --  
23 you're -- you're within a five-year period,  
24 let's say, nobody knows who's going to get  
25 cancer, you're agreeing that everybody could be

1 in that class action and that there would be  
2 standing, correct?

3 MR. CLEMENT: I -- I think so, Your  
4 Honor. I mean, just to be clear, I think so  
5 because I think a 50 percent exposure to cancer,  
6 when you haven't figured out whether or not you  
7 are going to get it because of the exposure, I  
8 think that's an injury-in-fact. Under, you  
9 know, the common law, it would probably be the  
10 kind of thing that --

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

13 MR. CLEMENT: -- someone would --

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

23 Now I would have said that if you're  
24 willing to give me that everybody has standing  
25 within the five years, it should be that



1 everybody has standing in the sixth year as well  
2 because you have standing if you suffered harm  
3 in the past.

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

7 MR. CLEMENT: No, I don't think so,  
8 Justice Kagan, but let me add one thing to the  
9 hypo to try to explain why I'm taking the  
10 position I'm taking.

11 I'm assuming that the people who are  
12 suing in the sixth year, like, they didn't even  
13 really know about the exposure until they found  
14 out they were in the claim. That's this case.  
15 And those people, I think, don't get to recover.  
16 I mean, if -- if you only --

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

22 MR. CLEMENT: But even in the process  
23 of filing the lawsuit during the five-year  
24 period, they essentially would know. And so I  
25 -- I -- I think, you know, if -- if you were

1 sort of subject to a risk that you didn't even  
2 know about and the risk never materialized, at  
3 that point, I don't think you can bring a  
4 retrospective action for damages.

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

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

14 JUSTICE KAGAN: Thank you.

15 MR. CLEMENT: -- as here -- I'm sorry.

16 CHIEF JUSTICE ROBERTS: Justice --  
17 Justice Gorsuch.

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

21 MR. CLEMENT: Thank you, Justice  
22 Gorsuch. What I was just going to say is that,  
23 you know, here, you have a 25 percent risk based  
24 on the information in the -- in the record, and  
25 then the consequences of that for everybody

1 other than Mr. Ramirez have not been anything  
2 like getting cancer. In fact, nobody else has  
3 registered essentially any complaint about what  
4 happened to them and being denied credit.

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

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

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

24 JUSTICE GORSUCH: Right.

25 MR. CLEMENT: -- for a mere battery or

1 something like that, that requires knowledge.

2 JUSTICE GORSUCH: So -- okay. So your  
3 -- so your argument as I understand it then is,  
4 with respect to those in the -- the group that  
5 didn't -- that didn't have their information  
6 sent to third parties, that they need to have  
7 some knowledge of the information in order to  
8 have any material risk of injury. Is that -- is  
9 that a fair summary of what you're saying?

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

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

24 MR. CLEMENT: Exactly. And I think  
25 you have to -- the other side, not me, with all

1 due respect, has to have a theory as to how the  
2 material risk translates into an injury-in-fact,  
3 unless you think that a material risk just  
4 standing alone is an injury-in-fact, and, if you  
5 think that, I think it's got to be a lot higher  
6 than 25 percent.

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

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

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

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

2 MR. CLEMENT: -- on the OFAC list.

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

8 CHIEF JUSTICE ROBERTS: Justice  
9 Kavanaugh.

10 JUSTICE KAVANAUGH: Thank you, Chief  
11 Justice.

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

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

21 In response to Justice Kagan and  
22 Justice Gorsuch, I think you were saying -- but  
23 tell me if I'm wrong -- that the risk of harm is  
24 still not enough for damages unless the risk of  
25 harm is itself a separate harm. In other words,

1 the risk of harm is not cancer, in other words,  
2 you don't have the cancer, but the risk of harm  
3 may create emotional injury.

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

6 MR. CLEMENT: I think that's right,  
7 Your Honor. And I guess the only other thing I  
8 would add is I suppose there might be certain  
9 risks of harm that are so high that maybe you  
10 think that the material risk is itself an  
11 injury-in-fact even if it doesn't manifest  
12 itself in emotional harm or some other  
13 injury-in-fact, but I don't think that's  
14 25 percent chance of a dissemination of a credit  
15 report.

