

15-1101

Supreme Court, U.S.
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No. 15-

IN THE
Supreme Court of the United States

GOOGLE INC.,

Petitioner,

v.

PULASKI & MIDDLEMAN, LLC, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL G. RHODES
WHITTY SOMVICHIAN
KYLE C. WONG
COOLEY LLP
101 California Street
5th Floor
San Francisco, CA 94111

NEAL KUMAR KATYAL
Counsel of Record
MARY HELEN WIMBERLY
FREDERICK LIU
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

QUESTIONS PRESENTED

A class action may be certified only if the four prerequisites of Federal Rule of Civil Procedure 23(a) are satisfied (numerosity, commonality, typicality, and fair-and-adequate representation), and the class action falls within one of Rule 23(b)'s defined types. The third subpart of Rule 23(b) is at issue here, and it allows certification only if "the court finds 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). In addition, class certification "shall not abridge, enlarge or modify any substantive right" under the Rules Enabling Act. 28 U.S.C. § 2072(b).

This case presents two questions about these requirements. They are:

1. Whether individual damage calculations alone can overwhelm questions common to the class, precluding certification under Rule 23(b)(3).
2. Whether plaintiffs may use a formula that relies on a uniform measure of harm derived from the average experience of all class members as common proof of damages.

PARTIES TO THE PROCEEDINGS

1. Google Inc., petitioner on review, was defendant-appellee below.

2. Pulaski & Middleman, LLC; JIT Packaging, Inc.; RK West, Inc.; and Richard Oesterling, respondents on review, were plaintiffs-appellants below.

RULE 29.6 DISCLOSURE STATEMENT

Google Inc. is a wholly owned subsidiary of Alphabet Inc., a publicly traded company. No other company owns 10% or more of Google's stock.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS.....	ii
RULE 29.6 DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES.....	vii
OPINIONS BELOW	1
JURISDICTION	2
STATUTE AND RULE INVOLVED	2
INTRODUCTION.....	2
STATEMENT	5
A. Factual Background	5
B. Proceedings Below	6
REASONS FOR GRANTING THE PETITION	9
I. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER INDIVIDUAL DAMAGE CALCULATIONS ALONE CAN OVERWHELM QUESTIONS COMMON TO THE CLASS	9
A. This Important And Recurring Question Has Divided The Circuits	9
B. The Ninth Circuit’s Decision Is Contrary To Supreme Court Precedent	17
II. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER PLAINTIFFS MAY USE FORMULAS BASED ON THE AVER- AGE CLASS MEMBER’S EXPERIENCE AS COMMON PROOF OF DAMAGES	20

TABLE OF CONTENTS—Continued

	<u>Page</u>
A. The Courts Of Appeals Are Divided On The Propriety Of Averages-Based Class Damages Models.....	21
B. The Ninth Circuit’s Embrace Of “Trial By Formula” Conflicts With The Decisions Of This Court	26
CONCLUSION	32
APPENDICES	
APPENDIX A—Court of Appeals’ Opinion (Sept. 21, 2015).....	1a
APPENDIX B—District Court’s Opinion and Order Denying In Part Plaintiffs’ Motion To Strike; Denying Plaintiffs’ Motion To Certify Class (Jan. 5, 2012).....	22a
APPENDIX C—District Court’s Opinion and Order Denying Motion For Leave To File Motion For Reconsideration (May 4, 2012)....	60a
APPENDIX D—Court of Appeals’ Order Staying Mandate (Dec. 21, 2015).....	65a
APPENDIX E—Court of Appeals’ Order Denying Panel Rehearing And Rehearing En Banc (Dec. 8, 2015)	66a
APPENDIX F—Statute and Rule Involved	68a

TABLE OF AUTHORITIES

Page(s)**CASES:**

<i>Allison v. Citgo Petroleum Corp.</i> , 151 F.3d 402 (5th Cir. 1998)	12
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997)	8
<i>American Sur. Co. v. Baldwin</i> , 287 U.S. 156 (1932)	30
<i>Bell Atl. Corp. v. AT&T Corp.</i> , 339 F.3d 294 (5th Cir. 2003)	12, 13
<i>Bridge v. Phoenix Bond & Indem. Co.</i> , 553 U.S. 639 (2008)	22
<i>Bouaphakeo v. Tyson Foods, Inc.</i> , 765 F.3d 791 (8th Cir. 2014)	24
<i>Broussard v. Meineke Discount Muffler Shops</i> , <i>Inc.</i> , 155 F.3d 331 (4th Cir. 1998)	4, 21, 22
<i>Brown v. Nucor Corp.</i> , 785 F.3d 895 (4th Cir. 2015)	11
<i>Chiang v. Veneman</i> , 385 F.3d 256 (3d Cir. 2004)	10
<i>Comcast Corp. v. Behrend</i> , 133 S. Ct. 1426 (2013)	<i>passim</i>
<i>Coopers & Lybrand v. Livesay</i> , 437 U.S. 463 (1978)	17
<i>Cortez v. Purolator Air Filtration</i> <i>Prods. Co.</i> , 999 P.2d 706 (Cal. 2000)	28, 30
<i>Day v. AT&T Corp.</i> , 74 Cal. Rptr. 2d 55 (Cal. Ct. App. 1998)	30

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>Espenscheid v. DirectSat USA, LLC</i> , 705 F.3d 770 (7th Cir. 2013)	23
<i>Haley v. Merial, Ltd.</i> , 292 F.R.D. 339 (N.D. Miss. 2013)	13
<i>In re Deepwater Horizon</i> , 739 F.3d 790 (5th Cir. 2014)	13
<i>In re Fibreboard Corp.</i> , 893 F.2d 706 (5th Cir. 1990)	23, 24
<i>In re Hydrogen Peroxide Antitrust Litig.</i> , 552 F.3d 305 (3d Cir. 2008)	10
<i>In re Rail Freight Fuel Surcharge Antitrust Litig.</i> , 725 F.3d 244 (D.C. Cir. 2013)	14, 15
<i>In re Tobacco Cases II</i> , 192 Cal. Rptr. 3d 881 (Cal. Ct. App. 2015)	29, 30
<i>In re Urethane Antitrust Litig.</i> , 768 F.3d 1245 (10th Cir. 2014)	24, 25
<i>Johnson v. GEICO Cas. Co.</i> , 310 F.R.D. 246 (D. Del. 2015)	10, 11
<i>Lienhart v. Dryvit Sys., Inc.</i> , 255 F.3d 138 (4th Cir. 2001)	11
<i>Lindsey v. Normet</i> , 405 U.S. 56 (1972)	30
<i>Little v. T-Mobile USA, Inc.</i> , 691 F.3d 1302 (11th Cir. 2012)	14
<i>Martin v. Mountain State Univ., Inc.</i> , No. 5:12-cv-03937, 2014 WL 1333251 (S.D.W. Va. Mar. 31, 2014)	11

