No. 22-15916

In the United States Court of Appeals
for the Ninth Circuit

DZ RESERVE and CAIN MAXWELL d/b/a MAX MARTIALIS,

Plaintiffs-Appellees,

v.

META PLATFORMS, INC., f/k/a FACEBOOK, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California, Case No. 3:18-cv-04978-JD
The Honorable James Donato

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

Dated: May 13, 2024

s/ Erik R. Zimmerman
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STATEMENT OF IDENTITY AND INTEREST[1]

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

The Chamber's members include technology companies and other businesses that are often sued in class actions. The Chamber is thus familiar with class-action litigation, both from the perspective of individual defendants and more generally. The Chamber has a keen interest in this case because the panel majority's dilution of class-

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[1] All parties consented to the filing of this brief. No party's counsel authored this brief in whole or in part. No party, no party's counsel, and no person other than amicus, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

certification standards for fraud claims misunderstands Rule 23 and state law. The proper application of those standards is of vast importance for the Chamber's members and for the customers, employees, and other businesses that count on those members.

SUMMARY OF ARGUMENT

This appeal involves an issue of exceptional importance to the business community and the public as a whole: the proper application of class-certification requirements in fraud cases. Because the panel majority weakened those requirements and departed from the decisions of other courts of appeals, this case calls for en banc review.

Since the current version of Rule 23 was adopted in 1966, the settled understanding has been that class actions are difficult to certify in fraud cases. The main stumbling block for the certification of fraud classes is Rule 23(b)(3)'s predominance requirement, a vital restraint on class-action litigation.

Fraud claims usually fail the predominance requirement because key elements of common-law fraud require individualized inquiries that overwhelm class-wide questions. Those individualized elements include whether the defendant made a material misrepresentation to each class

member and whether each class member relied on a misrepresentation to its detriment.

This case is a textbook example. Meta showed individualized Potential Reach estimates to each of the more than three million class members, and each class member in turn placed its own individualized degree of weight on Meta's estimates. Deciding whether Meta made material misrepresentations to each class member and whether each class member relied on those alleged misrepresentations would thus require millions of individualized inquiries. Those particularized questions dwarf any common ones, defeating predominance and precluding class certification.

The panel majority nevertheless upheld the district court's certification of a damages class in this case. In so doing, the majority adopted a diluted approach to predominance that would make certification in fraud cases the norm. The majority even went so far as to say that fraud claims are "particularly well suited" for class treatment. Op. 12. As that statement reflects, the panel decision turned the settled understanding about class certification in fraud cases on its head.

Left uncorrected, the majority's dilution of the predominance requirement in fraud cases would harm American businesses and the national economy. The certification of large class actions creates hydraulic pressure for defendants to settle, even if the plaintiffs' claims have no merit. That is particularly true in fraud cases, where plaintiffs can inflate their damages demands with threats of punitive damages. Neutering the predominance requirement in fraud cases would thus impose massive costs on defendant businesses—costs that these businesses would then pass along to consumers, employees, and the rest of the business community.

This case presents a stark illustration of these reverberating harms. Many small companies depend on technology platforms like Facebook to advertise their products and services. The panel majority's overly permissive approach for certifying fraud class actions against technology platforms would increase the costs of advertising on these platforms. The end result would be to cut off the lifeblood of small businesses across the country.

For these reasons, this appeal warrants rehearing en banc.

ARGUMENT

I. The panel majority watered down Rule 23's predominance requirement.

A. The predominance requirement is a critical limitation on class actions.

The predominance requirement imposes a crucial restraint on class-action litigation. Under that requirement, a damages class may be certified only if the court finds that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This rule bars certification unless the class is "sufficiently cohesive to warrant adjudication by representation." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009) (internal quotation marks omitted). The predominance requirement thus limits class treatment to cases in which it will achieve judicial economy while maintaining procedural fairness. *See* Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment ("1966 Advisory Committee Note"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009).