16 JUSTICE KAVANAUGH: Even for damages  
17 claims?

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

1 materialize, I don't think you have  
2 injury-in-fact at that point.

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

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

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



1 JUSTICE KAVANAUGH: And then, in  
2 response to Justice Thomas, I think you're  
3 saying that the problem here is that Congress is  
4 setting up, in essence, a shadow government of  
5 private attorneys general to enforce  
6 prohibitions on certain activities by certain  
7 entities, and that's an Article II/Article III  
8 problem, and your test is no harm/no foul.

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

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

19 And then the one thing I would add --  
20 and I think this speaks particularly to people  
21 that are focused on the public rights/private  
22 rights distinction -- when you have a statute  
23 like the one at issue here or like the one at  
24 issue in Fohl, where the structure of the  
25 statute is to give certain individuals, whether

1 they be consumers here or plan participants in  
2 Fohl, a right, essentially, to enforce any  
3 violation of the subchapter, that is a strong  
4 indication that Congress has not actually made  
5 the judgment that this is a very specific  
6 private right.

7 JUSTICE KAVANAUGH: Thank --

8 MR. CLEMENT: Instead, they basically  
9 --

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

12 MR. CLEMENT: Sure.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Barrett.

15 JUSTICE BARRETT: Mr. Clement, I want  
16 to ask you a follow-on to Justice Kagan's  
17 hypothetical about the people who drink water  
18 are exposed to a carcinogen, they're at  
19 50 percent risk of cancer.

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

25 I want to know what would happen, say,

1 if they filed in year two, but the litigation  
2 drags on and on and on and the case doesn't come  
3 to its conclusion until year six.

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

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

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

1           The only thing I would add, Your  
2 Honor, is, you know, this Court has made very  
3 clear in cases like Lujan that you do have to  
4 maintain your standing at every stage of the  
5 case.

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

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

21           And then, for slander per se, you  
22 know, there are some harms that were recognized  
23 at the common law, as we have discussed during  
24 this argument, that were presumed to cause harm  
25 because, even if you didn't have to prove that

1 you lost a job over it, you know, that the risk  
2 was so great that in and of itself the common  
3 law tort proposed it.

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

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

13 Am I understanding you correctly?

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

24 I mean, you know -- you know, at the  
25 point that you, you know, are -- are -- you

1 know, there's a real risk that you might be  
2 injured, but you're not injured, I suggest the  
3 way I see that is you're not injured.

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

7 MR. CLEMENT: Sure. And -- and that's  
8 why I got into the discussion about sort of  
9 whether you'd know about it, because, obviously,  
10 you know, I think, if you don't know about it at  
11 all, then you can't be distressed about it, and  
12 so you can't suffer the injury-in-fact, whereas,  
13 with certain injuries, you know, if somebody  
14 trespasses on my property and I find out --

15 JUSTICE BARRETT: I --

16 MR. CLEMENT: -- later, but, at the  
17 time, I had no idea --

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

21 MR. CLEMENT: Sure.

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

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

1           In the end, there's no getting around  
2 the two fatal flaws that the class certified  
3 here. The district court recognized from the  
4 outset that proof of an actual de facto injury  
5 would require individualized proof and refused  
6 to certify certain state law claims on that  
7 ground. But he excused the class from making an  
8 individualized showing of de facto injury for  
9 the FCRA claims because Ninth Circuit law did  
10 not require it at the time.

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

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

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Ms. Reaves.

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

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

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

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



1           Congress also gave consumers rights to  
2 receive certain disclosures and summaries of  
3 their rights, and under this Court's  
4 informational standing cases, all class members  
5 have standing to bring claims for violations of  
6 those rights.

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

12           I welcome the Court's questions.

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

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

25           And I think, in addition, we look at a

1 few different factors when considering the  
2 reasonable procedures requirement. We don't  
3 really focus on potential of any emotional  
4 distress but look at just the risk of  
5 dissemination as to these class members.

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

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

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

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

1 accuracy.

