No. 24-3894

In the

United States Court of Appeals
For the Ninth Circuit

ALICIA NOLEN,
Plaintiff-Appellee,

v.

PEOPLECONNECT, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of California
The Honorable Edward M. Chen
No. 3:20-cv-09203

BRIEF OF AMICUS CURIAE
THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA
IN SUPPORT OF DEFENDANT-APPELLANT

Jennifer B. Dickey
Christopher J. Walker
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062

Brian D. Schmalzbach
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219
Telephone: (804) 775-4746
bschmalzbach@mcguirewoods.com

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

CORPORATE DISCLOSURE STATEMENT

Amicus curiae the Chamber of Commerce of the United States of America ("Chamber") certifies that it has no outstanding shares or debt securities in the hands of the public, and does not have any parent companies. No publicly held company has a 10% or greater ownership interest in the Chamber.

/s/ Brian D. Schmalzbach
Brian D. Schmalzbach

TABLE OF CONTENTS

Page

IDENTITY AND INTEREST OF AMICUS CURIAE 1

STATEMENT OF CONSENT, AUTHORSHIP, AND CONTRIBUTION 2

INTRODUCTION 2

ARGUMENT 4

I. The failure to identify an appropriate winnowing plan bars certification 4

A. Courts owe rigorous analysis to Rule 23 questions 5

B. Rigorous analysis requires a workable mechanism to winnow out the meritless and excluded claims here 8

C. The winnowing of meritless claims cannot be punted to some undefined later stage of litigation 11

II. The class certification order depends on a dangerous misconstruction of California's Right of Publicity statute 14

A. The proximity of search results to an online advertisement does not violate § 3344 15

B. The district court's enlargement of § 3344 threatens the internet economy 18

III. Improperly certified class actions hurt American businesses and the entire economy 19

CONCLUSION 22

TABLE OF AUTHORITIES

Cases **Page(s)**

Abdul-Jabbar v. Gen. Motors Corp.,
85 F.3d 407 (9th Cir. 1996) 10

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 5, 6-7

Am. Sur. Co. v. Baldwin,
287 U.S. 156 (1932) 12

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 21

Califano v. Yamasaki,
442 U.S. 682 (1997) 5

Carrera v. Bayer Corp.,
727 F.3d 300 (3d Cir. 2013) 13

Comcast Corp. v. Behrend,
569 U.S. 27 (2013) 4, 5, 6, 7

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 21

Cross v. Facebook, Inc.,
14 Cal. App. 5th 190 (2017) 16, 17

E. Tex. Motor Freight Sys., Inc. v. Rodriguez,
431 U.S. 395 (1977) 5-6

Holt v. Virginia,
381 U.S. 131 (1965) 12

ICC v. Louisville & N.R. Co.,
227 U.S. 88 (1913) 12-13

In re Rail Freight Fuel Surcharge Antitrust Litig.,
934 F.3d 619 (D.C. Cir. 2019)..8, 9, 10

In re Asacol Antitrust Litig.,
907 F.3d 42 (1st Cir. 2018) 9, 10, 11, 13

Johannessohn v. Polaris Indus. Inc.,
9 F.4th 981 (8th Cir. 2021)..7, 8, 12

Lindsey v. Normet,
405 U.S. 56 (1972)...12

Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC,
31 F.4th 651 (9th Cir. 2022)...6, 7

Prantil v. Arkema Inc.,
986 F.3d 570 (5th Cir. 2021) 7-8

Unger v. Amedisys Inc.,
401 F.3d 316 (5th Cir. 2005) 5

Van v. LLR, Inc.,
61 F.4th 1053 (9th Cir. 2023)...8, 9, 14

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011)..3, 5, 6, 10, 13

Zinser v. Accufix Rsch. Inst., Inc.,
253 F.3d 1180 (9th Cir. 2001)..7, 12

Statutes

Cal. Civ. Code § 3344 .... 2, 4, 10, 14, 15, 16, 17, 18, 19

Fed. R. Civ. P. 23(b)(3) 3, 4, 7

Other Authorities

2024 Carlton Fields Class Action Survey,
https://ClassActionSurvey.com 20

Adeola Adele, *Dukes v. Wal-Mart: Implications for Emp. Practices Liability Insurance* (July 2011) 20

IAB & PwC, *Internet Advertising Revenue Report – Full Year 2023 Results* (Apr. 2024), https://bit.ly/4dUgbrt 18