Consistent with its essential nature, the predominance requirement is a demanding one. *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). Plaintiffs seeking class certification must prove, not merely plead, that their claims satisfy Rule 23(b)(3). *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 664 (9th Cir. 2022) (en banc). To that end, the plaintiffs must show—by a preponderance of the evidence—that their claims' essential elements "are capable of being established through a common body of evidence, applicable to the whole class." *Id.* at 665–66. When deciding whether the plaintiffs have met that burden, the court must conduct a "rigorous analysis," *id.* at 664, and "take[ ] into consideration all factors that militate in favor of, or against, class certification," *Vinole*, 571 F.3d at 946.

B. Fraud claims usually flunk the predominance requirement.

When the predominance requirement is rigorously applied, common-law-fraud claims typically cannot satisfy it. That point has been the subject of widespread agreement since the predominance requirement was adopted in the 1966 amendments to Rule 23.

As the Advisory Committee observed at that time, even when fraud claims have "some common core," those claims may not be suited for class treatment if there was "material variation" in either "the representations made" or "the kinds or degrees of [class members'] reliance." 1966 Advisory Committee Note. Courts have followed this guidance and been reluctant to certify class actions in fraud cases ever since. *See* 2 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* §§ 4:58 to 4:59 (6th ed. 2022); 1 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 5:54 (20th ed. 2023) ("McLaughlin").

The Advisory Committee's guidance reflects that individualized inquiries usually predominate over common questions on two key elements of a fraud claim.

The first is that the defendant must have made a material misrepresentation to the plaintiff. *See, e.g.*, *Graham v. Bank of Am., N.A.*, 172 Cal. Rptr. 3d 218, 227–28 (Ct. App. 2014). If the defendant made different representations to different class members, the class cannot use class-wide evidence to satisfy this element. Rather, each class member will need to make an individualized showing that the

defendant said something to that class member that was materially misleading. Those individualized showings will ordinarily swamp any common questions and bar class certification. *See, e.g.*, *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1066, 1069 (9th Cir. 2014); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012).

The second key element of a fraud claim that often precludes class certification is that the plaintiff must have detrimentally relied on the defendant's alleged misrepresentation. *See, e.g.*, *Graham*, 172 Cal. Rptr. 3d at 228. Class members usually act based on their own individual tastes, motivations, and knowledge. As a result, individual inquiries are typically needed to judge why each class member acted as she did—and thus to determine whether each class member relied on the defendant's alleged misrepresentation in taking that action. *See, e.g.*, *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 665–66 (9th Cir. 2004); *Mazza*, 666 F.3d at 596. Unless the alleged misrepresentation was the class members' *only* conceivable basis for acting as they did, particularized reliance inquiries will ordinarily predominate. *See* 1 McLaughlin § 5:54.

C. This case exemplifies the difficulties of meeting the predominance requirement in fraud cases.

Under the principles described above, class certification is improper in this case. Plaintiffs' fraud claims trigger both of the concerns that the Advisory Committee highlighted when the predominance requirement was adopted and that courts have treated as barring class certification in the decades since.

1. This case involves "material variation in the representations made." 1966 Advisory Committee Note. The representations at issue are Meta's Potential Reach estimates, which varied for each proposed advertisement. *See generally* Class Action Compl., Dkt. 1; *see also* Dissenting Op. 37, 41; 2-ER-79, 89, 92 (operative complaint); 2-ER-71. Plaintiffs allege that those estimates were inflated. *See* 2-ER-79–80, 82–88. But the level of alleged inflation varied widely across the class. 1-ER-11–13; Meta Pet. 4–5. Meta's alleged misrepresentations therefore differed from class member to class member.

Meta's representations to class members also varied in additional ways. Meta displayed other metrics, such as Estimated Daily Results, alongside Potential Reach. *See* 2-ER-79, 150. For many advertisers,

those other metrics mattered more than Potential Reach did. *See* 2-ER-97.

Meta also made disclosures about Potential Reach that changed over time. *See* 2-ER-176–79, 183; 2-ER-82, 181. In *Berger*, this Court held that analogous disclosures, such as statements posted on signs or made orally to customers, gave rise to individualized issues. *See* 741 F.3d at 1069.

In light of these variations in Meta's representations, the question of whether Meta made a material misrepresentation to each class member cannot be answered through class-wide evidence. Rather, that question must be answered individually for each class member.

Those individualized inquiries will predominate over any common ones. The millions of class members in this case vary in countless ways along each of the three axes described above: alleged inflation, other metrics, and disclosures. As a result, the number of individualized permutations that bear on the material-misrepresentation element here is astronomical.