2                   And one thing that's going on in this  
3 case is Petitioner has conflated in a lot of  
4 ways the standing and the merits arguments here.  
5 So, under Spokeo, we have to look at whether  
6 that's a type of harm that Congress could  
7 legitimately identify.

8                   CHIEF JUSTICE ROBERTS: What --

9                   MS. REAVES: -- and whether it has  
10 some --

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

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

22                   CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24                   Justice Thomas.

25                   JUSTICE THOMAS: Thank you, Mr. Chief

1 Justice.

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

5 MS. REAVES: We haven't quite gone  
6 that far, Justice Thomas, but we do think that  
7 the courts below viewed typicality through the  
8 long -- wrong legal framework, and that may have  
9 resulted in a improper certification of the  
10 class. But we haven't taken the position that  
11 it was certainly an abuse of discretion.

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

15 MS. REAVES: So we think that the  
16 court below did apply the -- an incorrect legal  
17 framework, but we're not sure that the ultimate  
18 outcome was incorrect. And so we think that the  
19 basis the Court would send it back would be to  
20 say that this was the wrong typicality  
21 framework. The court of appeals and district  
22 court should have considered the guidelines that  
23 we suggested in our brief that we think are tied  
24 to the legal standard that a claim or defense be  
25 typical and that the lower court should

1 reconsider this in the first instance because  
2 there are open questions as to forfeiture and  
3 what Petitioner and Respondent did and did not  
4 agree to below.

5 JUSTICE THOMAS: So do you think that  
6 there's anything other than the level of harm,  
7 what -- what is atypical about this claim?

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

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

21 JUSTICE THOMAS: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Breyer.

24 JUSTICE BREYER: I have the same  
25 question, just if you want to say more about

1 Justice Thomas's last question. How is this  
2 different? I've always thought that a -- a -- a  
3 class of antitrust plaintiffs, all of whom have  
4 to pay higher prices as the result of price  
5 fixing, could be represented by a -- a consumer  
6 who, through an odd chance, bought a thousand  
7 times more of the product than anyone else in  
8 the class. He just had higher damages.

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

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

25 MS. REAVES: A couple responses to

1 that, Justice Breyer.

2 I think, as to the two hypotheticals  
3 you gave, the first hypothetical, the antitrust  
4 plaintiffs, there might not be a typicality  
5 problem there because any differences would be  
6 easily calculated, and the court could consider  
7 that at the outside -- outset of the case and  
8 determine whether there's a viable damages model  
9 to separate different individuals out just based  
10 on kind of a mechanical mathematical  
11 calculation.

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

19 And, here, in the statutory damages  
20 context, the jury is charged with setting the  
21 amount of damages within a range. And  
22 plaintiffs' specific experience can be relevant  
23 to that. So, in a situation like this, where  
24 one individual, the class plaintiff, was placed  
25 on the stand and gave extensive testimony about

1 his specific experiences, we think that there  
2 can be typicality problems there because that  
3 isn't indicative of what happened to other class  
4 members, and they might benefit from that in a  
5 way that they really shouldn't.

6 CHIEF JUSTICE ROBERTS: Justice Alito.

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

14 MS. REAVES: I don't read that as  
15 alone setting out a legal test for  
16 injury-in-fact. I think the Court in Spokeo set  
17 out a number of considerations that may be  
18 relevant to injury-in-fact when Congress defines  
19 a harm, one of which is Congress's judgment;  
20 another of which is whether there's a common law  
21 analogue for the harm; and another of which is  
22 whether there was a material risk of harm, which  
23 might be necessary in some cases but not in all.

24 JUSTICE ALITO: You know, Spokeo's  
25 discussion of harm is quite clipped and it's



1 potentially subject to different  
2 interpretations. But let me shift to something  
3 else and ask about the class members' standing  
4 to assert claims for failure to provide the  
5 information called for by Congress.

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

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

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

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

1 at the various factors that Spokeo lay out.

2 JUSTICE ALITO: All right. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Sotomayor.

5 JUSTICE SOTOMAYOR: Counsel, do you  
6 think that everyone in this class is entitled to  
7 some measure of statutory damages?