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>McLaughlin v. American Tobacco Co.</i> , 522 F.3d 215 (2d Cir. 2008).....	22
<i>O'Connor v. Uber Techs., Inc.</i> , No. 13-cv-03826, 2015 WL 8292006 (N.D. Cal. Dec. 9, 2015).....	16
<i>O'Sullivan v. Countrywide Home Loans, Inc.</i> , 319 F.3d 732 (5th Cir. 2003).....	12
<i>Roach v. T.L. Cannon Corp.</i> , 778 F.3d 401 (2d Cir. 2015).....	19, 20
<i>Robinson v. Open Top Sightseeing S.F., LLC</i> , No. 14-cv-852, 2015 WL 9304041 (N.D. Cal. Dec. 22, 2015).....	16
<i>Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.</i> , 601 F.3d 1159 (11th Cir. 2010)	13, 14, 18, 19
<i>Simms v. Jones</i> , 296 F.R.D. 485 (N.D. Tex. 2013).....	13
<i>St. Gregory Cathedral Sch. v. LG Elecs., Inc.</i> , No. 6:12-CV-739, 2015 WL 5604763 (E.D. Tex. Sept. 23, 2015)	13
<i>Steering Comm. v. Exxon Mobil Corp.</i> , 461 F.3d 598 (5th Cir. 2006)	12, 13
<i>Tyson Foods, Inc. v. Bouaphakeo</i> , 135 S. Ct. 2806 (2015)	4, 24
<i>Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.</i> , 725 F.3d 1213 (10th Cir. 2013)	15
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 131 S. Ct. 2541 (2011)	<i>passim</i>

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>Ward v. Dixie Nat’l Life Ins. Co.</i> , 595 F.3d 164 (4th Cir. 2010)	11
<i>Windham v. American Brands, Inc.</i> , 565 F.2d 59 (4th Cir. 1977)	11
 CONSTITUTIONAL PROVISION:	
U.S Const. amend. VII.....	23
 STATUTES:	
18 U.S.C. § 1961 <i>et seq.</i>	22
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2071 <i>et seq.</i>	3
28 U.S.C. § 2072.....	2
28 U.S.C. § 2072(b)	3, 27
29 U.S.C. § 201 <i>et seq.</i>	23
 RULES:	
Fed. R. App. P. 41(d)(2)(A)	16
Fed. R. Civ. P. 23	<i>passim</i>
Fed. R. Civ. P. 23(a).....	11
Fed. R. Civ. P. 23(b)(3)	<i>passim</i>
 OTHER AUTHORITIES:	
Robert H. Klonoff, <i>The Decline of Class Actions</i> , 90 Wash. U. L. Rev. 729 (2013)	16
Richard A. Nagareda, <i>Class Certification in the Age of Aggregate Proof</i> , 84 N.Y.U. L. Rev. 97 (2009)	17

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Google Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 802 F.3d 979. Pet. App. 1a-21a. Its orders denying rehearing en banc, Pet. App. 66a-67a, and staying its mandate pending the filing of this certiorari petition, Pet. App. 65a, are unreported. The opinion of the United States District Court for the Northern District of California denying class certification is not published in the *Federal Supplement*, but is available at 2012 WL 28068. Pet. App. 22a-59a.

JURISDICTION

The judgment of the Ninth Circuit was entered on September 21, 2015, and a timely petition for rehearing was denied on December 8, 2015. Pet. App. 66a-67a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

This case involves the Rules Enabling Act, 28 U.S.C. § 2072, and Federal Rule of Procedure 23, which are reproduced at Pet. App. 68a-76a.

INTRODUCTION

This is a case where the Ninth Circuit has impermissibly diluted Federal Rule of Civil Procedure 23's rigorous requirements for certification of class actions. The court of appeals reversed the district court's refusal to certify a class of Google advertisers claiming violations of California's unfair-competition laws. Its decision departs from the fundamental principles of class certification that this Court laid down in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), joining and creating circuit splits in the process. Google respectfully asks the Court to grant review and reverse.

The first question presented concerns Rule 23(b)(3)'s predominance requirement. To meet that requirement, a plaintiff must show 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). In many cases, although common questions of *liability* exist, there are nonetheless individual questions of *damages*. So the question frequently arises: Can individual damage

calculations alone overwhelm questions common to the class, defeating certification under Rule 23(b)(3)?

The courts of appeals are divided. Five circuits—the Third, Fourth, Fifth, Eleventh, and D.C. Circuits—have answered yes: Individual damage calculations alone *can* defeat certification under Rule 23(b)(3). By contrast, the Ninth Circuit in this case answered no: Individual damage calculations alone *cannot* defeat certification. That decision flies in the face of this Court’s decision in *Comcast*, which held that “individual damage calculations” not simply *can*, but sometimes “*will*,” “overwhelm questions common to the class.” 133 S. Ct. at 1433 (emphasis added). Because this important and recurring issue has divided the circuits, and because the Ninth Circuit plainly erred, this Court should agree to decide the first question presented.

The second question presented challenges the Ninth Circuit’s embrace of a general, one-size-fits-all formula to resolve damages for the whole class. The court of appeals approved the formula *because* it did “not turn on individual circumstances.” Pet. App. 21a. But that, of course, is precisely the problem. This Court has expressly “disapprove[d]” just that “novel project” of computing class damages by a formula “without further individualized proceedings.” *Wal-Mart*, 131 S. Ct. at 2561. *Wal-Mart*’s holding on that point directly follows from the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, which “forbids interpreting Rule 23 to ‘abridge, enlarge or modify any substantive right.’” *Wal-Mart*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b)). “Trial by Formula” forecloses individual defenses and sets damages for plaintiffs at amounts divorced from their particular circumstances, thereby giving plaintiffs greater

substantive rights than they would have in individual proceedings. *Id.*

Consistent with the Rules Enabling Act, the Second, Fourth, Fifth, and Seventh Circuits have all held that damages in class actions cannot be computed using an “abstract analysis of ‘averages.’” *E.g., Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998). The Ninth Circuit’s decision erroneously joins the minority view of the Eighth and Tenth Circuits, contrary to *Wal-Mart’s* instruction. The cert-worthiness of this question is already established; it is currently pending before the Court in *Tyson Foods, Inc. v. Bouaphakeo*, 135 S. Ct. 2806 (2015) (granting review of Eighth Circuit decision). *See* Pet. at i, *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (Mar. 19, 2015), 2015 WL 1285369 (first question presented).

