No. 24-384

In the
Supreme Court of the United States

META PLATFORMS, INC., F/K/A FACEBOOK, INC.,
Petitioner,

v.

DZ RESERVE; CAIN MAXWELL D/B/A/ MAX MARTIALIS,
Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONER

ERIK R. ZIMMERMAN
Counsel of Record
JORDAN T. DEJACO
MATTHEW S. QUEEN
ROBINSON, BRADSHAW
& HINSON, P.A.
1450 Raleigh Road,
Suite 100
Chapel Hill, N.C. 27517
(919) 328-8826
ezimmerman@
robinsonbradshaw.com

(additional counsel listed on inside cover)

JENNIFER B. DICKEY
JORDAN L. VON BOKERN
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062

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

PAUL N. LEKAS
SOFTWARE & INFORMATION
INDUSTRY ASSOCIATION
1620 I Street, NW
Washington, D.C. 20006

Counsel for the Software & Information Industry Association

STEPHANIE JOYCE
COMPUTER &
COMMUNICATIONS
INDUSTRY ASSOCIATION
25 Massachusetts
Avenue, NW,
Suite 300C
Washington, D.C. 20001

Counsel for the Computer & Communications Industry Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

Other Authorities

INTEREST OF AMICI CURIAE*

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. Based on that familiarity, the Chamber often files amicus briefs in this Court in class-action cases. Many of those cases have come from the Ninth Circuit. *E.g.*, *TransUnion LLC v. Ramirez*, No. 20-297; *Microsoft Corp. v. Baker*, No. 15-457; *Campbell-Ewald Co. v. Gomez*, No. 14-857; *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277.

The Computer & Communications Industry Association (CCIA) is an international, not-for-profit trade

---

* Pursuant to this Court's Rules 37.2 and 37.6, amici state that counsel of record for all parties received timely notice of amici's intent to file this brief, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than amici, amici's members, and/or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

association representing a broad cross section of communications, technology, and Internet industry firms that collectively employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA believes that open, competitive markets and original, independent, and free speech foster innovation. The list of CCIA members is available at www.ccianet.org/members.

The Software & Information Industry Association (SIIA) is the principal trade association for the software and digital information industries. SIIA's membership includes more than 350 software companies, search engine providers, data and analytics firms, and digital publishers that serve nearly every segment of society, including business, education, government, healthcare, and consumers. It is dedicated to creating a healthy environment for the creation, dissemination, and productive use of information.

The Chamber, CCIA, and SIIA have a keen interest in this case. The decision below is the latest in a line of rulings in which the Ninth Circuit has diluted the requirements of Rule 23 and tilted the scales in favor of granting and affirming class certification. Left intact, the Ninth Circuit's erroneous approach to class certification will distort the judicial process and harm not only amici's members but the customers, employees, and other businesses that count on those members.

SUMMARY OF ARGUMENT

This Court has recognized that abuses of the class-action device impose burdens on defendants and

absent class members alike. *See, e.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363-64 (2011); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997). Improper class actions also distort the adjudicatory process by circumventing the "usual rule" that cases are litigated on an individual basis. *Dukes*, 564 U.S. at 348 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979)). To avoid those harmful results, before a court certifies a class, it must conduct a "rigorous analysis" to ensure that Rule 23's demands are met. *Id.* at 351 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).

The Ninth Circuit has not heeded this message. In multiple ways, Ninth Circuit law on class certification conflicts with the law in other circuits and allows classes to be certified without the rigorous analysis that Rule 23 and this Court's precedents demand.

The decision below highlights two of the wrong turns that the Ninth Circuit has taken. Each of these missteps has serious doctrinal and practical significance.

First, the Ninth Circuit has watered down Rule 23's limitations on the certification of class actions in consumer-fraud cases.

Since the current version of Rule 23 was adopted in 1966, precedent has consistently shown that consumer-fraud cases are difficult to certify as class actions. The part of Rule 23 that is most crucial when considering the certification of fraud classes is the predominance requirement, a necessary restraint on class-action litigation.