8 MS. REAVES: Yes, Justice Sotomayor.

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

12 MS. REAVES: That is correct.

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

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

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

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

5                   MS. REAVES: That's correct.

6                   JUSTICE SOTOMAYOR: But why isn't that  
7                   a trial issue? And why is that an issue for  
8                   23(a)? Wouldn't that be a predominance  
9                   requirement under 23(b)(3)?

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

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

24                  And getting to the second kind of  
25                  point, I think that this is not a trial issue

1 because this Court has repeatedly said that a  
2 plaintiff needs to demonstrate that he or she  
3 meets requirements of Rule 23, and this may have  
4 to be done by an evidentiary showing at the  
5 outset of a case. So it's not as if, if that  
6 isn't sufficiently done, it's the obligation of  
7 the defendant to try to fix any --

8 JUSTICE SOTOMAYOR: All right.

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

11 JUSTICE SOTOMAYOR: Thank you,  
12 counsel.

13 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

23 MS. REAVES: I think it's very likely  
24 that there would not be a typicality problem in  
25 that situation, and that's because a plaintiff

1 is the master of their complaint and the master  
2 of the case that they put on at trial.

3 JUSTICE KAGAN: Well, it's a little  
4 bit odd to me to say that there wouldn't be a  
5 typicality problem in that situation, but still  
6 it's a -- it's -- it's a -- it's a problem  
7 that's about class certification, because Mr.  
8 Ramirez could have brought this case as a class  
9 representative and not testified at trial.

10 Or, alternatively, he could have had  
11 somebody else testify at trial, a different  
12 member of the class. I mean, there's no  
13 necessary relationship between who's the class  
14 representative and who testifies at trial.

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

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

22 MS. REAVES: Not necessarily. You're  
23 correct as a matter of trial management that the  
24 named plaintiff wouldn't have to testify. But  
25 that doesn't absolve courts of the requirement

1 to find out whether a putative named plaintiff  
2 is, in fact, typical at the outset.

3 JUSTICE KAGAN: I mean, suppose that  
4 -- suppose -- it's sort of a mismatch, your  
5 argument and your conclusion. Suppose that  
6 there were a different class representative. It  
7 wasn't Mr. Ramirez. It was a class  
8 representative with a perfectly typical injury.  
9 But then you said, I have this great idea, let's  
10 put Mr. Ramirez on the stand.

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

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

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

23 Here, it's a typicality problem  
24 because it was the named plaintiff. But, as  
25 this Court has laid out in cases like *Dukes* and

1 Falcone, a plaintiff has to bear the burden of  
2 proof of demonstrating that they meet --

3 JUSTICE KAGAN: Thank you, Ms. Reaves.

4 MS. REAVES: -- Rule 23 class  
5 requirements.

6 JUSTICE KAGAN: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Gorsuch.

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

12 So Congress has a statute that says  
13 notice needs to be provided in a particular  
14 form. This then provides it in a different  
15 form. Is that alone enough to create an  
16 injury-in-fact under Spokeo, or do you agree  
17 that something more needs to be shown, some risk  
18 of harm, some actual harm, something befell the  
19 plaintiff because the form of the information  
20 was different?

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

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

5                   JUSTICE GORSUCH:   So some --

6                   MS. REAVES:    And --

7                   JUSTICE GORSUCH:  -- something more  
8                   than a mere violation of the statutory form of  
9                   notice?

10                  MS. REAVES:   I think that's likely  
11                  there would not be harm there, although I'm  
12                  obviously answering in the complete abstract  
13                  without any -- any statute.

14                  JUSTICE GORSUCH:  Okay.  All right.  
15                  Thank you, counsel.

16                  CHIEF JUSTICE ROBERTS:  Justice  
17                  Kavanaugh.

18                  JUSTICE KAVANAUGH:  Thank you, Chief  
19                  Justice.

20                  And welcome, Ms. Reaves.  On the risk  
21                  of harm, I want to make sure I understand your  
22                  answer.  My understanding was that a risk of  
23                  harm that is not itself a separate cognizable  
24                  harm does not give you standing to seek damages,  
25                  as opposed to injunctive relief, because you



1 haven't been harmed. Is that wrong?

