No. 18-987

IN THE
Supreme Court of the United States

MCKESSON CORPORATION;
MCKESSON TECHNOLOGIES, INC., PETITIONERS,
V.
TRUE HEALTH CHIROPRACTIC, INC.;
MCLAUGHLIN CHIROPRACTIC ASSOCIATES, INC.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

DRI—The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 20,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers, promoting appreciation of the role of defense lawyers in the civil justice system, anticipating and addressing substantive and procedural issues germane to defense lawyers and their clients, improving the civil justice system, and preserving the civil jury. To help foster these objectives, DRI participates as *amicus curiae* at both the certiorari and merits stages in carefully selected Supreme Court appeals presenting questions that are exceptionally important to civil defense attorneys, their clients, and the conduct of civil litigation.

DRI has long held a special interest in issues surrounding class action fairness. DRI has authored numerous briefs as *amicus curiae* before this Court on the topic, has testified before Congress on proposed rule changes, and provides class action resources to its many members. Based on this experience, DRI's

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1. In accordance with Supreme Court Rule 37.6, *amicus curiae* DRI—The Voice of the Defense Bar certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than DRI, its members, and its counsel, made a monetary contribution intended to fund preparation or submission of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the intention to file this brief, and have consented to the filing of this *amicus curiae* brief.

perspective will help the Court understand the policy implications in this case.

This class action case presents an issue critical to DRI's interests. DRI's members frequently face class certification motions, which, if granted, have the power to force settlements, despite the merits of the claims involved. Because the stakes of class certification are so high, DRI strives to ensure the integrity of the class certification process. The decision below threatens that integrity by blunting the procedural protections of Rule 23(b)(3).

SUMMARY OF THE ARGUMENT

This case involves the most adventurous type of class action under Rule 23, the damages class action. Because money damages classes are the least cohesive by nature, Rule 23(b)(3) requires class plaintiffs to prove and the district court to find *both* that common issues predominate over individual ones *and* that classwide adjudication is superior to individual litigation before a class can be certified.

Here, the District Court refused to certify a damages class action under the TCPA because determining whether each plaintiff consented to receive a fax was an individualized issue that predominated over any common claims. In reversing, the Ninth Circuit required McKesson to prove its affirmative defenses were individualized—and prove those defenses for each class member—in order to defeat predominance. In so holding, the Ninth Circuit upended Rule 23(b)(3) and departed from the proper application of the rule in other Circuits.

The Ninth Circuit's decision inverts Rule 23(b)(3)'s procedural protections by requiring the class *defendant* to prove a *lack* of predominance in order to defeat certification. The result, in essence, is an effective *presumption* that the predominance standard is met as to affirmative defenses. This is not the inquiry Rule 23(b)(3) requires. Rule 23 and this Court's decisions interpreting it require a court to closely evaluate whether the entirety of the proposed class litigation can fairly and efficiently be adjudicated on an aggregate as opposed to individual basis. The Ninth Circuit's decision not only creates a presumption that affirmative defenses can be collectively adjudicated, but a presumption that will require class defendants to engage in exactly the kind of individualized discovery, adjudication, and expense that Rule 23 is intended to avoid.

The practical result of this decision will be to render it almost impossible for a defendant to meaningfully invoke affirmative defenses in class actions, thus effectively changing the substantive law of liability when a claim is adjudicated in a class action as opposed to through individual litigation. This outcome runs contrary to the text of Rule 23, the Rules Enabling Act, and the principles of Due Process to which the procedural class action rule must remain tethered. The Ninth Circuit's decision is also troubling as it is set in the landscape of uncapped statutory damage liability that is TCPA class action litigation. In TCPA class actions, potentially ruinous liability hinges almost exclusively on the individualized defense of consent.

The Court should grant certiorari and reverse the Ninth Circuit's decision.

ARGUMENT

This Court has made clear that there is a presumption against class litigation, not in favor of it: class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citations omitted). This approach is especially important in the context of class actions seeking money damages under Rule 23(b)(3). A damages class action is "an 'adventuresome innovation' of the 1966 amendments, . . . framed for situations 'in which "class-action treatment is not as clearly called for."' *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) (internal citation omitted).

The text of Rule 23(b)(3) governing damages class actions sets a high bar for class certification. It requires "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). Additional considerations to guide the court's analysis include "the class members' interests in individually controlling the prosecution of defense of separate actions" and "the likely difficulties in a managing a class action." FED. R. CIV. P. 23(b)(3)(A) & (D).