In short, the Ninth Circuit’s decision “conflicts with” *Comcast* and *Wal-Mart*, and it creates and deepens divisions among the circuits regarding class-certification standards. It threatens to turn the Ninth Circuit into a class-action magnet. And, on the merits, this case should not proceed as a class action; the court of appeals was only able to approve that course by bending the substantive law of restitution to fit the needs of class adjudication and robbing Google of its right to present defenses. Procedural rules are supposed to serve substantive law, not the other way around. The decision below would result in an unwieldy class comprised of hundreds of thousands of different advertisers who purchased millions of different ads from Google over the course of several different years. That entire class will demand restitution from Google for alleged violations of California’s unfair competition laws—never mind

that some putative class members *benefited* from the alleged misconduct. And it will do so by punching numbers into an abstract formula, even though—as the district court rightly found—determining the proper amount of restitution for each class member requires a “complex and highly individualized analysis.” Pet. App. 56a.

This Court should grant review to bring the Ninth Circuit’s class-action jurisprudence in line with *Comcast* and *Wal-Mart*, and to resolve the multiple conflicts among the courts of appeals.

STATEMENT

A. Factual Background

Google AdWords is an online advertising service. During the class period, AdWords allowed advertisers to place ads alongside Google search results or on other webpages that were part of Google’s advertising network. Pet. App. 23a. The ads generally were matched to Internet users based on the search queries the users entered on Google (or other search engines) or the subject-matter of the websites they viewed. Pet. App. 5a-6a. The ads typically were short strings of text with hyperlinks that, when clicked, took the user to the advertiser’s website. *Id.* Advertisers paid Google each time an Internet user clicked on an advertisement link. Pet. App. 5a.

Plaintiffs in this suit all purchased advertising services from Google AdWords. They allege that Google misled them in violation of California law by showing their ads on two types of websites: “parked domains” and “error pages.” Pet. App. 6a. A “parked domain” is a webpage with a registered address that is relatively undeveloped and consists primarily of ads or

links. *Id.* “Error pages” act as placeholders when a user enters an address that does not match a registered URL. *Id.* Google generally displayed ads on parked domains and error pages that were matched to terms the user entered into the address bar of a web browser, or searches a user made on the website, so the ads a user saw were typically relevant to what the user was looking for. Pet. App. 5a-6a, 24a.

B. Proceedings Below

Plaintiffs brought this putative class action against Google under California’s Unfair Competition and Fair Advertising Laws. They sought restitution for Google’s alleged failure to inform them that it would display their ads on two types of purportedly “low quality” sites: “parked domains” and “error pages.” Pet. App. 41a. They moved to certify a class—for the purpose of establishing liability *and* damages—which consisted of “[a]ll Google AdWords Customers who, during the [class period], were charged by Google for clicks on their advertisements that Google placed on parked domains or error pages.” Pet. App. 38a (citation omitted).

The district court denied Plaintiffs’ motion for certification of a Rule 23(b)(3) class. The court found that there was a single common issue: “whether Google’s alleged omissions were misleading to a reasonable AdWords customer.” Pet. App. 51a. But it was “unconvinced” that “commonalities predominate.” Pet. App. 54a. The main obstacle was “the individual nature of the restitutionary relief sought.” *Id.* Plaintiffs’ theory rested on “what AdWords customers would have paid ‘but for’ the alleged misstatements or omissions.” Pet. App. 55a. Yet, as the district court explained, “any effort to determine what adver-

tisers ‘would have paid’ *** requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed.” Pet. App. 56a.

Plaintiffs had proposed three methods of calculating restitution, none of which sufficiently took into account the circumstances surrounding the AdWords auctions. Pet. App. 57a. Plaintiffs’ primary proposal—which was the only one it defended on appeal, see CA9 Appellants’ Opening Br. 27-37; CA9 Appellants’ Reply Br. 16-20—is called the “Smart Pricing Method.” “Smart Pricing” refers to a discount that Google gives advertisers as a business accommodation in certain circumstances. Pet. App. 57a. It involves looking at the aggregate performance of ads on a given webpage, and comparing it to the performance of ads on a benchmark page like google.com. Pet. App. 57a, 62a-63a. Performance is measured by a “conversion rate,” which is the rate at which a click on an ad link leads to a particular business result for the advertiser, like a purchase or a sign-up. Pet. App. 5a & n.2. Google uses Smart Pricing in certain contexts to discount the cost-per-click bid on a website with lower performance. *Id.*

Plaintiffs sought to use that Smart Pricing discount as a way to measure restitution. “The amount of restitution owed a class member would be the difference between the amount the advertiser actually paid and the amount paid reduced by the Smart Pricing discount ratio.” Pet. App. 7a. As the district court explained, the “‘Smart Pricing Method’ would apply a uniform discount on all ads placed on a parked domain—even if an individual advertiser’s ads on that web page outperformed ads appearing on other types of websites.” Pet. App. 57a. Take one of the named

plaintiffs, RK West, as an example. RK West had a *higher* conversion rate on parked domains than on the benchmark site. *Id.* In other words, RK West benefited from Google's practice because its performance was *better* on parked domains. Because of this, the district court correctly concluded that "applying a uniform discount" to all putative class members, regardless of their circumstances, was "too inexact a solution." Pet. App. 63a. It held that "individualized issues of restitution permeate the class claims," and "the proposed class is not 'sufficiently cohesive to warrant adjudication by representation.'" Pet. App. 58a-59a (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)); *see also* Pet. App. 60a-64a (denying petition for reconsideration).

A panel of the Ninth Circuit reversed, concluding that the predominance requirement was satisfied. In reaching that conclusion, the court of appeals first held that there were no individual questions regarding "*entitlement* to restitution." Pet. App. 14a (emphasis added). The court thus perceived no individual issues of *liability*. *See* Pet. App. 11a-14a. The court then held that any differences in calculating the *amount* of restitution could not predominate. That is because, the court declared, "damage calculations alone cannot defeat certification." Pet. App. 14a (citation omitted). Applying that categorical rule, the court did not even consider whether, in the particular circumstances of this case, there were any individual issues of damages—much less whether those issues overwhelmed questions common to the class. Finally, the court found that a simple formula based on the Smart Pricing Method was an acceptable way to measure restitution for class members. Pet. App. 21a. "Because restitution ***

measures what the advertiser would have paid at the outset, rather than accounting for what occurred after the purchase, using a ratio from Google's data that adjusts for web page quality is both targeted to remedying the alleged harm and does not turn on individual circumstances." *Id.* The panel therefore reversed the district court's decision and remanded.