2 MS. REAVES: We disagree with that,  
3 Justice Kavanaugh, in that I think what this  
4 Court suggested in Spokeo is that in certain  
5 instances, a risk of harm alone can be enough to  
6 provide Article III standing.

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

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

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

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

23 I think Mr. Clement is suggesting and,  
24 certainly, the amicus briefs are suggesting on  
25 his side that Congress is, in essence,

1 delegating private attorneys general to enforce  
2 federal law against a wrong committed by someone  
3 to try to deter that wrongful behavior.

4           And some of the amicus briefs say the  
5 problem is that the executive branch enforces  
6 federal law and that private plaintiffs can't do  
7 that, can't be delegated that authority by  
8 Congress unless they themselves have a concrete  
9 injury.

10           Do you disagree with any of that?

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

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

1 that individual.

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

4 CHIEF JUSTICE ROBERTS: Justice  
5 Barrett.

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

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

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

21 JUSTICE BARRETT: Can you describe a  
22 little bit more? Because it seems to me that  
23 Havens Realty is -- the harm there is  
24 discrimination, not deprivation of information.  
25 And since it's kind of an obvious cite since

1 those are the three cases that the courts of  
2 appeals relied on, I was surprised not to see it  
3 there.

4 Do you think Havens Realty is  
5 distinction -- distinguishable?

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

12 JUSTICE BARRETT: Okay. Let me --

13 MS. REAVES: And then --

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

23 MS. REAVES: I think it's certainly a  
24 closer question, but I don't think that  
25 informational standing, as this Court has viewed

1 it, requires -- it sole -- I should say it  
2 solely requires the denial of information to  
3 which someone's entitled under Article III.

4 JUSTICE BARRETT: Then why is it a  
5 close question if they -- if the -- if the  
6 plaintiffs in those cases had disclaimed any  
7 intent to use the information or even look at  
8 it, why under your theory isn't it a -- a -- a  
9 straightforward yes, they had informational  
10 injury and, therefore, standing?

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

22 JUSTICE BARRETT: Thank you, Ms.  
23 Reaves.

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

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

3 While we've discussed a number of  
4 hypotheticals today, it's important to keep in  
5 mind the actual claims here. On these facts,  
6 the various Spokeo factors all cut in favor of  
7 finding standing for the reasonable procedures  
8 claims. The OFAC alerts were inaccurate as to a  
9 material issue, whether a party making a  
10 contracting decision could lawfully contract  
11 with a consumer.

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

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

1                   And the disclosure and summary of  
2 rights claims fall squarely within this Court's  
3 informational standing precedents. But, given  
4 the typicality issues, the Court should vacate  
5 the decision below and remand the case.

6                   Thank you.

7                   CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9                   Mr. Issacharoff.

10                  ORAL ARGUMENT OF SAMUEL ISSACHAROFF

11                               ON BEHALF OF THE RESPONDENT

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

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

22                       Nothing in Article III restricts  
23 Congress's power to create those rights. The  
24 class alleged and proved invasion of  
25 particularized statutory rights granted to them,

1 not the general public. The common law has long  
2 recognized a concrete interest in economic  
3 reputation and afforded an inferred remedy  
4 without proof of actual damages.

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

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

22 But the heart of this case is the  
23 concrete harm established at trial. Being  
24 labeled a potential OFAC match is not a  
25 misreported ZIP code. It is the scarlet letter



1 of our time. It banishes individuals from the  
2 marketplace. It is thus staggering that since  
3 2002 Petitioner could not identify a single  
4 correct OFAC match despite issuing thousands of  
5 OFAC alerts a year.

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

9 Thank you, Your Honor.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

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

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

21 MR. ISSACHAROFF: I believe you could  
22 bring an action under that statute. The  
23 question would be whether you were harmed at  
24 all. And Spokeo runs the inquiry about the risk  
25 of harm together with the scope of the

1 congressional interest, and at that point, you  
2 would have a marginal -- a marginal case, Your  
3 Honor.

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

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

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

21 You -- you didn't know -- you were  
22 exposed to risk, but you didn't know it, and by  
23 the time you found out about it, you weren't. I  
24 think Mr. Clement said, you know, you should be  
25 breaking out the champagne or -- or talking

1 about how lucky you are, not -- not how much  
2 you've been injured.