Rule 23(b)(3)'s predominance requirement, as applied by this Court, imposes dual burdens. First,

the class plaintiffs must "satisfy through evidentiary proof" that "questions of law or fact common to class members predominate over any questions affecting only individual members." *Comcast Corp.*, 569 U.S. at 33 (quoting FED. R. CIV. P. 23). Second, the trial court must affirmatively "find" that common issues of law or fact predominate over individualized issues that could undermine the efficiency of classwide litigation. *See* FED. R. CIV. P. 23(b)(3) (requiring that "*the court finds* questions of law or fact common to class members predominate over any questions affecting only individual members" (emphasis added)); *see* 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE, § 1798, at 120 (3ed. 2005 & Supp. 2009) ("[T]he court is under a duty to evaluate the relationship between the common and individual issues in all actions under Rule 23(b)(3).").

"Rule 23(b)(3)'s predominance criterion is even more demanding than [the commonality requirement of] Rule 23(a)." *Comcast Corp.*, 569 U.S. at 34. "What matters . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc.*, 564 U.S. at 350 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)). This inquiry goes beyond identifying mere similarities in the plaintiffs' claims, but also requires the court to confirm whether there may be a "dissimilarity that has the capacity to undercut the prospects for joint resolution of class members' claims through a unified proceedings." Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.

L. REV. 97, 131 (2009); *see also Wal-Mart Stores, Inc.*, 564 U.S. at 350. Thus, the district court must "take a 'close look' at whether common questions predominate over individual ones." *Comcast Corp.*, 569 U.S. at 34 (citation omitted).

None of these standards creates one rule of class certification for the elements of a claim and another rule for affirmative defenses. Nor can any such distinction be found in Rule 23 itself. The decision below ignored both the actual text of Rule 23 and this Court's precedents. First, viewing the controversy as a whole, the class plaintiffs pleaded, but failed to prove, that common issues predominated over individual ones. Second, the Ninth Circuit failed to take the "close look" at whether classwide adjudication was practicable when the most important issue at trial would be McKesson's individualized consent defense to statutory damages. As a result, the Ninth Circuit fabricated a new rule to justify ignoring affirmative defenses instead of analyzing whether individualized issues surrounding those defenses predominated over common issues in trying the claims. Relegating affirmative defenses to second-class citizenship in the predominance and certification analysis is a new judicial adventure that cannot stand.

I. Rule 23's procedural requirements apply regardless of whether affirmative defenses are at issue.

The requirements of Rule 23(a) and 23(b)(3) are purely procedural, not substantive. Rule 23's requirements turn on issues of fairness and efficiency, not the elements of any particular claim or defense.

Allocation of the burden of proof on the merits of a defense does not bear on Rule 23's requirements for collective adjudication, such as the typicality of the class representative, the adequacy of class counsel, the commonality of the class's claims, or the superiority of aggregate litigation. *See* FED. R. CIV. P. 23(a) & (b)(3). The question is simply whether common issues as to which there are common answers predominate over individual ones—that is the critical analysis that determines whether class adjudication of damage claims is permissible. A court undertaking the predominance inquiry therefore need not ask, "Who has the burden of proof at trial?" Nonetheless, this is precisely the question the Ninth Circuit asked below. This caused the Court to ignore the plaintiffs' lack of proof of predominance and arbitrarily limit its predominance analysis to the individuals for whom McKesson presented individualized evidence at the class certification stage. Plainly, this analysis fails the procedural requirements of Rule 23(b)(3).

Whether a plaintiff consented to receive a call or fax is a recurring and typically dispositive issue in TCPA litigation. The Ninth Circuit recognized this in an earlier case. *See* Pet. App. 15a–16a. Even assuming the defendant would bear the burden of proving consent at trial, the merits of a consent defense are not adjudicated at the class certification stage. What is being adjudicated is whether the issue of consent would have to be proved individually or collectively at trial, and whether the controversy as a whole is one as to which individual or common issues would predominate.