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009) 6

U.S. Dep't of Commerce, *Quarterly Retail E-Commerce Sales, 4th Quarter 2023*, (Feb. 20, 2024), https://bit.ly/4dVkCT7 19

U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 2013), http://bit.ly/3rrHd29 20

IDENTITY AND INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents around 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 in matters 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 and their subsidiaries are often targeted as defendants in class actions. The Chamber thus is familiar with class action litigation, both from the perspective of individual defendants in class actions and from a more global perspective. The Chamber has a significant interest in this case because the district court's misapplications of Rule 23 and misconstruction of California's right-of-publicity statute raise issues of immense significance not only for its members, but also for the customers, employees, and other businesses that depend on them.

STATEMENT OF CONSENT, AUTHORSHIP, AND CONTRIBUTION

Counsel for all parties confirmed that they do not oppose the filing of this brief. No party's counsel authored this brief in whole or in part, and no such counsel nor any party here contributed money intended to fund the preparation of this brief or its submission. No person other than amicus, its members, and/or its counsel contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION

Certification of gargantuan class actions is always of concern to the business community, but certification of such actions based on an expansive interpretation of California law that would endanger one of the most common forms of internet advertising raises that concern to a new level. California's right-of-publicity statute, Cal. Civ. Code § 3344, is not implicated by banner advertising that does not use a person's name or likeness. And even if it were, a class of the countless Californians who ever appeared in yearbooks posted on Classmates.com should never have been certified under Rule 23. It is both bloated with individuals lacking

meritorious claims and would require individualized inquiries that overwhelm any common questions.

This Court should take this opportunity to correct two serious errors in the district court's predominance analysis.

First, the district court certified a class that it knows to contain meritless claims with no manageable plan to winnow them out. Under Rule 23(b)(3), plaintiffs must show, among other things, that any common questions "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). That is a plaintiff's burden of *proof*, not just pleading. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Yet, here PeopleConnect proved—and the district court did not dispute—that some class members' identities *could not have been* used on Classmates.com. Moreover, some class members consented to the use of their identity. But the district court had no plan besides wishful thinking for winnowing those claims out of the class to ensure prevent individualized inquiries from predominating.

Second, the district court wrongly nixed the burden of showing the use of each class member's identity *in* an advertisement, and accepted the easier showing that a name or image appeared in search results *near* an

advertisement. That misconstruction of § 3344 may be useful for trying to analyze a statutory violation on a classwide basis. But in that mistaken view, a potential violation of § 3344 would arise anytime a banner ad appears near search results. That happens billions of times *every day*. Both the statutory text and precedent rule out that result, which would threaten disaster for the digital economy.

This Court should reverse.

ARGUMENT

I. The failure to identify an appropriate winnowing plan bars certification.

Class certification is such a momentous event—with such momentous implications for defendants—that courts must apply a "rigorous analysis" to the requirements of Rule 23. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). That includes a "'close look' at whether common questions predominate over individual ones" under Rule 23(b)(3). *Id.* at 34. That rigorous analysis of predominance is especially important when, as here, a defendant shows that it has valid individualized defenses to some class members' claims. In that circumstance, a district court cannot certify a class without a plan to winnow out those meritless claims. Because the district

court offered no winnowing mechanism for the undisputed meritless claims present here, certification should be reversed.

A. Courts owe rigorous analysis to Rule 23 questions.

Rule 23 creates an "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties." *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979). But class actions still raise "important due process concerns" for both defendants and absent class members. *Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005). So district courts must "conduct a 'rigorous analysis' to determine whether" a proposed class satisfies Rule 23, "even when that requires inquiry into the merits of the claim." *Comcast*, 569 U.S. at 35 (citing *Wal-Mart*, 564 U.S. at 351).

Chief among Rule 23's safeguards is the requirement that a named plaintiff "affirmatively demonstrate" that common questions predominate over individual ones. *Comcast*, 569 U.S. at 33 (quoting *Wal-Mart*, 564 U.S. at 350). This "demanding" predominance requirement ensures that "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997). That cohesion exists only when all class members "possess the same interest and suffer the same injury." *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403

(1977). Merely pleading "a violation of the same provision of law" and labeling it a common question is not enough, because "any competently crafted class complaint literally raises common questions." *Wal-Mart*, 564 U.S. at 349–50. The need to prove predominance by establishing a common, classwide injury ensures "sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Amchem*, 521 U.S. at 620–21.