3 MR. ISSACHAROFF: Well, Your Honor, I  
4 think Spokeo addresses the question of material  
5 risk and does not do so in terms of your  
6 subjective knowledge. And so the question is  
7 whether you -- there was material risk of your  
8 being harmed and whether Congress sought to  
9 deter parties from engaging in that material  
10 risky behavior by creating a cause of action.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Thomas.

13 JUSTICE THOMAS: Thank you, Mr. Chief  
14 Justice.

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

19 MR. ISSACHAROFF: Yes, Your Honor.

20 JUSTICE THOMAS: The -- let me -- I'd  
21 like just to explore something just briefly.  
22 Let's assume that in this case that -- that your  
23 client received a summary of -- of his rights on  
24 day one on a Monday, and the company admits that  
25 it inadvertently sent that out, immediately

1 corrects it the next day with an explanation, so  
2 you have the two letters again with complete  
3 information.

4           Would you -- would you have a claim?

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

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

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

23           MR. ISSACHAROFF: Intentionality would  
24 come in on the damages side. And the statute is  
25 quite clear that it is the willfulness of the

1 defendant that gives rise to a claim for  
2 statutory damages.

3 So, in this case, I think that there  
4 would be standing, but there would be no remedy  
5 available. It would probably go to the  
6 redressability side, not the injury-in-fact  
7 side.

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

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

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

23 JUSTICE THOMAS: So you think that it  
24 would be -- it would really jeopardize your --  
25 Petitioner's or Respondent's chance of being

1 typical of the class?

2 MR. ISSACHAROFF: Not at -- not  
3 typicality, Your Honor, because the typicality  
4 goes only to the claims. It would compromise  
5 predominance. It would compromise perhaps the  
6 adequacy of representation.

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

10 JUSTICE THOMAS: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Breyer.

13 JUSTICE BREYER: Well, you want to say  
14 anything additional on that point, additional  
15 about, I mean, what I -- what I think must have  
16 come up often in -- or fairly often in class  
17 cases, where damages differ, but there are the  
18 issues that you said are the same, someone goes  
19 in and tries to testify about the extra damages  
20 that he suffers, the higher, higher prices, or  
21 the many more widgets that they were charged on,  
22 or the special bad treatment he got in some  
23 hospital, et cetera, and the other side, I  
24 should think, would be able to object either  
25 that it's relevant, something like its relevance

1 is -- is small compared to the harm it's going  
2 to do to our case for these damages or not,  
3 really very typical. They're especially  
4 egregious and it'll prejudice the jury.

5 But am I on the right track there, the  
6 wrong track? What's actually happened?

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

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

19 More broadly, I would -- I would say  
20 that if you look at the mechanics of class  
21 certification and the requirement under Rule  
22 23(c) that it be done as early as practicable,  
23 at this point, at the point of class  
24 certification, it is unlikely that anyone has  
25 any idea what the nature of the trial testimony

1 will be.

2           When Petitioner sought 23(f) review in  
3 the court of appeals, it did not address the  
4 typicality point. It tried to disqualify Mr.  
5 Ramirez not because he was too strong but  
6 because he had no claim. They said that he had  
7 dissembled his application. They said that he  
8 had no damages. And they tried to disqualify  
9 him on summary judgment on the same basis.

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

15           JUSTICE BREYER: Thank you.

16           CHIEF JUSTICE ROBERTS: Justice Alito.

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

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



1           MR. ISSACHAROFF: I think they have  
2 under this Court's standard in Spokeo. There  
3 was certainly material risk.

4           Mr. Clement relies heavily on the  
5 75 percent number. But the fact is that one  
6 quarter of the class had their files accessed by  
7 one subset of potentially accessing parties  
8 within only seven of the 46 months of the class  
9 period.

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

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

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

1                   What is the closest case you can think  
2 of where there -- where a suit could be brought  
3 to recover for having been subjected to a risk  
4 in the past even though the person had no  
5 knowledge that the person had been subjected to  
6 that risk?