The Ninth Circuit denied rehearing en banc, Pet. App. 66a-67a, but upon Google's motion and over Plaintiffs' objection, the court of appeals stayed its mandate pending the filing of this certiorari petition. Pet. App. 65a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER INDIVIDUAL DAMAGE CALCULATIONS ALONE CAN OVERWHELM QUESTIONS COMMON TO THE CLASS.

The first question presented concerns Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement; it asks whether individual damage calculations alone can overwhelm questions common to the class, precluding certification. This recurring and important question of class-action procedure has divided the federal courts of appeals. And the Ninth Circuit's resolution of that question in this case was plainly wrong. Accordingly, this Court should grant certiorari and reverse.

A. This Important And Recurring Question Has Divided The Circuits.

Review is warranted to resolve a clean split over a fundamental issue: Whether individual damage cal-

culations alone can overwhelm questions common to the class, defeating certification under Rule 23(b)(3).

1. Five courts of appeals—the Third, Fourth, Fifth, Eleventh, and D.C. Circuits—have answered yes: Individual damage calculations alone *can* defeat class certification under Rule 23(b)(3).

As the Third Circuit has held, “there are cases where the question of damages is so central that it can, in some sense, overtake the question of liability.” *Chiang v. Veneman*, 385 F.3d 256, 273 (3d Cir. 2004), *abrogated on other grounds by In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 n.18 (3d Cir. 2008). That ruling remains the law in the Third Circuit. As one district court explained, the relevant inquiry is “whether the individual proofs of damages predominate over the common liability issues * * * — that is, whether this is [one of those cases [where the question of damages is so central that it can, in some sense, overtake the question of liability.’” *Johnson v. GEICO Cas. Co.*, 310 F.R.D. 246, 255 (D. Del. 2015) (quoting *Chiang*, 385 F.3d at 273). *Johnson* involved a putative class of insureds who brought suit against their automobile insurer. The plaintiffs alleged that the insurer engaged in bad faith and consumer fraud by using arbitrary rules to determine whether to pay personal injury protection benefits. *Id.* at 248. The district court originally granted Rule 23(b)(3) class certification, but later decertified the class because it concluded individual damages issues predominated. *Id.* at 254-256. The court explained: “Although there are common questions of law and fact as to the substantive liability of [the insurers] for their allegedly deficient processes and misrepresentations, these common questions would consume much less litigation time than the proof of

damages for each individual class member.” *Id.* at 255. Accordingly, although “[t]he individualized determinations with respect to the relief to be granted do not undermine Rule 23(a) commonality as to liability issues,” they “predominate over them under Rule 23(b)(3)’s more demanding standard.” *Id.*

The Fourth Circuit reached the same conclusion in *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138 (4th Cir. 2001). In that case, a putative class of homeowners sued a manufacturer for negligently designing a home siding product. *Id.* at 141. The district court certified a Rule 23(b)(3) class, but the Fourth Circuit vacated that ruling. *Id.* at 151. The court of appeals explained that the “functional equivalent of a full-blown trial on damages causation for each putative class member would be required.” *Id.* at 149. And according to the court, that need alone—the need for “individualized proof of damages”—“destroy[ed] predominance.” *Id.* at 149; *see also Brown v. Nucor Corp.*, 785 F.3d 895, 924 (4th Cir. 2015) (citing *Comcast* as “explaining that individual damage-related questions might destroy predominance”); *Ward v. Dixie Nat’l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) (“individualized damage determinations cut against class certification under Rule 23(b)(3)”); *Windham v. American Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977) (holding that the “damage aspect of [a] case predominate[s]” where “the issue of damages *** requires separate mini-trials” (brackets and citations omitted)); *Martin v. Mountain State Univ., Inc.*, No. 5:12-cv-03937, 2014 WL 1333251, at *4 (S.D.W. Va. Mar. 31, 2014) (“the varied and diverse circumstances of the proposed class members indicates that individualized proof of

damages and causation will be required; such individualized proof defeats predominance”).

The decisions of the Fifth Circuit are to the same effect. For example, in *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003), a putative class of plaintiffs sued AT&T for monopolizing the market for caller-ID service. *Id.* at 297. In affirming the denial of class certification, the court of appeals held that the plaintiffs’ motion “founder[ed] on the issue of the amount of damages.” *Id.* at 303. As the court explained, “any adequate estimation of actual damages” would require “individualized inquiries.” *Id.* at 304. And given the need for “the calculation of individualized actual economic damages,” the court held that the predominance requirement could not be satisfied. *Id.* at 308; *see also id.* at 304 (“In light of the need for such individualized inquiries, we cannot conclude that the plaintiffs have established that the requirements of Rule 23(b)(3) can be satisfied in the present case.”). Numerous other Fifth Circuit decisions have denied Rule 23(b)(3) certification on the same basis: the need for individual damage calculations alone. *See, e.g., Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006) (holding that “individual issues of medical causation and damages” predominate); *O’Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 744 (5th Cir. 2003) (holding that “individualized calculations of damages predominate”); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 419 (5th Cir. 1998) (holding that “individual-specific issues relating to the plaintiffs’ claims for

compensatory and punitive damages” predominate).¹ And district courts within the Fifth Circuit continue to apply the same rule today. *See, e.g., St. Gregory Cathedral Sch. v. LG Elecs., Inc.*, No. 6:12-CV-739, 2015 WL 5604763, at *7 (E.D. Tex. Sept. 23, 2015) (denying class certification in part because of *Steering Committee*; holding that “calculating damages will require individual inquiries that will also predominate over any common issues that may be presented by this case”); *Simms v. Jones*, 296 F.R.D. 485, 504-505, 507-508 (N.D. Tex. 2013) (denying class certification based on *Bell Atlantic*), appeal docketed, No. 15-10242 (5th Cir. Mar. 27, 2015); *Hailey v. Merial, Ltd.*, 292 F.R.D. 339, 360 (N.D. Miss. 2013) (“The Fifth Circuit has held that the necessity of calculating damages on an individual basis, by itself, can be grounds for not certifying a class.”).