2. The predominance problems get worse from there. That is because this case also involves "material variation" in class members' "kinds or degrees of reliance." 1966 Advisory Committee Note.

Not every advertiser relies on Potential Reach to the same extent—or at all—when making decisions about ads. Different advertisers have different objectives for their ad campaigns, and those objectives need not depend on Potential Reach. *See* 2-ER-152–53; *see also, e.g.*, 2-ER-97, 103, 113–14.

Analysis from plaintiffs' own expert confirms that many advertisers did not rely on Meta's alleged misstatements about Potential Reach. Plaintiffs' expert found that 21% of advertisers set *lower* budgets when Potential Reach was *higher*. 2-ER-54. These advertisers' reactions to Potential Reach estimates were *the opposite* of the reactions predicted by plaintiffs' reliance theory.

For these reasons, plaintiffs cannot show reliance through class-wide evidence. Each class member must instead show reliance through individualized evidence about its own decision-making process. Resolving the class's fraud claim will therefore require millions of mini-trials on reliance issues.

Any other approach would improperly relieve plaintiffs of their burden to prove the essential elements of fraud. A non-individualized approach would also violate Meta's right, guaranteed by both the Rules Enabling Act and the Due Process Clause, to raise unique and legally relevant defenses to each class member's claims. *See* 28 U.S.C. § 2072(b); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366–67 (2011); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

In sum, this case confirms that the Advisory Committee was right when it observed that material variations in alleged misstatements and reliance produce individualized questions that make class treatment improper for fraud claims.

D. The panel majority's predominance analysis would make fraud classes too easy to certify improperly.

The panel majority failed to heed the longstanding recognition that classes are hard to certify in fraud cases. Instead, the majority adopted the opposite approach—one that would make the certification of fraud classes the rule, not the exception. The majority did so in multiple ways, including by erroneously limiting its predominance analysis to the defendant's conduct and disregarding the individualized

ways in which that conduct can affect members of the class. Under the majority's approach, fraud plaintiffs would almost always be deemed to have class-wide evidence of material misrepresentations and reliance, allowing the predominance requirement to be satisfied in fraud cases with ease.

1. The majority erred at the outset by asserting that fraud claims are "particularly well suited to class treatment under Rule 23(b)(3)." Op. 12. That assertion upends the consensus that common-law-fraud claims typically cannot satisfy the predominance requirement. As Judge Forrest put it in her dissent, the majority's statement on this point "runs in the face of the [Advisory] Committee's cautionary understanding that our sister circuits have consistently recognized." Dissenting Op. 36 n.2.

The majority tried to support its assertion that fraud claims are well suited for class treatment by referring to securities-fraud and consumer-fraud cases. Op. 12. The majority's reliance on those cases was flawed.

In the securities context, the Supreme Court has explained, the typical investor who buys or sells stock relies on the integrity of the

stock's market price. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 268 (2014). As a result, securities-fraud plaintiffs can show class-wide reliance through the fraud-on-the-market theory. *See id*. Otherwise, the Court has explained, the reliance element "would ordinarily preclude certification of a class action seeking money damages because individual reliance issues would overwhelm questions common to the class." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 462–63 (2013).

"[T]he overwhelming majority of courts," however, has "rejected efforts to export the fraud on the market theory" outside the securities-fraud context. 2 McLaughlin § 8:11; *see, e.g.*, *Harnish v. Widener Univ. Sch. of Law*, 833 F.3d 298, 312–13 (3d Cir. 2016); *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1095 (10th Cir. 2014); *Mirkin v. Wasserman*, 858 P.2d 568, 575, 583–84 (Cal. 1993). Thus, in other types of cases, "courts will not deny defendants the opportunity to present individual evidence" on reliance. 2 McLaughlin § 8:11. As a result, in common-law-fraud cases, individualized reliance issues *do* typically "overwhelm questions common to the class." *Amgen*, 568 U.S. at 463.

For these reasons, securities-fraud cases actually confirm that common-law-fraud cases are *not* well suited for class treatment. The panel majority thus drew exactly the wrong conclusion from securities-fraud precedent.