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

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

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

20                   JUSTICE ALITO: Well, suppose in -- in  
21 -- in 1786 someone was getting ready to publish  
22 a newspaper article defaming me. I had no idea  
23 that this was going to happen. And just before  
24 the person -- before this article was published,  
25 the owner of the paper said: No, we're not

1 going to do that. And so it never was  
2 published.

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

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

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

17           JUSTICE ALITO: Thank you.

18           CHIEF JUSTICE ROBERTS: Justice  
19 Sotomayor.

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

24           Both of them believe that under 23(a)  
25 that typicality often has to do -- has to

1 address whether your -- your -- your damages  
2 claim are common to the class in some way.

3 So give me your best answer.

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

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

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

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

1 predominance.

2 JUSTICE SOTOMAYOR: Thank you,  
3 counsel.

4 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

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

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

21 But the evidence presented to the jury  
22 here -- and these were factual determinations as  
23 to the violation, the willful violation of the  
24 statute, by the jury. The evidence presented to  
25 the jury was that these were confusing not just

1 as to Mr. Ramirez, but the drafter of the  
2 letters testified to that as well, and that they  
3 did not serve the statutory purpose of giving  
4 the disclosure in a form that was tied to the  
5 specific risk of being on an OFAC match list.

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

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

22 Injunctive relief, a party has to  
23 establish standing in a more exacting way. I  
24 think that's one of the conclusions of Lujan.  
25 It is a -- it makes a difference whether the --

1 the claim is a facial challenge to a statute or  
2 an applied application to the particular  
3 claimant. And, most significantly, I think it  
4 makes a difference whether these are generalized  
5 claims of the public at large or private claims  
6 or private endowment of the right to sue by  
7 Congress.

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

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

19 JUSTICE KAGAN: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Gorsuch.

22 JUSTICE GORSUCH: Counsel, in your  
23 brief at least, you seem to suggest that the  
24 6,332 class members have standing in part  
25 because there was publication of their

1 information at least within TransUnion and its  
2 agents who print up information for them.

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

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

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

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

24 JUSTICE GORSUCH: No, I -- I -- I  
25 understand that point. I was just trying to



1 clarify the first one. And I guess, on that, my  
2 -- my -- my follow-up to you is, would that view  
3 of defamation law allow for individuals to sue  
4 newspapers and other media outlets who have  
5 shared false information internally but not  
6 actually published it externally?

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

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

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

15 JUSTICE GORSUCH: So this whole  
16 argument we should just ignore then?

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

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Thank you, Chief  
25 Justice.

1           Good morning, Mr. Issacharoff. I  
2 think you have a good argument with respect to  
3 the 1,853 in terms of the reasonable procedures,  
4 but I'm more concerned about the 6,332, whose  
5 information was not, in essence, published.

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

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

25           Judge Tatel in the D.C. Circuit

1 analogized it: If inaccurate information falls  
2 into a database, does it make a sound? And his  
3 answer to that, applying Stoke -- Spokeo, was  
4 no. And I guess then-Judge Barrett, talking  
5 about no harm/no foul, seemed to be picking up  
6 on the same thing.

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

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

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

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

1                   And I think that the evidence here is  
2                   that with regard to the other 6,000, that there  
3                   was circumstantial evidence given the  
4                   limitations on what the defendant provided to  
5                   us. I would direct Your Honor's attention --

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

12                  And you don't have that here for the  
13                  6,332. If you can continue your answer to that.

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

21                  But even assuming the burden of  
22                  publication, if the Court's attention could be  
23                  directed to Joint Appendix page 104, where  
24                  TransUnion did an internal audit of its OFAC  
25                  claims and found that in one month, in July

1 2012, which is still within the statutory  
2 period, within the class period, there were over  
3 17,000 OFAC alerts sent out. All of the class  
4 members were still on the list at that time.