But as McKesson demonstrated below, the answer to the question of consent can—and here did—vary between members of a class action based on each individual class member's interactions with the defendant. *See id.* at 28a–29a. This means that each class member's right to recover would turn almost entirely on his or her individual evidence as to consent, causing individual questions to predominate over common ones, as the District Court properly concluded. Reversing, the Ninth Circuit found that consent is an affirmative defense in a TCPA case, and because the McKesson would bear the burden of proof on the merits of the consent defense at trial, McKesson also bore the burden of proving that consent was an individualized issue and that it predominated over common issues for purposes of class certification. The Ninth Circuit focused on similarities in some, but not all, of the evidence McKesson submitted and conclusorily determined that because "there is little or no variation in the product registrations" or license agreements, "the predominance requirement of Rule 23(b)(3) is therefore satisfied." Pet. App. 17a.

Although the Ninth Circuit found certain common questions of consent in product registrations and licenses, there was no showing that those questions were the exclusive means available to establish consent with respect to all class members. The Ninth Circuit also made no meaningful inquiry as to whether other individual questions of consent would predominate in resolving the claims of the class as a whole. This analysis fails to satisfy Rule 23. *See, e.g.*, *Comcast Corp.*, 569 U.S. at 35–36 (determination that damages model *could* be applied on a class-wide

basis was insufficient under Rule 23 where no inquiry was also made as to whether the model related to the damage theories alleged).

In reality, the Ninth Circuit failed to make the right inquiry: whether *the plaintiffs proved* that defendant's TCPA liability to the entire class could be determined through common proof. Indeed, the District Court acknowledged what should have been the dispositive failing for class certification: "Plaintiffs [did] not offer[] their own satisfactory method of establishing a lack of [consent]" on a classwide basis. Pet. App. 32a. Rather than treat the plaintiffs' failing as a reason to deny certification, the Ninth Circuit punished McKesson for marshalling exemplar proof that members of the alleged class had individually consented and had done so in a variety of ways. The Court essentially held that because McKesson had not provided evidence of consent for each and every individual putative class member at the certification stage, class certification was appropriate as to all those for whom no individual proof of consent was offered. *See* Pet. App. 17a ("[W]e do not consider consent defenses that McKesson might advance or for which it has presented no evidence."). This nonsensical ruling reversed the plaintiff's burden of proof on certification and flipped Rule 23's presumption against certification. The Ninth Circuit was not empowered by the text of Rule 23 to do any of these things. The duty to conduct a rigorous analysis into the predominance of common issues over individual ones applies to the entire controversy, and the burden of proving that predominance rests entirely on *the party seeking certification*. *See, e.g.*, *Wal-Mart Stores, Inc.*, 564 U.S. at 366–67.

Make no mistake. The Ninth Circuit created a new presumption that predominance is met as to any affirmative defense absent individualized proof to the contrary for each class member. Even in those limited instances in which the law allows common resolution of individual questions through presumption, Rule 23(b)(3) still dictates that the court confirm the proposed class presented evidence to establish that presumption. *E.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 268 (2014) (discussing the showing a plaintiff must make at class certification stage to demonstrate presumption of reliance in securities fraud cases). No such presumption is permitted in TCPA cases, nor did the plaintiffs offer any proof that consent was a common issue. The Ninth Circuit's decision wreaks havoc not only in TCPA litigation, but in any litigation in which consent or other affirmative defenses must be individually proven. *See, e.g.*, 47 U.S.C. § 227 (TCPA); 18 U.S.C. § 2511(d) (2018) (the Electronic Communications Privacy Act of 1985) (establishing consent as an affirmative defense).

II. Rule 23 does not require individualized discovery to defeat class certification or defend against liability.

The Ninth Circuit has created a perverse framework under which defendants must now conduct individual discovery as to each and every absent class member to present actual evidence of affirmative defenses in order to defeat class certification. Such discovery is disfavored, untenable in practice, and clearly runs contrary to the purpose of Rule 23. 3 NEWBERG ON CLASS ACTIONS § 9:16 (5th ed.) ("If the

defendant could propound discovery on each class member's individualized issues, such discovery would frustrate the rationale behind Rule 23's representative approach to litigation and turn the class action into a massive joinder of individual cases."); *see also* 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE, § 1796.1, at 57 (3ed. 2005 & Supp. 2009) ("At least initially, . . . discovery should be limited to what is necessary for determining whether a proper class action exists."). The majority of Circuits have accepted defendants' representative evidence and have not required the type of specific evidence of variance that the Ninth Circuit now requires. *See, e.g.*, *Sandusky Wellness Ctr. v. ASD Specialty Healthcare*, 863 F.3d 460, 468–69 (6th Cir. 2017); *Myers v. Hertz Corp.*, 624 F.3d 537, 549–51 (2d Cir. 2010); *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 328–29 (5th Cir. 2008); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 324 (4th Cir. 2006).