The majority fared no better in its reliance on two consumer-fraud decisions: *Amchem* and *Hyundai*. As Judge Forrest noted, those decisions stand only for the point that certification may be appropriate in "certain" cases of consumer fraud—namely, cases where every class member was exposed to the same misrepresentation. Dissenting Op. 36 n.2 (quoting *Amchem*, 521 U.S. at 625); *see id.* at 39, 44; *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 559 (9th Cir. 2019) (stating that the class members were exposed to "uniform" misrepresentations). Those cases do not stand for the point that fraud claims are well suited for class treatment as a general matter. Indeed, in *Amchem*, the Supreme Court emphasized the Advisory Committee's warning that courts should exercise caution "when individual stakes are high and disparities among class members great." 521 U.S. at 625.

In sum, the panel majority was mistaken when it relied on cases involving securities fraud and consumer fraud to assert that fraud

claims on the whole are particularly well suited for class certification. That assertion conflicts with the law in other circuits, *see* Meta Pet. 16–17, and sends precisely the wrong message to the district courts in this Circuit.

2. The majority also erred by holding that the predominance requirement is satisfied whenever a defendant engages in a "common course of conduct." Op. 4, 15–16. As Meta shows in its petition, that holding conflicts with this Court's precedent and conflates Rule 23(b)(3)'s predominance requirement with Rule 23(a)'s less demanding requirement of commonality. Meta Pet. 1, 10–12, 15. Because fraud plaintiffs can almost always allege that the defendant engaged in a course of conduct that was "common" to the class in at least some sense, the majority's "common course of conduct" approach would largely do away with the predominance requirement in fraud cases.

3. The majority also erred in its analysis of materiality. Based on *Amgen*, the majority noted that materiality is an objective question. Op. 15. From there, the majority jumped to the conclusion that

materiality is necessarily a common question that can be answered on a class-wide basis. *See id.* That logical leap was erroneous.

As Judge Forrest pointed out, *Amgen* does not stand for the proposition "that materiality, no matter the context, necessarily is provable with class-wide evidence." Dissenting Op. 46. *Amgen* instead stands for the more limited point that materiality can be a common question *if*, as in that case, the defendant's alleged misrepresentations or omissions were the same for each class member. *See* 568 U.S. at 463, 467, 470.

Indeed, if the majority's understanding of *Amgen* were correct, materiality would *always* be a common question in fraud cases. But that is not so. This Court has held that materiality can be an individualized issue that defeats class certification. *See Mazza*, 666 F.3d at 596. The California courts and federal district courts have held the same. *See* Dissenting Op. 47 & n.9. For example, the California Court of Appeal has held that "if the issue of materiality or reliance is a matter that would vary from consumer to consumer, the issue is not subject to common proof." *In re Vioxx Class Cases*, 103 Cal. Rptr. 3d 83,

95 (Ct. App. 2009); *accord, e.g.*, *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1045, 1047–48 (C.D. Cal. 2018).

For these reasons, the panel majority's conclusion that materiality is always a class-wide issue is mistaken. Left intact, that erroneous approach would make the predominance requirement far too easy to meet in fraud cases.

4. The panel majority's reliance analysis was also unsound and would further dilute the predominance requirement.

The majority concluded that the reliance element was a common issue because plaintiffs could invoke a presumption of reliance under California law. Op. 18. But that presumption does not apply here.

Under California law, the presumption of reliance does not apply "where the record will not permit it." *Tucker v. Pac. Bell Mobile Servs.*, 145 Cal. Rptr. 3d 340, 362 (Ct. App. 2012). Plus, this Court and others refuse to presume class-wide reliance when there are potential explanations for class members' conduct *other than* reliance on the defendant's alleged misrepresentations or where the alleged misrepresentations were not uniform. *See, e.g.*, *Poulos*, 379 F.3d at 665–66; *Kaldenbach v. Mut. of Omaha Life Ins. Co.*, 100 Cal. Rptr. 3d

637, 653 (Ct. App. 2009); *see also* 1 McLaughlin § 5:55. For the reasons discussed above, many class members did not rely on Meta's alleged misstatements to their detriment. *See supra* p. 11. There are also many explanations for class members' advertising decisions other than Meta's alleged inflation of Potential Reach. Thus, the record does not allow a class-wide presumption of reliance.