To satisfy the predominance requirement, plaintiffs must offer "a theory of liability that is . . . capable of classwide proof." *Comcast*, 569 U.S. at 37. Otherwise, a liability finding about a named plaintiff cannot determine "in one stroke" whether defendants are liable to the entire class, and liability cannot be a "common" issue. *Wal-Mart*, 564 U.S. at 350. So dissimilarities within the proposed class may defeat class certification even when some commonality exists. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–32 (2009).

Rigorous analysis is especially important in determining whether common issues will predominate over individualized questions. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 664 (9th Cir. 2022) (en banc); *see also Comcast*, 569 U.S. at 34 (quoting *Amchem*, 521 U.S. at 615) (noting "the court's duty to take a 'close look' at whether common

questions predominate over individual ones”). Two aspects of that rigorous analysis are particularly relevant here. First, that analysis must hold Plaintiff to *her* burden of being able to prove classwide liability under Rule 23(b)(3). Second, the analysis must consider what a trial would actually look like, considering not just Plaintiff’s case but Defendant’s evidence too.

Starting with the first, Plaintiff bears the burden of *proving*—not just alleging—that her claims “in fact” can be litigated on a classwide basis without the need for individualized mini-trials. *Comcast*, 569 U.S. at 33–34. That proof is not Defendant’s burden. *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Nor is it a burden that Plaintiff can satisfy with mere allegations. *Comcast*, 569 U.S. at 33–34 (requiring “evidentiary proof” that elements of Rule 23 are satisfied). Plaintiff’s evidence “must meet all the usual requirements of admissibility” including Rule 702. *Olean*, 31 F.4th at 665.

Second, rigorous analysis must also consider what a real-life trial would look like. “[C]ases are not tried on the evidence of one party.” *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 986 (8th Cir. 2021). So before certifying a class, a district court must “account for issues implicated by the asserted claims *and defenses*.” *Prantil v. Arkema Inc.*, 986 F.3d 570, 578 (5th

Cir. 2021) (emphasis added). Ignoring a defendant's individualized evidence dooms a class certification decision. *See, e.g.*, *id.* at 578–79 (vacating class certification because district court disregarded how individualized issues in both claims and defenses would actually be tried); *see also Johannessohn*, 9 F.4th at 986 (affirming denial of certification because defendant "would be entitled to present contrary evidence" that plaintiff's purported proof of injury does not apply to certain class members).

B. Rigorous analysis requires a workable mechanism to winnow out the meritless and excluded claims here.

That rigorous analysis has special force when a defendant "provide[s] evidence that at least some class members lack meritorious claims . . . thus summoning the spectre of class-member-by-class-member adjudication." *Van v. LLR, Inc.*, 61 F.4th 1053, 1069 (9th Cir. 2023); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624 (D.C. Cir. 2019) (for class members who "cannot prevail on the merits," their "claims must be winnowed away as part of the liability determination"). In that scenario, "the district court must determine . . . whether a class-member-by-class-member assessment of the individualized issue will be unnecessary or workable." *Van*, 61 F.4th at 1069. That determination requires a

"winnowing mechanism" to cull those meritless claims. *Rail Freight*, 934 F.3d at 625.

That winnowing mechanism must successfully balance the efficiency needed for predominance while respecting defendants' rights. It "must be truncated enough to ensure that the common issues predominate, yet robust enough to preserve the defendants' Seventh Amendment and due process rights to contest every element of liability and to present every colorable defense." *Id.*

And the district court must have that winnowing plan *before* certifying the class. "[T]o determine whether a class certified for litigation will be manageable, the district court must *at the time of certification* offer a reasonable and workable plan for how that opportunity will be provided in a manner that is protective of the defendant's constitutional rights and does not cause individual inquiries to overwhelm common issues." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 58 (1st Cir. 2018) (emphasis added); *see also Van*, 61 F.4th at 1069 (vacating certification and remanding for the district court to "re-assess whether [plaintiff] has met her burden" of showing that individualized inquiries are unnecessary or workable). Without that plan in place, plaintiffs cannot "'affirmatively demonstrate' that the commonality

and predominance requirements are satisfied." *Rail Freight*, 934 F.3d at 622 (quoting *Wal-Mart*, 564 U.S. at 350); *accord Asacol*, 907 F.3d at 61 (Barron, J., concurring) (without a viable winnowing plan, "the plaintiffs have not yet shown that common rather than individual issues would predominate if this class were certified").