The Eleventh Circuit is in agreement. In *Sacred Heart Health Systems, Inc. v. Humana Military Healthcare Services, Inc.*, 601 F.3d 1159 (11th Cir. 2010), a putative class of hospitals sued a health maintenance organization (HMO), alleging that the

¹ *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir.), cert. denied, 135 S. Ct. 754 (2014), addressed a slightly different issue. The court there explained that the absence of “a formula for classwide measurement of damages” will not defeat certification in a case where “predominance [i]s based not on common issues of damages but on the numerous common issues of liability.” *Id.* at 815. In other words, the court held that individualized damage issues do not *always* defeat predominance; it did *not* hold that individualized damages can *never* predominate. Rather, the Fifth Circuit simply affirmed the district court’s ruling that “even without a common means of measuring damages *** common issues nonetheless predominated over the issues unique to individual claimants.” *Id.* at 816.

HMO “systematically underpaid them for medical services.” *Id.* at 1164. The HMO argued that the predominance requirement could not be satisfied in light of its affirmative defenses. *See id.* at 1177-1178 (citation omitted). The district court, however, “minimized the impact of [those] defenses on the outcome of the predominance inquiry, stating that the defenses ‘largely involve individualized damages issues, not liability issues.’” *Id.* at 1178. On appeal, the court of appeals reversed the certification of a Rule 23(b)(3) class, “find[ing] no support in the text of Rule 23 or interpretive case law for the district court’s rigid distinction between liability and damages.” *Id.* Even when the individual issues involve damages, the court explained, the “relevant inquiry” is still the same: “whether common issues predominate over individual ones.” *Id.* at 1179. The Eleventh Circuit therefore held that it was “clear error” for the district court to “brush [the HMO’s defenses] aside as mere ‘damages’ issues.” *Id.* The upshot is that individual issues *can* defeat predominance, *even when* they involve damages. The Eleventh Circuit reaffirmed that principle in *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302 (11th Cir. 2012), upholding the district court’s conclusion that “variation in individual damages render[ed] the class unsuitable for certification on predominance grounds.” *Id.* at 1308.

The D.C. Circuit is in the same camp. In *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013), a putative class of shippers sued a group of freight railroad companies, alleging antitrust violations. *Id.* at 247. The court of appeals held that the plaintiffs could meet the predominance requirement only if they could “offer common evidence of classwide injury.” *Id.* at 253. As the court

put it: “No damages model, no predominance, no class certification.” *Id.* In other words, without an adequate classwide damages model, individualized damages questions alone would defeat predominance and class certification. Accordingly, the D.C. Circuit vacated certification of the class and ordered the district court to reconsider the adequacy of the plaintiffs’ damages model. *Id.* at 255.²

2. The Ninth Circuit’s decision in this case conflicts with the decisions of the Third, Fourth, Fifth, Eleventh, and D.C. Circuits. As explained above, each of those five circuits has held that individual damage calculations alone *can* overwhelm questions common to the class. The Ninth Circuit, our nation’s largest, has now reached the opposite conclusion, holding in this case that “damage calculations alone *cannot* defeat certification.” Pet. App. 14a (emphasis added; citation omitted); *see also* Pet. App. 17a (“[D]ifferences in damage calculations do not defeat class certification ***.”). Thus, while courts in other circuits would have asked (1) whether there were any individual issues of damages and (2) whether those issues overwhelmed any questions common to the class, the Ninth Circuit in this case did neither. Instead, having concluded that there were no individual issues of *liability*, *see* Pet. App. 11a-14a, the Ninth Circuit held that it was simply irrelevant whether there were any individual issues of *damag-*

² The Tenth Circuit also has generally aligned with the majority view. *See Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013) (explaining that “material differences in damages determinations” that “require individualized inquiries” may “destroy[]” predominance).

es, see Pet. App. 14a-18a. That categorical holding—that individual damage calculations alone cannot defeat certification under Rule 23(b)(3), see Pet. App. 14a, 17a, 18a—cannot be reconciled with the decisions of the Third, Fourth, Fifth, Eleventh, and D.C. Circuits.

3. The time is now to resolve this circuit split. The Ninth Circuit, which denied rehearing en banc in this case, has given no indication of changing its interpretation of Rule 23(b)(3).³ And as long as the decision below is permitted to stand, plaintiffs across the country will elect to file their putative class actions in the Ninth Circuit, where they know they can satisfy the predominance requirement regardless of the individual damages they seek. See Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 823 (2013) (explaining that plaintiffs may choose to file in “circuits that are most receptive to class actions”). Indeed, district courts in that circuit have already begun relying on the decision below—and its categorical rule regarding individual damage calculations—in allowing suits to proceed as Rule 23(b)(3) classes. See, e.g., *Robinson v. Open Top Sightseeing S.F., LLC*, No. 14-cv-852, 2015 WL 9304041, at *4 (N.D. Cal. Dec. 22, 2015); *O’Connor v. Uber Techs., Inc.*, No. 13-cv-03826, 2015 WL 8292006, at *15 (N.D. Cal. Dec. 9, 2015), appeal docketed, No. 15-17420 (9th Cir. Dec. 10, 2015).

³ As previously mentioned, *supra* p. 9, the Ninth Circuit did, however, stay its mandate pending the filing of a certiorari petition in this case. The standard for such a stay is “that the certiorari petition would present a substantial question and that there is good cause for a stay.” Fed. R. App. P. 41(d)(2)(A).

The practical consequences of this split are therefore sweeping. More plaintiffs will file their class actions in the Ninth Circuit, where more motions for class certification will be granted—despite the presence of individual damage questions that would lead those very cases to be denied certification in other circuits. And those class-certification orders will likely dictate the outcome of many of those cases, “set[ting] the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs’ case by trial.” Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). Indeed, by “increas[ing] the defendant’s potential damages liability and litigation costs,” class certification often forces a defendant to “abandon” even a “meritorious defense.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978).

The question presented thus calls out for this Court’s review. The circuits are squarely divided, and the question is important and recurring. This Court should intervene now.

B. The Ninth Circuit’s Decision Is Contrary To Supreme Court Precedent.

Review should be granted for an additional reason: The Ninth Circuit’s categorical rule that individual damage calculations alone can *never* predominate is wrong. Indeed, it flatly contradicts this Court’s decision in *Comcast*, which held that “individual damage calculations” alone *can*—and in fact *did* in that case—“overwhelm questions common to the class.” 133 S. Ct. at 1433.

