No. 15-1101

In the Supreme Court of the United States

GOOGLE, INC., PETITIONER

v.

PULASKI & MIDDLEMAN, LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR INTEL CORPORATION AS AMICUS CURIAE SUPPORTING PETITIONER

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Erin Griffin, *The Top Technology Companies of the Fortune 500*, Fortune (June 13, 2015), http://fortune.com/2015/06/13/fortune-500-tech 19

Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729 (2013) 19

Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts* (Apr. 2008) 18

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BRIEF FOR INTEL CORPORATION AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF AMICUS CURIAE*

Intel Corporation is the world's leading semiconductor manufacturer and a major producer of computer, networking, and communications hardware and

* No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel has made a monetary contribution intended to fund the preparation or submission of the brief. Amicus timely notified all parties of its intention to file this brief. The parties have entered blanket consents to the filing of amicus briefs, and copies of their letters of consent are on file with the Clerk.

software. Because of its size, Intel is a frequent target in class-action litigation. Class certification can transform an ordinary lawsuit into "bet-the-company" litigation, even for a company of Intel's size. Few companies can afford to place that bet—no matter how small the chances of an adverse judgment—so class certification often drives settlement. Such settlements damage Intel and its shareholders, drive up prices, and ultimately harm consumers.

This case presents the questions whether individual damages issues can preclude class certification under Federal Rule of Civil Procedure 23(b)(3) and whether plaintiffs may establish common proof of damages by using a statistical formula based on an average of the experiences of different class members. Intel has a substantial interest in the resolution of those questions. Intel participated as an amicus curiae in *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), which presented similar questions.

SUMMARY OF ARGUMENT

The Ninth Circuit has directed the district court to certify an immense plaintiff class of hundreds of thousands of advertisers who purchased millions of different Google ads over nearly four years—including untold class members with no legal injury at all. And it has directed that any classwide restitution award should ignore individualized differences in damages and should instead be based on the application of a statistical formula approximating the injury suffered by an average member of the class.

However unjust those results may be as between the parties, the legal and practical consequences of the

decision below reach much further. As Google correctly explains in its petition, the court of appeals' contributes to disagreement among the circuits, departs from this Court's precedent, and ignores the language of Rule 23. It also raises serious constitutional concerns: By allowing a class action to proceed when some of the class members have suffered no injury at all, it violates principles of Article III standing, and by approving the use of statistical evidence that would not be permitted in individual actions, it violates the Due Process Clause.

This Court's recent decision in *Tyson Foods, Inc.* v. *Bouaphakeo*, No. 14-1146 (Mar. 22, 2016), confirms both that the Ninth Circuit erred and that the issues in this case are important. This Court should resolve those issues now, rather than awaiting further development in the lower courts, because the decision below will have immediate practical consequences. It is easy for potential plaintiffs to establish jurisdiction and venue in the Ninth Circuit, and that court can be expected to become a magnet for class actions, creating pressure for defendants to settle. That result warrants this Court's review and correction.

ARGUMENT

A. The Ninth Circuit erred, and created a circuit conflict, in holding that the need for individual damages calculations can never preclude class certification under Rule 23(b)(3)

The Ninth Circuit has adopted a categorical rule that "damage calculations alone *cannot* defeat certification." Pet. App. 14a (quoting *Yokoyama* v. *Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010))

(emphasis added). As the petition explains, that rule is contrary to decisions of this Court and of five other courts of appeals. Pet. 9-20. It is particularly inappropriate where, as here, the members of the class differ not just in the amount of their damages but in the *fact* of damages—in other words, where the class includes some members who have suffered no injury at all. In that context, the rule adopted by the court below is inconsistent not only with Rule 23(b)(3) but also with Article III of the Constitution.

1. Rule 23(b)(3) does not permit a court to certify a class action in which individual damages questions predominate over common questions

Class actions represent "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U.S. 682, 700-701 (1979). Under Rule 23(a), a district court may certify a class only if it "is satisfied, after a rigorous analysis," that four conditions are met: numerosity of plaintiffs, commonality of legal or factual questions, typicality of the named plaintiff's claims or defenses, and adequacy of representation by class counsel. *General Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 161 (1982). The requirement of commonality is satisfied only when the plaintiff shows that all members of the class "have suffered the same injury." *Id.* at 157. Although the plaintiff need not show that any common question "will be answered, on the merits, in favor of the class," *Amgen Inc.* v. *Connecticut Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1191 (2013), the common question "must be of such a nature that it is capable of classwide resolution," and it must be one

whose resolution will "'drive the resolution of the litigation,'" *Wal-Mart*, 131 S. Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