This class certification record amply triggers the need for a "reasonable and workable plan" to deal with meritless and excluded claims. *Asacol*, 907 F.3d at 58. The district court itself acknowledged that some class members will be unable to satisfy all the statutory requirements. For example, § 3344 requires that the identity used by identifiable as the claimant's own. *See Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 415 (9th Cir. 1996). But "there may be occasions in which people share the same name or have similar names, and therefore some individualized inquiries will be necessary." 1-ER-35. Likewise, the district court recognized that school consent forms can present individualized defenses. 1-ER-36–37. And although the class definition attempts to exclude those who consented in other ways and can never appear in a search result, 2-ER-59, those exclusions are not self-executing. Some workable plan is needed to exclude those who do not belong in the class, or cannot prove their claims within the class.

C. The winnowing of meritless claims cannot be punted to some undefined later stage of litigation.

Despite all the individualized inquiries needed to weed out those meritless and excluded claims, the district court offered no winnowing plan. Instead, the court kicked the can down the road. That approach inevitably fails the rigorous analysis required by Rule 23 because "at the time of certification" there was no "reasonable and workable plan" to address meritless claims. *Asacol*, 907 F.3d at 58. That approach likewise compromises PeopleConnect's rights under the Due Process Clause and the Seventh Amendment.

The district court had no consistent or specific plan for dealing with claims that must be winnowed out of this lawsuit. The court sometimes suggested that those individual inquiries could be the subject of a damages-calculation stage. 1-ER-4 (identifiability issues "could be reserved for a later stage in the proceedings, i.e., when damages are to be determined"). Or at least "something akin to" a damages stage. *Id.* ("[W]hat is before the Court is something akin to a separation of liability and damages issues."). Or "a later prove-up stage," whatever that means. 1-ER-34. Other times, the district court flipped the Rule 23 burden back to PeopleConnect: "it could

always move the Court for decertification if it demonstrates that excessive numbers of individualized inquiries are necessary." 1-ER-41; 1-ER-47 (PeopleConnect "may seek decertification at the appropriate time").

That failure to offer any appropriate winnowing plan cannot survive rigorous analysis under Rule 23. First, it misallocates the burden of proving predominance. That proof is *Plaintiff's* burden—not PeopleConnect's. *Zinser*, 253 F.3d at 1186. "We'll figure it out as we go" cannot sustain that burden, let alone by a preponderance of the evidence. Second, the district court seemed to turn a blind eye in the liability determination to PeopleConnect's individualized defenses. But PeopleConnect of course "would be entitled to present contrary evidence" before any finding of liability. *Johannessohn*, 9 F.4th at 986.

Non-plans like the district court's also threaten due process rights. Defendants have a fundamental due process right to "present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)). "The right to be heard must necessarily embody a right to … raise relevant issues," *Holt v. Virginia*, 381 U.S. 131, 136 (1965), and must allow the defendant to "test the sufficiency" of the plaintiff's case by offering "evidence in explanation or rebuttal," *ICC*

v. Louisville & N.R. Co., 227 U.S. 88, 93 (1913). As a result, "a class cannot be certified on the premise that [defendants] will not be entitled to litigate . . . defenses to individual claims." *Wal-Mart*, 564 U.S. at 367.

The district court's vague approach to winnowing also threatens the Seventh Amendment, under which "a defendant must be able to challenge class membership." *Carrera v. Bayer Corp.*, 727 F.3d 300, 309 (3d Cir. 2013). This issue cannot be assigned to a "claims administrator's review," because doing so "would fail to be protective of defendants' Seventh Amendment and due process rights." *Asacol*, 907 F.3d at 53. As the Supreme Court has explained, "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate … defenses to individual claims." *Wal-Mart*, 564 U.S. at 367. The district court's approach would endanger this principle by effectively preventing PeopleConnect from presenting the jury with its individualized defenses to liability. Because the court offered no winnowing plan consistent with Rule 23, the Due Process Clause, and the Seventh Amendment, the certification order cannot stand.