In *Comcast*, a putative class of cable-television subscribers sued their cable provider for alleged anti-trust violations. *Id.* at 1430. The plaintiffs proposed

four theories of antitrust liability, but the district court accepted only one—the so-called “overbuilder” theory—“as capable of classwide proof.” *Id.* at 1431. The district court further found that the damages resulting from that theory “could be calculated on a classwide basis,” using a model developed by the plaintiffs’ expert. *Id.* In light of that determination, the district court concluded that the proposed class met Rule 23(b)(3)’s predominance requirement, and the Third Circuit affirmed. *Id.* at 1430-1431.

This Court reversed. The Court concluded that the plaintiffs’ model failed to attribute damages to “any one particular theory” of liability. *Id.* at 1434. Instead, the Court explained, the model “assumed the validity of all four theories” advanced by the plaintiffs—not just the overbuilder theory, but also the three theories that had been rejected. *Id.* So while the plaintiffs had presented a classwide theory of liability, they had failed to present a classwide method for measuring damages. And the Court held that absent such a method, the plaintiffs “cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.” *Id.* at 1433. *Comcast* thus holds that “individual damage calculations” alone *can*—and sometimes *will*—“overwhelm questions common to the class.” *Id.*

That makes sense. After all, the text of Rule 23(b)(3) does not distinguish between liability and damages. See *Sacred Heart*, 601 F.3d at 1178 (finding “no support in the text of Rule 23” for a “rigid distinction between liability and damages”). It does not say, for example, that class certification is appropriate only if “questions of law or fact common to class members predominate over any questions of li-

ability affecting only individual members.” Rather, under the plain text of the rule, “*any* questions affecting only individual members” can overwhelm questions common to the class and thus defeat certification. Fed. R. Civ. P. 23(b)(3) (emphasis added). *Comcast’s* holding therefore follows directly from the text of the rule itself: Individual damage calculations—like any other “questions affecting only individual members”—can defeat certification of a Rule 23(b)(3) class.

This is not to say that individual damage calculations will *always* overwhelm questions common to the class. In certain circumstances, certification of a Rule 23(b)(3) class might be appropriate, notwithstanding the presence of individual issues involving damages. But for a court to make that determination, it would have to conduct the “rigorous analysis” that Rule 23 requires. *Comcast*, 133 S. Ct. at 1433 (citation omitted). The Ninth Circuit did not conduct that analysis here. Instead of examining the particular circumstances of this case to determine whether “questions of liability to the class *** predominate[] over *** individual issues relating to damages,” *Sacred Heart*, 601 F.3d at 1179 (brackets in original; citation omitted), the Ninth Circuit simply declared, as a categorical rule, that “damage calculations alone cannot defeat certification,” Pet. App. 14a (citation omitted).⁴

⁴ The Ninth Circuit cited *Roach v. T.L. Cannon Corp.*, 778 F.3d 401 (2d Cir. 2015), in support of its position. See Pet. App. 17a-18a. But *Roach* held that individualized damage calculations do not *always* predominate, 778 F.3d at 408; it did *not* hold that individualized damage calculations can *never* predominate. The district court’s error in that case was that it “did not

That decision is contrary to the decisions of other circuits, this Court's decision in *Comcast*, and the plain text of Rule 23(b)(3). Accordingly, this Court should grant full-dress review to resolve the circuit split and correct the Ninth Circuit's error. In the alternative, because the Ninth Circuit's decision is so obviously wrong, this Court may wish to summarily reverse.

II. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER PLAINTIFFS MAY USE FORMULAS BASED ON THE AVERAGE CLASS MEMBER'S EXPERIENCE AS COMMON PROOF OF DAMAGES.

The second question presented addresses the Ninth Circuit's approval of a formula-based approach to classwide restitutionary relief. The court of appeals held that restitution could be determined for each class member using an averages-based formula that applied a uniform discount rate. Pet. App. 20a-21a. It was enough that the rate was extrapolated "from Google's data" and purported to serve as a uniform means to "adjust[] for web page quality." Pet. App. 21a. That, according to the panel, was a sufficient indicator of "the value of the service at the time of purchase," which did "not turn on individual circumstances." Pet. App. 20a. The question is whether plaintiffs may rely on a damages model that uses a uniform measure of harm, derived from the aver-

evaluate whether the individualized damages questions predominate over the common questions of liability"; instead, the court refused to certify the class "only because the district court concluded damages were not capable of measurement on a classwide basis." *Id.* at 408-409.

age experience of class members, as common evidence of damages. *See* Pet. App. 57a.

**A. The Courts Of Appeals Are Divided
On The Propriety Of Averages-Based
Class Damages Models.**

The courts of appeals are in conflict over the answer to this question. *See* Pet. 3, 15-21, 24, *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (Mar. 19, 2015), 2015 WL 1285369 (describing split among the courts of appeals on this issue). The Second, Fourth, Fifth, and Seventh Circuits have answered no; plaintiffs may not resort to a statistical-averages-derived model to prove classwide monetary relief. The court below joins the Eighth and Tenth Circuits in answering yes.

1. The four-circuit majority rule is that models for classwide monetary relief cannot use averages to overcome individual calculation disparities. For example, in a state-unfair-competition-law case like this one, the Fourth Circuit disallowed the use of averages-based evidence as a “shortcut” to prove classwide damages. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998). A class of franchisees alleged that their franchisor had not told them about the large commission rate for expenditures paid out of the franchisees’ collective advertising account. *Id.* at 335. The franchisees alleged that they had lost sales as a result of the misallocated funds. *Id.* at 336. At trial, “[p]laintiffs’ expert outlined a damages formula, by which he purported to calculate the lost profits damages of all class members on a ‘global’ basis.” *Id.* He opined that the franchisees had all lost a uniform amount of sales with a uniform profit margin. *Id.*

Like in this case, the plaintiffs' recovery model was based "on abstract analysis of 'averages'" such as "the average effect of ads on sales," and "the average profit margin." *Id.* at 343. Unlike the court below, however, the Fourth Circuit rejected this approach. It explained: "That this shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible." *Id.* Because the class was improperly certified, the Fourth Circuit reversed the district court's judgment. *Id.* at 334.

The Second Circuit follows suit. *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). *McLaughlin* was a case dealing with the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, wherein smokers claimed they were deceived into believing that "light" cigarettes were healthier than regular cigarettes. *McLaughlin*, 522 F.3d at 220. The district court allowed classwide damages to be calculated based on an "estimate of the percentage of class members who were defrauded" and "an estimate of the average loss for each plaintiff." *Id.* at 231. The Second Circuit reversed, soundly rejecting this approach as simply "mask[ing] the prevalence of individual issues." *Id.* at 232. "[I]t offends both the Rules Enabling Act and the Due Process Clause" to allow classwide damages to be calculated in a manner "that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants." *Id.* at 231. So too here; yet the Ninth Cir-

cuit went ahead and approved the calculation anyway.