Rule 23(b)(3) imposes two additional requirements. It permits a court to certify a class only if the court finds, first, "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and," second, "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 making those findings, the court must consider "the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974). And to assess whether common questions predominate, the court must undertake a "far more demanding" inquiry than that required to identify common class questions under Rule 23(a). *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 624 (1997)

The language of Rule 23(b)(3) does not distinguish among the different kinds of questions that a case may present: It asks whether common "questions of law or fact"—of whatever type—"predominate over *any* questions affecting only individual members." Fed. R. Civ. P. 23(b)(3) (emphasis added). In particular, as several courts of appeals have recognized, the text of the rule makes no "distinction between liability and damages." *Sacred Heart Health Sys., Inc.* v. *Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1178 (11th Cir. 2010).

In some circumstances, individual damages issues can pose "staggering problems of logistics" that make a case unmanageable as a class action. *Windham* v. *American Brands, Inc.*, 565 F.2d 59, 67 (4th Cir. 1977) (en banc) (affirming denial of class certification where differences in damages would require an "overwhelming deluge of mini-trials"). Nothing in Rule 23(b)(3) or the policies underlying it suggests that such disparities in damages should be treated differently from other kinds of individual questions when, as here, they truly predominate. To the contrary, the Rule's drafters contemplated that individual "[p]rivate damages claims" arising out of a common and "concerted" legal wrong "may or may not involve predominating common questions." Fed. R. Civ. P. 23(b)(3), advisory committee's note to 1966 amendment; see also *ibid.* ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, *not only of damages* but of liability and defenses of liability, would be present, affecting the individuals in different ways.") (emphasis added).

In adopting a categorical rule that variations in damages can never defeat class certification, the court of appeals departed not only from the text and policy of Rule 23(b)(3) but also from this Court's cases interpreting it. In *Comcast*, the Court made clear that a district court should not turn a blind eye to "[q]uestions of individual damage calculations" in conducting the predominance inquiry if those questions "overwhelm questions common to the class." 133 S. Ct. at 1433. As Justice Ginsburg recognized in her dissenting opinion, the *Comcast* decision broke "no new

ground on the standard for certifying a class action" when it reaffirmed that disparate damages issues—including variations in the *fact* of damages—can sometimes preclude class treatment under the predominance test. *Id.* at 1436 (Ginsburg, J., dissenting). While a class may be certified "when liability questions common to the class predominate over damages questions unique to class members," it may not be certified when the reverse is true and individual damages questions predominate. *Id.* at 1437; see, *e.g.*, *Amchem*, 521 U.S. at 624 (individual questions predominated because, although all class members were unlawfully exposed to asbestos, they were exposed "for different amounts of time, in different ways, and over different periods," with the result that "[s]ome class members suffer[ed] no physical injury," that it was "unclear whether [some class members] will contract asbestos-related disease," and that those who did would "also incur different medical expenses") (quoting *Georgine* v. *Amchem Prods., Inc.*, 83 F.3d 610, 626 (3d Cir. 1996)).

2. Article III does not permit a court to certify a class action in which some class members lack standing

Article III restricts the jurisdiction of the federal courts to cases in which a plaintiff can establish the "irreducible constitutional minimum of standing"—an "injury in fact" that is "fairly . . . trace[able]" to the challenged action and likely to be "redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotation marks omitted) (brackets in original). Because the standing requirement is grounded in the Constitution, the Fed-

eral Rules of Civil Procedure may not alter it, and the rules themselves make clear that they do not do so. Fed. R. Civ. P. 82 (stating that the rules "do not extend or limit the jurisdiction of the district courts"). Accordingly, certification of a case as a class action under Rule 23 cannot relax the jurisdictional prerequisite of standing. *Tyson Foods*, slip op. 5-6 (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."); see *Allen* v. *Wright*, 468 U.S. 737, 750-751 (1984). If, and only if, "the district court has jurisdiction over the claim of each individual member of the class, Rule 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding." *Yamasaki*, 442 U.S. at 701.

For a case to proceed as a class action, the "class representative * * * must possess the same interest and suffer the same injury shared by *all* members of the class he represents." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974) (emphasis added); accord *Falcon*, 457 U.S. at 156 ("We have repeatedly held that 'a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.'") (quoting *East Tex. Motor Freight Sys., Inc.* v. *Rodriguez*, 431 U.S. 395, 403 (1977)). In other words, while the named plaintiff need not "submit evidence of [the] personal standing" of each potential class member, the class must "be defined in such a way that anyone within it would have standing." *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 263-264 (2d Cir. 2006); accord *Avritt*

v. *Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010).