II. The class certification order depends on a dangerous misconstruction of California's Right of Publicity statute.

Even when the district court got the substantive law right, its failure to address how to winnow out unmeritorious claims was fatal to certification. But the district court also got a key element of § 3344 wrong. The display of search results *near* an advertisement—which does not contain the searched name or image—is not a proscribed "use" of that name under § 3344. Correcting that substantive error would eliminate the cornerstone common question on which the district court found predominance.[1] But left uncorrected, the district court's misconstruction of § 3344 would endanger a pillar of global e-commerce.

[1] This Court has jurisdiction on this Rule 23(f) appeal to resolve the application of § 3344 to search results near—but not *in*—advertisements. "[A]n assessment of the validity and prevalence of state law issues . . . is a necessary part of a class certification decision." *Van v. LLR, Inc.*, 61 F.4th 1053, 1066 (9th Cir. 2023). And PeopleConnect properly raised the issue in its opposition to class certification. 1-ER-27–30. "[T]he mere fact that a district court addressed the issue in ruling on a Rule 12 motion does not insulate the issue from appellate review if the issue was re-briefed at the class certification stage and therefore formed a part of the class certification decision." *Van*, 61 F.4th at 1066.

A. The proximity of search results to an online advertisement does not violate § 3344.

The premise of the certification order is that the appearance of advertisements "in proximity (i.e., next to) the search results containing names and photos from yearbooks" is a "use" that is forbidden (and easily proved classwide) under § 3344. 1-ER-23; *see also* 2-ER-155 (holding that Plaintiff stated a claim by alleging that Defendant "displays banner ads promoting Classmates.com subscriptions adjacent to the search results containing Ms. Nolen's photograph"). Thus, the district court held, it was irrelevant that "[n]one of the content displayed in the Banners includes any information from the search results themselves, like the names or photos of individuals searched." 1-ER-23. That holding flouts the statutory text and its interpretation by California courts.

The California law forbids only using the name or likeness in the advertisements themselves. Section 3344 proscribes the "use" of "another's name, voice, signature, photograph, or likeness . . . for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent." Cal. Civ. Code § 3344(a). But the statute confines that proscription to uses "*directly connected*

with the commercial sponsorship or with the paid advertising." § 3344(e) (emphasis added).

The text of § 3344 contradicts the notion that banner ads may not appear on pages that also show the results of searches for names. The district court reasoned that § 3344(e) "does not require a direct connection between the use of the plaintiff's likeness and particular ads." 1-ER-29. Instead, the statute merely "requires a direct connection between the use and a 'commercial purpose.'" *Id.* That is flat wrong: the statute does not mention "commercial purpose." It states that the use of a person's name or image must be "directly connected with the commercial sponsorship or with the paid advertising." § 3344(e). There is no such direct connection between a name that appears in search results and an advertisement *not* containing that name.

The California Court of Appeal agrees: advertisements that do not use a person's name or likeness but are merely near that name or likeness do not violate the statute. *Cross v. Facebook, Inc.* addressed a similar claim that "Facebook has used [plaintiff's] name and likeness for the purpose of advertising" when it placed ads next to Facebook pages referencing him. 14 Cal. App. 5th 190, 209 (2017). The Court of Appeal rejected that § 3344 claim

because "[n]owhere does [plaintiff] demonstrate that the advertisements appearing next to the pages used his name or likeness." *Id.*; *see also id.* (plaintiff "necessarily concedes that his name and likeness appear not in the ads themselves"); *id.* at 212 ("The advertisements here did not depict [plaintiff], using neither his name nor identity."). The court explained that, under § 3344, the plaintiff must show "that any advertiser used his name or likeness," yet "the advertisements that . . . appear[ed] adjacent to the content posted by third parties made no use of his name or likeness."[2] *Id.* at 211. Adjacency was not enough. The same is true here: because the advertisements themselves do not depict any class members. Defendant does not "use" their name or image, let alone in the proscribed "directly connected" way.[3]

---

[2] The district court dismissed *Cross* as "inapposite" because here "it is Defendant, *not* a third-party entity who is using Plaintiff's image in their advertisements." 2-ER-149. Incorrect: *no one* is using any class member's name or image in advertisements. And although the complaint in *Cross* "expressly alleges that the content at issue was created by third parties," 14 Cal. App. 5th at 209, nothing about the court's analysis turned on that fact. Instead, *Cross* relied heavily and repeatedly on the absence of use in the advertisements themselves.

[3] It follows that the *potential* display of advertisements near class member names (that may not have actually been viewed by anyone) is even less of a proscribed "use" of those names. *See* PeopleConnect Br. 47–48.