Consumer-fraud claims usually fail the predominance requirement because key elements of those

claims require individualized inquiries that overwhelm class-wide questions. These individualized elements include whether the defendant's alleged misrepresentations were material 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 placed its own individualized degree of weight on Meta's estimates. Deciding whether Meta's alleged misrepresentations were material to each class member and whether each class member relied on those alleged misrepresentations would thus require millions of particularized inquiries. Those inquiries dwarf any common questions, defeating predominance and precluding class certification.

The Ninth Circuit nevertheless upheld the certification of a damages class. It reasoned that when a fraud defendant has engaged in a "common course of conduct" toward the class, materiality and reliance are always common issues, so predominance is always satisfied. Pet. App. 10a, 13a; *see also id.* at 12a, 16a-17a. That reasoning is flawed. The common-course-of-conduct test originated in securities-fraud cases, and the Ninth Circuit did not offer a basis for transporting that test into the far different realm of consumer-fraud litigation. Nor could it. Consumer-fraud plaintiffs can almost always frame a defendant's conduct toward the class as "common" in at least some sense. As a result, the Ninth Circuit's common-course-of-conduct test makes thin gruel of the predominance requirement and allows consumer-fraud classes to be certified in almost every case.

The Ninth Circuit itself underscored this consequence of its predominance analysis. The court announced that under its test, fraud claims are "particularly well suited" for class treatment. Pet. App. 9a. That statement confirms that the Ninth Circuit has turned the settled understanding about class certification in consumer-fraud cases on its head. And the Ninth Circuit's approach will leave courts with the unenviable task of adjudicating fraud claims either by ignoring the very individualized issues that they must resolve to enter final relief, or tackling such individualized issues in a wholly unmanageable way.

Second, the Ninth Circuit has placed a thumb on the scale in favor of class-action plaintiffs by adopting an asymmetric standard of review for class-certification decisions.

Unlike every other circuit save one, the Ninth Circuit affords "noticeably more deference" to a grant of class certification than to a denial. Pet. App. 4a. As Meta shows in its petition, that judge-made asymmetry in the standard of review lacks any doctrinal basis. *See* Pet. 32-34.

Giving extra deference to decisions that grant class certification also overlooks those decisions' real-world impact and continues the distortion of the judicial process. The certification of large class actions creates hydraulic pressure for defendants to settle, even if the plaintiffs' claims lack merit. That is especially true in fraud cases, where plaintiffs can supercharge defendants' exposure by making threats of punitive damages. It is unsound to give outsized deference to decisions that have such immense practical significance. Courts should not be in the business of pressuring defendants to settle meritless claims.

Left uncorrected, the Ninth Circuit's holdings on these issues will harm American businesses and the national economy. The Ninth Circuit's dilution of the predominance requirement will make it too easy to certify nationwide consumer-fraud classes, and its asymmetric standard of review will make it too easy to affirm those certification decisions on appeal. This overly permissive approach to class certification will impose massive costs on defendant businesses—costs that these businesses will need to 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 Ninth Circuit's lax standards for class certification in lawsuits against technology companies will increase the costs of advertising on these platforms. The end result will be to cut off the lifeblood of small businesses across the country.

To prevent these harms, this Court should grant review and realign Ninth Circuit law with Rule 23 and this Court's decisions.

ARGUMENT

I. The Ninth Circuit's "common course of conduct" test waters down Rule 23's predominance requirement in consumer-fraud cases.

Rule 23's predominance requirement imposes a crucial restraint on class-action litigation. When this requirement is applied with care, consumer-fraud claims seldom satisfy it. The Ninth Circuit's common-course-of-conduct test, however, upends the settled

understanding that class actions are difficult to certify in consumer-fraud cases. Indeed, if that test allows class certification in this case, where individualized questions of materiality and reliance abound, it is hard to imagine any fraud class that could not be certified in the Ninth Circuit.

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

The predominance requirement is a key bulwark against abusive class actions. Under this 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). Certification must be denied unless the class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. The predominance requirement thus limits certification to cases where class-wide adjudication 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*, 521 U.S. at 615.