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

10 JUSTICE KAVANAUGH: Thank --

11 MR. ISSACHAROFF: -- as to all.

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

14 CHIEF JUSTICE ROBERTS: Justice  
15 Barrett.

16 JUSTICE BARRETT: Good morning, Mr.  
17 Issacharoff. I have a question about whether  
18 you can ever have a bare procedural violation  
19 with respect to any of these consumer protection  
20 statutes, like FCRA or the FDCPA. I mean, all  
21 of them have procedures that are designed to  
22 protect against a risk of harm. So, you know,  
23 whether it's to have information put clearly on  
24 two pages instead of one or, you know, whether  
25 it's to say that certain things must be in

1 writing or whether it's -- I'm thinking of many  
2 of the cases that the lower courts have dealt  
3 with -- not having so many numbers of your  
4 credit card receipt -- credit card number  
5 reflected on a receipt, all of these are  
6 designed to protect a consumer against the risk  
7 of some harm.

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

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

25           It remains a question whether the

1 Court is best off handling these as standing  
2 matters, meaning that the individual would then  
3 be free to file in state court, or should handle  
4 it as a matter of part of the injury-in-fact and  
5 necessary as part of the statutory standing and  
6 then simply rule against the plaintiff on the  
7 merits.

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

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

1 JUSTICE BARRETT: But that doesn't  
2 have anything to do with whether the plaintiff  
3 was injured. That might bear on how egregious  
4 TransUnion's behavior was, but that doesn't bear  
5 on the injury, right?

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

9 JUSTICE BARRETT: But not the  
10 concreteness, right?

11 MR. ISSACHAROFF: It -- no, not the  
12 concreteness of the individual plaintiff, that's  
13 correct, Your Honor.

14 JUSTICE BARRETT: Okay. Thank you  
15 very much.

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

18 MR. ISSACHAROFF: Thank you, Your  
19 Honor.

20 The concern in this Court's Article  
21 III cases is protecting the domain of Congress.  
22 Never has this Court found Article III to remove  
23 jurisdiction for retrospective damage claims  
24 when Congress has created the private cause of  
25 action, vested the affected individuals with the



1 right to bring suit, and then provided for  
2 statutory remedy to those individuals.

3 It is difficult to imagine a fact  
4 pattern more at the heart of the statutory zone  
5 of interest or one that is more uniform across  
6 the class. There are only a total of 6,000  
7 people on the OFAC list, and over 98 percent of  
8 them are foreigners.

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

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

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

21 Thank you, Your Honor.

22 CHIEF JUSTICE ROBERTS: Mr. Clement.

23 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

24 ON BEHALF OF THE PETITIONER

25 MR. CLEMENT: Thank you, Mr. Chief

1 Justice, and may it please the Court:

2 Just a few points in rebuttal.

3 First, on falsity, it's interesting to  
4 hear the government to say that reporting this  
5 as a potential match is not -- is -- is false  
6 because, if you go to the OFAC website today and  
7 type in the Respondent's name, you will get a  
8 hit. And so they think it's good enough for the  
9 government. I guess they -- they hold  
10 TransUnion to a higher standard.

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

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

24 But, if a material risk is enough and  
25 the answer to the Chief Justice's hypo is that's

1 right, everybody can bring actions for traffic  
2 violations that didn't actually realize  
3 themselves in any harm, I mean, the Article III  
4 courts could be open to all sorts of trivial  
5 injuries where everybody should be essentially  
6 toasting their good luck, not suing the person  
7 who posed a risk to them but didn't actually  
8 injure them.

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

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

20 On typicality, I want to make two  
21 points about that. First is typicality is  
22 required at the outset of the case because the  
23 class representatives, typicality is important  
24 from the beginning. It's not just a trial  
25 issue. The -- the -- the defense has the right

1 to depose the class representative. So, from  
2 the very beginning of the case, the class  
3 representative is essentially the embodiment of  
4 the case.

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

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

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

22 But, in a statutory damages case,  
23 particularly one seeking punitives, at the  
24 predominance issue, what the plaintiffs say is,  
25 don't worry, we have one-size-fits-all statutory

1 and punitive damages here. And then, they turn  
2 around and say, we're going to find the least  
3 typical class representative we can. That's an  
4 abuse. That's an abuse this Court has to stop.

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

16 And the last --

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

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

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

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

24 CHIEF JUSTICE ROBERTS: Okay. Thank  
25 you. Thank you, counsel. The case is

1 submitted.

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

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