B. The district court's enlargement of § 3344 threatens the internet economy.

The district court's theory that advertisements next to search results violate § 3344 is not only wrong—it is dangerous. That theory stretches far beyond Classmates.com. It could apply to all manner of websites that include a search function and are monetized through internet advertising, which has become a $225 billion industry. IAB & PwC, *Internet Advertising Revenue Report – Full Year 2023 Results* 5 (Apr. 2024), https://bit.ly/4dUgbrt. Applying the district court's newfangled theory to this pillar of the modern economy would threaten that driver of economic growth.

Consider classic search websites that serve as portals to the internet—themselves a nearly $90 billion advertising revenue driver. *Id.* at 15. A teenager's search for news about a pop star reveals a list of hits with the singer's name and image. And a banner ad next to those hits touts the search engine's new social media platform. That banner does not mention the pop star's name or include any likeness. But on the district court's theory, the banner's mere proximity to the singer's search results entails an actionable exploitation of the singer's identity.

Or take an e-commerce platform—part of the $1.187 *trillion* e-commerce sector. U.S. Dep't of Commerce, *Quarterly Retail E-Commerce Sales, 4th Quarter 2023*, (Feb. 20, 2024), https://bit.ly/4dVkCT7. A civic-minded voter peruses the platform to buy a political candidate's book. The resulting search page includes the candidate's name, likeness, and an ad for the platform's premium membership program. Again, on the district court's theory, an exploitation of the candidate's identity.

The applications of that theory are as endless as the theory is meritless. This Court should put a stop to it before the rapid expansion of that theory—combined with lax class certification standards—destabilizes the internet economy. Instead, the Court should hold, in reversing class certification, that searching plus advertising does not equal exploitation of the right of publicity under § 3344.

III. Improperly certified class actions hurt American businesses and the entire economy.

The district court's laissez-faire approach to class certification also threatens American enterprise. An appropriately rigorous analysis is sorely

needed to combat the burdens that such an approach imposes on the business community and the public.

Class action litigation costs in the United States are eye-popping. Those costs surged to $3.9 billion in 2023, continuing a long-running rise. *See* 2024 Carlton Fields Class Action Survey, 6–7, https://ClassActionSurvey.com. Defending *even one* class action can cost a business over $100 million. *See, e.g.*, Adeola Adele, *Dukes v. Wal-Mart: Implications for Emp. Practices Liability Insurance* 1 (July 2011). And those class actions can persist for years, accruing legal fees, with no resolution of class certification—let alone the dispute as a whole. *See* U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, 1, 5 (Dec. 2013), http://bit.ly/3rrHd29 ("Approximately 14 percent of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis.").

Certifying a class—and especially a class bloated with those who cannot prove their claims at the end of the day—creates extraordinary exposure and thus immense pressure on defendants to settle even meritless cases. Judge Friendly aptly termed these "blackmail settlements." Henry J.

Friendly, *Federal Jurisdiction: A General View*, 120 (1973). As the Supreme Court explained, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail").

Judicial recommitment to rigorous enforcement of Rule 23 at the class certification stage would help. These legal requirements, if properly enforced, ensure that parties do not waste time and money—and defendants do not face undue settlement pressure—litigating a certified class action through trial only for a court to conclude at "some later stage in the proceedings" that meritless claims have run rampant. 1-ER-4. If the district court's breezy approach to the elements of class claims is affirmed as the law of this Circuit, however, then that immense pressure to settle meritless class actions will continue to balloon regardless of whether plaintiffs have meritorious claims. That coercion undermines the rule of law. It also hurts the entire economy, because the attorney's fees and costs accrued in

defending and settling overbroad class actions are ultimately absorbed by consumers and employees through higher prices and lower wages.

CONCLUSION

For these reasons and those in PeopleConnect's brief, the Court should reverse the order granting class certification.

Dated: October 22, 2024

Respectfully submitted,

<u>/s/ Brian D. Schmalzbach</u>
Brian D. Schmalzbach
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219
Telephone: (804) 775-4746
bschmalzbach@mcguirewoods.com

Jennifer B. Dickey
Christopher J. Walker
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062

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

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,289 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point size.

/s/ Brian D. Schmalzbach
Brian D. Schmalzbach

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2024, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the system.

/s/ Brian D. Schmalzbach
Brian D. Schmalzbach