The Ninth Circuit's decision also presents significant practical implications for defendants *after* certification. McKesson will now have to marshal individual evidence of consent at a class action trial in order to defend against liability for a certified subclass. When it does so, that proof will again show that class certification was inappropriate to begin with. If the Ninth Circuit follows its own logic, however, rather than find against any members of the class on the merits, the court will simply once again excise the losers from the class in pursuit of failsafe class certification for its own sake.

But of course, in practice, individualized rebuttal *after* class certification has proven "virtually impossible" in overbroad certifications. *See Halliburton Co.*, 573 U.S. at 296 (Thomas, J. dissenting) ("As it turns out, however, the realities of class-action procedure make rebuttal based on an individual plaintiff's lack of reliance virtually impossible. . . . After class certification, courts have refused to allow defendants to challenge any plaintiff's reliance . . . prior to a determination on classwide liability."). It is pure fantasy. Undoubtedly, a defendant's ability to rebut individualized questions after certification will also be weighed against the "in terrorem settlement pressures brought to bear by certification." *Id.* at n.7. In the TCPA context, where violations rack up fines of between $500 and $1500 per fax sent, these statutory penalties will force all but the most stubborn defendant to settle rather than defend itself against liability. *See Stoneridge Investment Partners, LLC v. Scientific–Atlanta, Inc.*, 552 U.S. 148, 163 (2008) ("[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies.").

Class certification is not supposed to be the tail that wags the dog. Rule 23(b)(3) places the burden on the party seeking certification to prove predominance and superiority. This protects defendants' ability to defend themselves from being eroded in the ever more "adventuresome innovation" of class suits brought under Rule 23(b)(3). The plaintiff's failure to show that the most dispositive, most critical issue in the case can be resolved on a common basis should preclude class certification. Otherwise, the

predominance inquiry becomes a mere pretense. McKesson presented ample representative evidence to support that individual issues of consent would indeed exist and predominate over common questions at trial. That should have precluded a finding of predominance under 23(b)(3). The Court should grant certiorari in this case to resolve the split created by the Ninth Circuit's decision.

III. Without sufficient safeguards at the pivotal certification stage, the Ninth Circuit's decision will foster a surge in overbroad class certifications.

"Rule 23's requirements must be interpreted in keeping with Article III constraints." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Through a judicial rewriting of Rule 23, the Ninth Circuit has presumptively excised all affirmative defenses from the class action analysis, leaving a class action defendant with the impossible and illogical task of defending against class certification with individualized proof specific to each putative class member. This greatly increases the likelihood that plaintiffs who have not suffered injury and could not prove liability in individual suits can nevertheless recover in class actions. The Ninth Circuit's interpretation of Rule 23(b)(3) thus runs afoul of Rules Enabling Act and the constitutional protections of Article III standing. *See* 28 U.S.C. § 2072(b) (prohibiting any federal rule of civil procedure from "abridg[ing], enlarge[ing] or modify[ing] any substantive right"). Especially in the context of the onerous monetary penalties attached to the TCPA, this result alone warrants reversal.

The Ninth Circuit's approach to Rule 23(b)(3) is also likely to create a surge of class action filings in the Ninth Circuit designed to shepherd overbroad classes of plaintiffs through class certification as a means to obtain large settlements. DRI's members often face class certification motions, which, if granted, would force settlements, despite the merits of the claims involved. In the context of class actions seeking monetary damages, "the class obtains substantial settlement leverage from a favorable certification decision." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1292 (2002). In turn, that leverage both "increases the prospects for frivolous class action suits," *id.* at 1301, and increases the chances that uninjured plaintiffs will recover for meritless TCPA claims.

As a matter of fundamental fairness, class action defendants should receive the procedural protections built into Rule 23 before becoming subject to the threat of massive liability that accompanies an unfavorable class certification decision. Rule 23's burdens of proof and required rigorous analysis should be applied uniformly to all issues forming part of the controversy. This case presents an opportunity for this Court to preserve its past decisions cabining the class action device with basic principles of fundamental fairness, and to prevent that purely procedural device from becoming a tool by which the substantive law can be judicially edited in the name of efficiency.

CONCLUSION

Because the Ninth Circuit's opinion relieves class plaintiffs and the district court of their obligations under Rule 23(b)(3) and conflicts with decisions of other United States Courts of Appeals on the same important matter, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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