Consistent with its important nature, the predominance requirement is a demanding one. *Comcast*, 569 U.S. at 34. Plaintiffs who seek class certification must prove, not merely plead, that their claims satisfy Rule 23(b)(3). *See Dukes*, 564 U.S. at 350; *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014). To that end, plaintiffs must show that their claims' essential elements "will prevail or fail in unison" based on common evidence. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013). When a court analyzes whether plaintiffs

have met this burden, it must conduct a rigorous analysis. *Comcast*, 569 U.S. at 33.

In sum, the predominance requirement reflects that the class-action device is meant to promote efficiency for courts and litigants, not to short-circuit the legal requirements of proof for class claims.

B. Consumer-fraud claims usually flunk the predominance requirement.

When the predominance requirement is rigorously applied, consumer-fraud claims rarely satisfy it. This 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 "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 consumer-fraud cases ever since. *See* 1 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 5:54 (20th ed. 2023); 2 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* §§ 4:58 to 4:59 (6th ed. 2022).

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

The first is that any misrepresentation by the defendant must have been material. *See, e.g.*, Restatement (Second) of Torts § 538(1) (1977) (Restatement); *Graham v. Bank of Am., N.A.*, 172 Cal.

Rptr. 3d 218, 228 (Ct. App. 2014); *see also* Pet. App. 3a (noting that the plaintiffs in this case brought their fraud claims under California law).

Materiality is typically an individualized issue in consumer-fraud cases. That is because the materiality analysis depends on whether a misrepresentation is important to "the transaction in question." Restatement § 538(2)(a); *accord* Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 675 (2d ed.). In some circumstances, materiality can even depend on the idiosyncrasies of a particular plaintiff. *See* Restatement § 538(2)(b); Dobbs et al., *supra*, § 675.

As a result, individual questions on materiality often swamp any common questions and bar class certification. *See, e.g.*, *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1253, 1255-56 (2d Cir. 2002); *In re Vioxx Class Cases*, 103 Cal. Rptr. 3d 83, 98-99 (Ct. App. 2009); *Fairbanks v. Farmers New World Life Ins. Co.*, 128 Cal. Rptr. 3d 888, 901-02, 906-07 (Ct. App. 2011).

The second key element of a consumer-fraud claim that often precludes class certification is reliance. *See* Restatement § 537(a); 1 McLaughlin, *supra*, § 5:54. Consumers usually act based on their own individual tastes, motivations, and knowledge. Thus, individual inquiries are typically needed to judge why each class member acted as she did—and thus to decide whether each class member relied on an alleged misrepresentation in taking that action. *See* 1 McLaughlin, *supra*, § 5:54. Unless the alleged misrepresentation was each class member's *only* conceivable basis for acting as she did, particularized reliance inquiries will ordinarily predominate. *See id.*

C. The Ninth Circuit's common-course-of-conduct test violates Rule 23 and conflates consumer-fraud cases with securities-fraud cases.

The Ninth Circuit has turned the settled understanding that consumer-fraud classes are hard to certify on its head. The court has erroneously taken a common-course-of-conduct test that was developed for securities-fraud cases and redeployed it in consumer-fraud cases. Because that test focuses solely on the defendant's conduct and disregards the individualized ways in which that conduct affects members of the class, its use in consumer-fraud cases will make class certification in those cases the norm.

1. In the decision below, the Ninth Circuit stumbled at the outset by asserting that fraud claims are "particularly well suited to class treatment under Rule 23(b)(3)." Pet. App. 9a. That assertion upends the consensus that consumer-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." *Id.* at 35a n.2.

The Ninth Circuit tried to support its assertion that fraud claims are well suited for class treatment by referring to securities-fraud cases. *Id.* at 9a-10a. That was a mistake.

In the securities context, this Court has explained that the typical investor who buys or sells stock relies on the integrity of the stock's market price. *See Halliburton*, 573 U.S. at 268. As a result, securities-fraud plaintiffs can show class-wide reliance through

the fraud-on-the-market theory. *See id*. If not for that theory, the Court has noted, 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*, 568 U.S. at 462-63.