The Seventh Circuit, too, agrees with the majority rule. In *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), that court of appeals reviewed the decertification of a class action brought under state wage-and-hour law (as well as a collective action under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*). *Espenscheid*, 705 F.3d at 771. A putative class of satellite dish technicians brought suit against their employer for wage violations. *Id.* at 772-773. The plaintiffs argued that testimony from 42 representative witnesses would “enable a rational determination of each class member’s damages.” *Id.* at 776. The court of appeals disagreed. “Essentially they asked the district judge to embark on a shapeless, freewheeling trial that would combine liability and damages and would be virtually evidence-free so far as damages were concerned.” *Id.* That prospect should sound familiar—it is exactly what the Ninth Circuit approved in this case: Once a single class representative established liability, recovery at the uniform discount rate followed. *See* Pet. App. 14a, 21a. The Seventh Circuit rejected class certification using that same type of formula; the Ninth Circuit should have done the same.

The Fifth Circuit rounds out the majority courts of appeals’ view. That court has held that a class action that paves over individual differences in service of class treatment violates the Rules Enabling Act, the Due Process Clause, and potentially the Seventh Amendment’s jury trial guarantee. *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990). The district court in *In re Fibreboard* consolidated over 3,000 asbestos personal-injury cases for trial and directed

that “certain representative cases w[ould] be fully tried and the jury w[ould] decide the total, or ‘omnibus’ liability to the class.” *Id.* The Fifth Circuit took issue with this approach, explaining that the “elements of compensation” in products-liability cases “focus upon individuals, not groups.” *Id.* at 711. “To create the requisite commonality for trial, the discrete components of the class members’ claims and the asbestos manufacturers’ defenses must be submerged.” *Id.* at 712. Contrary to the Ninth Circuit’s decision below, the Fifth Circuit recognized the “enabling acts prevent” that strategy. *Id.* And it believed the issue important enough to grant mandamus, vacating the district court’s order directing a single damages trial. *Id.*

2. Three circuits, including the court below, have held differently. The Eighth Circuit reached the issue in a case where a class of poultry plant workers claimed that they were not paid for all time worked. *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 2806 (2015). The district court certified the class, and at trial, it allowed the plaintiffs to use “average times calculated from a sample” as evidence of the time the class as a whole spent working on uncompensated activities. *Id.* at 799. The Eighth Circuit affirmed the jury verdict for the plaintiffs. It rejected the defendant’s argument that the district court had allowed a prohibited “Trial by Formula.” *Id.* at 798-799. Instead, according to the court, the plaintiffs’ averages-based calculations were “representative evidence” properly used to determine classwide damages. *Id.* at 798. That decision is currently on review in this Court.

The Tenth Circuit reached a similar result in an antitrust case. *In re Urethane Antitrust Litig.*, 768

F.3d 1245 (10th Cir. 2014), pet. for cert. pending, No. 14-1091 (U.S. filed Mar. 9, 2015), joint motion to hold pet. in abeyance pending approval of settlement filed (U.S. Feb. 25, 2016). It affirmed class certification, and the jury's verdict for the plaintiffs, in a case where the district court had allowed use of exactly the same extrapolating technique that this Court rejected in *Wal-Mart. Urethane Antitrust Litig.*, 768 F.3d at 1256-1257. *See infra* pp. 26-27. The relevant distinction for the Tenth Circuit was that when *Wal-Mart* discussed "trial by formula," it "used this term to describe a novel method of calculating damages, where the district court determined the *merits of individual claims* by extrapolating from a sample set of class members." *Urethane Antitrust Litig.*, 768 F.3d at 1256 (emphasis added). According to the court, "*Wal-Mart* does not prohibit certification based on the use of extrapolation to calculate *damages*." *Id.* at 1257 (emphasis added). And for that reason, the court of appeals concluded that the class was properly certified. *Id.*

Finally, in the decision below, the Ninth Circuit joined the minority view. It concluded that the plaintiffs needed to establish only a rough approximation of damages, Pet. App. 20a, so a model that did "not turn on individual circumstances" was perfectly permissible, Pet. App. 21a. That decision cannot be reconciled with the Second, Fourth, Fifth, and Seventh Circuits, which all have held that a damages model that lumps together disparate individual class members without any means of differentiation violates the Rules Enabling Act and the Due Process Clause. This Court's review is necessary to resolve the conflict.

3. The cert-worthiness of this question is already established. In *Tyson Foods*, this Court granted certiorari to decide “[w]hether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3) * * * where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.” See Pet. at i, *Tyson Foods*, *supra*, 2015 WL 1285369 (first question presented). If this Court in *Tyson Foods* reverses the Eighth Circuit, the Court should grant this petition, decide the merits of the first question presented, and vacate the decision below for reconsideration of the second question presented in light of *Tyson Foods*. If, on the other hand, this Court decides *Tyson Foods* on other grounds, this Court should grant this petition and decide the merits of both questions presented. At a minimum, therefore, this Court should agree to decide the first question presented while holding the second question presented for *Tyson Foods*. And if the Court does not decide the latter question in that case, it should grant plenary review in this one, because the Ninth Circuit’s decision perpetuates an entrenched circuit split and, as we next explain, is contrary to existing precedent interpreting Rule 23(b)(3).

B. The Ninth Circuit’s Embrace Of “Trial By Formula” Conflicts With The Decisions Of This Court.

1. The decision below cannot be squared with this Court’s holding in *Wal-Mart*. The Court there held that courts cannot, under the banner of Rule 23, “replace [individualized] proceedings with Trial by Formula.” 131 S. Ct. at 2561. In that case, the

Ninth Circuit had approved certification of a class of “1.5 million * * * current or former Wal-Mart employees who allege[d] that the company discriminated against them on the basis of their sex by denying them equal pay or promotions.” *Id.* at 2547. The court of appeals did not view “individualized determinations of each employee’s eligibility for backpay” as an impediment to class certification. *Id.* at 2560. Instead, the court “believed that it was possible to replace [individualized] proceedings with Trial by Formula” whereby the district court would identify a sample set of class members, determine “the average backpay award in the sample set,” and multiply that number “to arrive at the entire class recovery.” *Id.* at 2561.

This Court said no. It expressly “disapprove[d]” the “novel project” of computing class damages by a formula “without further individualized proceedings.” *Id.* “Because the Rules Enabling Act forbids interpreting Rule 23 to ‘abridge, enlarge or modify any substantive right,’ 28 U.S.C. § 2072(b); a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.” *Id.* (citation omitted).