The panel majority nevertheless applied the presumption of reliance on the theory that Meta allegedly communicated "the same material misrepresentations" to plaintiffs. *See* Op. 18 (quoting *Mirkin*, 858 P.2d at 575). As shown above, however, the majority's materiality analysis was flawed. *See supra* pp. 16–18. A flawed materiality analysis cannot trigger a presumption of reliance. And even if a proper materiality analysis could trigger a presumption of reliance, that effect would underscore the need to conduct a rigorous inquiry on the materiality question—an inquiry that the majority here did not undertake.

* * *

In sum, the panel majority's reasoning would erode the predominance requirement and allow classes to be certified in the mine

run of fraud cases, upending the settled view that has prevailed for more than half a century. The decision here thus involves a question of exceptional importance and conflicts with the decisions of other courts of appeals. As a result, this case warrants rehearing en banc.

II. Watered-down standards for class certification hurt American businesses and the national economy.

Left intact, the panel majority's overly permissive approach to class certification would also impose serious harms on the business community and the public. For this reason as well, this appeal is exceptionally important and calls for en banc review.

Class actions are expensive to defend. American companies' total spending on class-action defense swelled to almost $4 billion in 2023, and that figure is expected to grow again in 2024. *See* Carlton Fields, *2024 Carlton Fields Class Action Survey* 6–7 (2024), https://bit.ly/3y4n7TM. Class actions can be litigated for years before the court even addresses the question of class certification. *See* U.S. Chamber of Commerce Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 1, 5 (2013), https://bit.ly/3DNmpuA. Indeed, a defendant can spend more

than $100 million to fight even a *single* class action. *See* Adeola Adele, Dukes v. Wal-Mart: *Implications for Employment Practices Liability Insurance* 1 (2011).

These extraordinary defense costs, together with massive damages exposure when a class is certified, often compel defendants to settle even meritless claims. As the Advisory Committee observed in 1998 when it allowed for immediate appeals of class-certification decisions under Rule 23(f), the grant of class certification may "force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. The Supreme Court has agreed that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). In other words, "even a small chance of a devastating loss" creates "the risk of 'in terrorem' settlements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also, e.g.*, Richard A. Nagareda, *Class*

Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 99 (2009).

These settlement dynamics are especially pronounced in fraud cases. Fraud claims come with the threat of punitive damages, exposing defendants to massive risks of liability even for marginal claims. *See Mirkin*, 858 P.2d at 583. "When deciding whether to go to trial or settle a case and, if so, how much is a reasonable settlement amount, businesses must consider the worst-case scenario." U.S. Chamber of Commerce Institute for Legal Reform, *Nuclear Verdicts: Trends, Causes, and Solutions* 8 (2022), https://bit.ly/3sMfUBY. Because the risk of punitive damages "increase[s] the unpredictability of the result in the event of a class-wide trial," the availability of punitive damages creates another powerful incentive for defendants to settle for inflated amounts. Nagareda at 161 n.249.

The costs of defending and settling class actions directly harm the businesses that pay them. But those businesses pass along at least some of these costs to others in the form of higher prices and lower wages. *See Nuclear Verdicts* at 34–38. The result is that defense and

settlement costs are ultimately borne by consumers, employees, other businesses, and the economy as a whole. *See id.*

This case highlights the widespread harms that result when class-certification standards are watered down. Advertising on technology platforms like Facebook is essential for many small businesses. In a recent survey, the Chamber found that:

- 95% of small businesses use at least one technology platform.
- 61% of small businesses use digital marketing platforms in particular.
- 70% of small businesses "would struggle to survive" without their technology platforms.

U.S. Chamber of Commerce Technology Engagement Center, *Empowering Small Business: The Impact of Technology on U.S. Small Business* 3–5 (2d ed. 2023), https://bit.ly/3wuUsqH. If class actions become too easy to certify against technology platforms, small businesses that rely on those platforms for their survival—along with those businesses' employees and customers—will pay the price.

To prevent that result, this Court should grant rehearing en banc and reaffirm the deeply rooted understanding that the predominance requirement makes class actions difficult to certify in fraud cases.

CONCLUSION

The Court should grant rehearing en banc.

Dated: May 13, 2024

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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