"[T]he overwhelming majority of courts" has "rejected efforts to export the fraud on the market theory" outside of the securities-fraud context. 2 McLaughlin, *supra*, § 8:11; *see, e.g.*, *Harnish v. Widener Univ. Sch. of Law*, 833 F.3d 298, 312-13 (3d Cir. 2016); *CGC Holding Co. 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, *supra*, § 8:11. As a result, in consumer-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 consumer-fraud cases are *not* well suited for class treatment. The Ninth Circuit thus drew exactly the wrong conclusion from securities-fraud precedent.

2. The Ninth Circuit's erroneous reliance on securities-fraud cases also caused it to commit a deeper error: It held that the predominance requirement is satisfied in consumer-fraud cases whenever a defendant engages in a common course of conduct. *See* Pet. App. 2a, 10a.

The Ninth Circuit derived its common-course-of-conduct test from securities-fraud precedent. The decision below drew this test from its earlier decision in

First Alliance. *See id.* at 10a (citing *In re First All. Mortg. Co.*, 471 F.3d 977, 990 (9th Cir. 2006)). *First Alliance*, in turn, drew this test from two securities-fraud decisions: *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975) and *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909 (9th Cir. 1964). *See First Alliance*, 471 F.3d at 990.

The Ninth Circuit's effort to transplant the common-course-of-conduct test from securities-fraud cases into consumer-fraud cases calls for this Court's review for multiple reasons.

First, as Meta shows, other circuits have rejected the use of a common-course-of-conduct test in consumer-fraud cases. Pet. 23-25. As then-Judge Sotomayor observed, "a common course of conduct is not enough to show predominance." *Moore*, 306 F.3d at 1255.

Second, in substance, the common-course-of-conduct "test" is mostly a box-checking exercise. As this Court noted in *Dukes*, any "competently crafted class complaint literally raises" common questions. 564 U.S. at 349 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131-32 (2009)). Any competently crafted fraud complaint can likewise frame the defendant's course of conduct as "common" on at least some level.

Third, and relatedly, the common-course-of-conduct test conflates Rule 23(b)(3)'s predominance requirement with Rule 23(a)'s less-demanding requirement of commonality. A showing that the defendant engaged in a common course of conduct might be enough to show commonality, a requirement on which even one common question is enough. *Id.* at 359. As discussed above, however, the mere existence

of a common question is not enough to show predominance. The class must instead show that any common questions outweigh the individualized ones. *See supra* p. 7.

Fourth, the common-course-of-conduct test runs headfirst into the Advisory Committee's observation that even when fraud claims have "some common core," those claims still may not be suited for class treatment if there are "material variation[s]" among the class members. 1966 Advisory Committee Note.

Fifth, and most fundamentally, the Ninth Circuit's test makes consumer-fraud claims too easy to certify improperly. It does so by simply declaring that materiality and reliance are common issues whenever a common course of conduct exists, and by ignoring the many ways in which individualized questions on those issues can predominate over common ones.

On materiality, the Ninth Circuit held that when a defendant has engaged in a common course of conduct by making the same alleged misrepresentation to each class member, the materiality of that misrepresentation can always be decided on a class-wide basis. *See* Pet. App. 10a-13a. To reach that holding, the Ninth Circuit started with this Court's observation in *Amgen* that materiality is an objective question. *Id.* at 12a. From there, the Ninth Circuit jumped to the conclusion that materiality is always a common question that can be answered class-wide. *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." *Id.* at 46a. *Amgen* was a securities-fraud case that addressed the interaction between the

fraud-on-the-market theory and Rule 23. *See* 568 U.S. at 458-59, 466-67. This Court's point about how the objective nature of materiality bears on class certification was limited to that context. *See id.* The fraud-on-the-market theory, however, does not apply in consumer-fraud cases. *See supra* pp. 10-11.

Indeed, if the Ninth Circuit's understanding of *Amgen* were correct, materiality would *always* be a common question in consumer-fraud cases. But that is not so. In these cases, materiality is often an individualized issue that defeats class certification. *See* Pet. App. 46a-47a & n.9 (Forrest, J., dissenting in part); *Vioxx*, 103 Cal. Rptr. 3d at 99. For example, as the California courts have held, if materiality varies "from consumer to consumer, the issue is not subject to common proof." *Vioxx*, 103 Cal. Rptr. 3d at 95.