2. The decision below has just that effect. The Ninth Circuit once again has endorsed a “Trial by Formula” approach. It approved, for class-certification purposes, the “Smart Pricing Method” of calculating damages—a method that would allow Plaintiffs to prove the amount allegedly owed to all class members by simply “apply[ing] a uniform discount for all ads” to “measure[] the monetary loss.” Pet. App. 21a, 57a. Therein lies the problem. The uniform discount “does not turn on individual circumstances.” Pet. App. 21a. It instead is based on

averages: a comparison between the *average* performance of advertisements on parked domains and error pages with the *average* performance of advertisements on a benchmark site. *See generally* Pet. App. 5a. This is precisely the Rules Enabling Act problem that *Wal-Mart* warned against.

First and foremost, the Smart Pricing Method gives class members substantive recovery that would be unavailable to them as individual plaintiffs. Restitution is “the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received.” *Cortez v. Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 713 (Cal. 2000). Here, it is measured by “the difference between what advertisers actually paid and what they would have paid had Google informed them that their ads were being placed on parked domains and error pages.” Pet. App. 7a. That amount cannot be reduced to a single uniform discount applied across the class. As is so often the case for putative Rule 23(b)(3) class actions, individualized damages issues overwhelm any purportedly common recovery questions.

As the district court found, AdWords prices are “determined through an auction process that generates a separate cost for *each* advertiser for *each* ad and for *each* click, with the specific amounts determined by the interplay of the bidding strategies of the participating advertisers in a given auction.” Pet. App. 55a. “[T]he ultimate amount Google charges for each ad depends on dozens of factors that are unique to each ad placement,” and “there is no ‘set’ price per click paid by all advertisers that is knowable ahead of time; instead all advertisers pay a different price that is determined based on the interplay between all of the differing maximum cost-per-clicks (i.e.,

‘bids’) from all of the advertisers participating in the auction.” Pet. App. 55a-56a (citation omitted). In short, “any effort to determine what advertisers ‘would have paid’ under a different set of circumstances requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed.” Pet. App. 56a. “Plaintiffs cannot simply assume that a reduction in the demand for advertising on AdWords among some undefined group of advertisers would lead to a lower ‘but for’ price for all advertisers.” *Id.*

The uniform discount rate allows Plaintiffs to do just that: *assume*, rather than prove, that a single, uniform discount rate accurately calculates the prices that all class members would have paid if they had known their advertisements would be displayed on parked domains and error pages. Plaintiffs could not make that assumption in individually litigated cases. In individual litigation, each Plaintiff would have to prove the extent of its economic injury with “substantial evidence.” *In re Tobacco Cases II*, 192 Cal. Rptr. 3d 881, 893 (Cal. Ct. App. 2015) (citation omitted). For example, Plaintiffs that “actively sought to have their ads placed on parked domains and error pages” would have to prove that they would have bid *less* for clicks on advertisements that might appear on their *preferred* webpages. Pet. App. 57a. Under the approved class-damages model, however, these Plaintiffs instead can rely on the uniform discount as proof of the appropriate amount of recovery. That consequence enlarges their substantive rights.

Second, the Smart Pricing Method is problematic for yet another reason: It deprives Google of its ability to raise individualized equitable defenses. Cali-

fornia law is quite clear that a trial court exercises complete discretion whether to order restitution for an unfair-competition-law violation. *Cortez*, 999 P.2d at 716-717. And “[i]n deciding whether to grant the remedy or remedies sought by a[n unfair-competition-law] plaintiff, the court must permit the defendant to offer [equitable] considerations” because “consideration of the equities between the parties is necessary to ensure an equitable result.” *Id.* at 717. *See also In re Tobacco Cases II*, 192 Cal. Rptr. 3d at 895-896; *Day v. AT&T Corp.*, 74 Cal. Rptr. 2d 55, 64-65 (Cal. Ct. App. 1998). *See generally Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (“Due process requires that there be an opportunity to present every available defense.”) (quoting *American Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)).

Google is denied its right to present individualized equitable defenses twice over. It cannot argue that the equities *bar* restitutionary recovery for any individual class member because the Ninth Circuit determined that “restitution is available on a classwide basis once the class representative makes the threshold showing of liability.” Pet. App. 14a. And it cannot argue that the equities *minimize* restitutionary recovery for any individual class member because the court of appeals approved a formula that “does not turn on individual circumstances.” Pet. App. 21a.

Google could do both of these things if it were litigating the case against individual plaintiffs. For example, if it were defending against an individual claim by named Plaintiff RK West, Google could argue that the equities do not support restitution (or they support at most a nominal sum) because RK West achieved *higher* conversion rates on parked

domains and error pages than on the Smart Pricing benchmarks. Pet. App. 57a. It cannot make the same argument here because the Ninth Circuit has approved a class-damages model allowing Plaintiffs to argue that all class members will be entitled to the same discount rate once one representative makes the threshold liability showing. Pet. App. 14a, 21a. “[A] class cannot be certified on the premise that [Google] will not be entitled to litigate” the actual amount of restitution owed to Plaintiffs, and the Ninth Circuit should not have approved certification here. *Wal-Mart*, 131 S. Ct. at 2561. Indeed, to the extent the Smart Pricing Method sweeps into its reach those with no injury, there is also an Article III problem. See Pet. at i, *Tyson Foods*, *supra*, 2015 WL 1285369 (second question presented).

Third and finally, the court of appeals’ decision ignores variation in appropriate restitutionary recovery in the service of class certification. The panel even saw it as a benefit that its approved measure of restitution did “not turn on individual circumstances,” Pet. App. 21a—not because they did not exist, or were irrelevant, but because Plaintiffs had come up with a formula that could gloss over those individual differences. That produces exactly the type of arbitrary results that *Comcast* warned against when the Court rejected a rule providing that “at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide.” 133 S. Ct. at 1433. “Such a proposition would reduce Rule 23(b)(3)’s predominance requirement to a nullity.” *Id.* The Ninth Circuit’s contravention of that principle should be corrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

MICHAEL G. RHODES
WHITTY SOMVICHIAN
KYLE C. WONG
COOLEY LLP
101 California Street
5th Floor
San Francisco, CA 94111

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Respectfully submitted,
NEAL KUMAR KATYAL
Counsel of Record
MARY HELEN WIMBERLY
FREDERICK LIU
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com
Counsel for Petitioner