The Ninth Circuit's analysis of reliance was also unsound. The court noted that Meta's common course of conduct triggered a presumption of reliance under California law. Pet. App. 16a. The court acknowledged that Meta could rebut this presumption by making individualized showings that many class members did not rely on its alleged misrepresentations. *See id.* Yet the Ninth Circuit held that the existence of the presumption makes reliance a common issue and that the possibility of individualized rebuttals is irrelevant to the predominance analysis. *See id.* at 16a-17a.

To reach that holding, the Ninth Circuit again turned to securities-fraud cases. *See id.* But in those cases, the presumption of reliance supports class certification because the possibility of rebutting the presumption is so remote. *See Halliburton*, 573 U.S. at 276; Pet. 20-21. In consumer-fraud cases, by contrast, defendants can often overcome a presumption of

reliance. *See* 1 McLaughlin, *supra*, § 5:55; J. Sternman & J. Garrett, *The Inappropriateness of Applying Presumptions of Reliance to Facilitate Class Certification of Consumer Fraud Actions*, 31 Class Action Reports No. 3 (2010). Thus, the presumption alone cannot satisfy predominance in consumer-fraud cases.

The Ninth Circuit also reasoned that if the presumption of reliance did not make reliance a class-wide issue in consumer-fraud cases, the presumption would be "pointless." Pet. App. 17a. The California courts beg to differ. As their decisions show, whether or not reliance is a common issue, the presumption still serves an important substantive purpose: It shifts the burden of proof on reliance to the defendant. *See Engalla v. Permanente Med. Grp., Inc.*, 938 P.2d 903, 919-20 (Cal. 1997).

For these reasons, the Ninth Circuit was wrong to hold that whenever a defendant has engaged in a common course of conduct, materiality and reliance are common issues. That approach erroneously discounts the ways in which individualized issues can arise on the elements of materiality and reliance. By treating those individual inquiries as irrelevant, the Ninth Circuit's test stacks the deck in favor of holding that common issues predominate and makes consumer-fraud classes far too easy to certify.

D. This case exemplifies the problems created by the Ninth Circuit's common-course-of-conduct test.

This case illustrates that the Ninth Circuit's approach will lead to class certification in almost every consumer-fraud case. By applying its common-course-of-conduct test, the Ninth Circuit upheld the certification of a damages class despite the many variations

among the class members on the issues of materiality and reliance.

The materiality analysis in this case is highly individualized. The representations at issue are Meta's Potential Reach estimates, which varied for each proposed advertisement. *See* Pet. App. 36a, 40a (Forrest, J., dissenting in part). Plaintiffs allege that those estimates were inflated. *See id.* at 36a. But the level of alleged inflation varied widely across the class. *Id.* at 41a-42a.

The circumstances surrounding Meta's representations to class members also varied in additional ways. Meta displayed other metrics, such as Estimated Daily Results, alongside Potential Reach. *Id.* at 28a. Meta's disclosures about Potential Reach that were shown to class members also changed over time. *Id.* at 29a.

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

These 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 materiality element here is astronomical.

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* Pet. 30-31; 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*. Pet. 31; 2-ER-54. These advertisers' reactions to Potential Reach estimates were *the opposite* of the reactions predicted by plaintiffs' reliance theory.

For these reasons, the reliance issue cannot be resolved through class-wide evidence. For each class member, this issue will require individualized evidence about that class member's own decision-making process. Resolving the class's fraud claim will therefore require millions of mini-trials on reliance issues, a daunting task for our already busy federal courts. Yet any other approach would 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); *Dukes*, 564 at 366-67; *Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

The Ninth Circuit's common-course-of-conduct test turns a blind eye to these many individualized inquiries on materiality and reliance. It does so by decreeing that whenever a common course of conduct exists, materiality and reliance are common issues, and predominance is satisfied. As this case shows, that approach will lead to class certification for almost

any fraud claim, no matter how many individualized issues exist.

* * *

In sum, the Ninth Circuit's common-course-of-conduct test erodes the predominance requirement and allows classes to be certified in the mine run of consumer-fraud cases, upending the settled view that has prevailed for more than half a century. This stark departure from established class-action principles calls for this Court's review.

II. The Ninth Circuit's asymmetric standard of review overlooks the harm inflicted by erroneous grants of class certification.

The Ninth Circuit has compounded the harm from its dilution of the predominance requirement by adopting an asymmetric standard of review for class-certification decisions. Under that asymmetric standard, the Ninth Circuit grants "noticeably more deference" to decisions that grant class certification than to decisions that deny class certification. Pet. App. 4a.

The Ninth and Second Circuits stand alone in applying this slanted standard of review. 2 McLaughlin, *supra*, § 7:15. Neither court has offered a rationale for this approach. To the contrary, the Second Circuit has noted that this asymmetric framework arose from a misreading of earlier decisions and is "out of step with recent Supreme Court authority." *In re Petrobras Sec.*, 862 F.3d 250, 260 n.11 (2d Cir. 2017). Meta's petition confirms that a pro-plaintiff standard of review for class-certification decisions is judge-made and doctrinally unsound. *See* Pet. 32-34.

This approach is unsound from a practical perspective as well. Giving added deference to decisions that grant class certification disregards the weighty impact of those decisions and the settlement pressures that they carry.

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. This 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.*, Nagareda, *supra*, at 99.

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: An Update on Trends, Causes, and Solutions* 11 (2024), https://bit.ly/3BNqoc5 (*Nuclear Verdicts*). 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, *supra*, at 161 n.249.

The Ninth Circuit's asymmetric standard of review does not account for these points. By giving extra deference to grants of class certification, the Ninth Circuit overlooks that certification is "often the whole ballgame" in class-action cases. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012). Courts should not be in the business of deferring so heavily to decisions that lead, as Judge Friendly put it, to "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). Instead, when courts review grants of class certification, they should apply the same amount of scrutiny that they apply when they review denials of class certification.

* * *

Taken together, the Ninth Circuit's holdings on the questions presented will distort the judicial process in class-action cases and inflict considerable harm on the business community and the national economy. By watering down the predominance requirement and creating what amounts to a rubber stamp for decisions that grant class certification, the Ninth Circuit has declared open season on business defendants in consumer-fraud class actions. These missteps will make the Ninth Circuit a magnet for nationwide fraud classes and lead to the grant and affirmance of certification in case after case.

The costs of defending and settling these wrongly certified class actions will harm the businesses that pay them. But the harms will not end there. Businesses will need to pass along at least some of these costs to others in the form of higher prices and lower wages. *See Nuclear Verdicts* at 46-49. The costs will thus ultimately be borne by consumers, employees, other businesses, and the economy as a whole. *See id.*

This case highlights the widespread harms that result when class-action principles are skewed in favor of certification. Advertising on technology platforms like Facebook is essential for many small businesses. In a recent survey, the Chamber found that:

- 99% of small businesses use at least one technology platform.
- 45% of small businesses use digital marketing platforms in particular.
- 67% 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* 4-5, 12 (3d ed. 2024), https://bit.ly/3YpSiDP. If class certification is too easily granted and affirmed in lawsuits against technology platforms, small businesses that rely on those platforms—along with those businesses' employees and customers—will pay the price.

CONCLUSION

The Court should grant the petition and reverse.

Respectfully submitted,

JENNIFER B. DICKEY
JORDAN L. VON BOKERN
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062

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

STEPHANIE JOYCE
COMPUTER &
COMMUNICATIONS
INDUSTRY
ASSOCIATION
25 Massachusetts
Avenue, NW,
Suite 300C
Washington, D.C. 20001

Counsel for the Computer & Communications Industry Association

November 4, 2024

ERIK R. ZIMMERMAN
Counsel of Record
JORDAN T. DEJACO
MATTHEW S. QUEEN
ROBINSON, BRADSHAW &
HINSON, P.A.
1450 Raleigh Road,
Suite 100
Chapel Hill, N.C. 27517
(919) 328-8826
ezimmerman@
robinsonbradshaw.com

Counsel for Amici Curiae

PAUL N. LEKAS
SOFTWARE & INFORMATION
INDUSTRY ASSOCIATION
1620 I Street, NW
Washington, D.C. 20006

Counsel for the Software & Information Industry Association