The predominance test of Rule 23(b)(3) helps to confine the certified class to persons with constitutional standing, and that provision must therefore "be interpreted in keeping with Article III constraints." *Amchem*, 521 U.S. at 613; see also *id.* at 623 ("[The predominance] inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy."); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) ("Meeting the predominance requirement" requires plaintiffs to "show that they can prove, through common evidence, that all class members were in fact injured by the alleged" wrongdoing.). Under Rule 23, "no class may be certified that contains members lacking Article III standing." *Denney*, 443 F.3d at 264; see *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (questioning certain class members' Article III standing but first addressing Rule 23 standards and reversing class certification on that basis); *id.* at 884 (Breyer, J., dissenting) (disagreeing with majority's decision on the merits but acknowledging the "standing-related requirement that each class member have a good-faith basis under state law for claiming damages for some form of injury-in-fact"). In *Tyson Foods*, this Court recognized that the presence of uninjured parties in a federal plaintiffs' class raises an Article III question of "great importance." Slip op. 16.

The court of appeals' interpretation of the predominance requirement ignores those principles of Article III jurisdiction. Erroneously declaring that individualized damages questions—including the question

whether any legal injury exists—can never predominate over other issues, the court of appeals held that the district court abused its discretion when it declined to certify a class of hundreds of thousands of advertisers with disparate potential injuries, many of whom suffered no injury at all. Pet. App. 18a. As the district court found (and the court of appeals did not question), "there is no systematic way to identify and exclude from Plaintiffs' proposed class the many advertisers who have no legal claim to restitution because they derived direct economic benefits from ads placed on parked domains and error pages." *Id.* at 48a. And even for those absent class members who did experience a concrete injury, there is no way to determine that any of their purchasing decisions actually relied on—that is, were fairly traceable to—Google's alleged misrepresentations. See Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment ("[A]lthough having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed."); *Amgen*, 133 S. Ct. at 1193 (noting that in the absence of classwide presumption of reliance, "individual reliance issues would overwhelm questions common to the class" and "preclude certification of a class action seeking money damages").

The court of appeals recognized those defects in the proposed class, but it failed to appreciate their constitutional dimension. Instead, the court deemed it sufficient that "one of the class representatives" had "*statutory* standing" under California's Unfair Competition

Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq.*, and California's False Advertising Law (FAL), Cal. Bus. & Prof. Code § 17500 *et seq.* Pet. App. 12a n.6 (emphasis added). Those statutes allow individuals to seek restitution from businesses that engage in fraudulent or otherwise improper practices. See Cal. Bus. & Prof. Code § 17204. Only a litigant who was actually harmed by the disputed business practice may file a lawsuit under the UCL or FAL. *Ibid.* The Ninth Circuit has held, however, that the statutory standing requirements apply only to the class representative, and that "it need not be shown that class members have suffered actual injury in fact connected to the" defendant's conduct. *Stearns* v. *Ticketmaster Corp.*, 655 F.3d 1013, 1020-1021 (9th Cir. 2011), cert. denied, 132 S. Ct. 1970 (2012). Applying that rule, the court below held that just one "class representative's standing satisfied the standing requirements for the putative class as a whole" because the UCL and FAL do not require "individualized proof of deception, reliance and injury" but require only "that members of the public are likely to be deceived." Pet. App. 12a & n.6 (internal quotation marks and citations omitted).

Whether or not that is a correct statement of California statutory law, it is clearly mistaken as a matter of federal procedure and constitutional law. Rule 23, "in keeping with Article III constraints," precludes certification of a class that contains a non-trivial number of members who lack constitutional standing. *Amchem*, 521 U.S. at 613. State law may create an individual cause of action to sue on behalf of the public at large, but that does not make the claim justiciable in federal court. See, *e.g.*, *Nike, Inc.* v. *Kasky*, 539

U.S. 654, 661 (2003) (Stevens, J., concurring in dismissal of writ of certiorari as improvidently granted) (concluding that an uninjured plaintiff lacked Article III standing to bring a UCL claim in federal court); *id.* at 667 (Breyer, J., dissenting) (agreeing that the plaintiff "might indeed have had trouble meeting [Article III standing] requirements" but reasoning that the defendant had standing to seek Supreme Court review of an adverse state-court decision); see also *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2662 (2013). As the Eighth Circuit has correctly recognized, to the extent California law permits "a single injured plaintiff [to] bring a class action on behalf of a group of individuals who may not have had a cause of action themselves, it is inconsistent with the doctrine of standing as applied by federal courts." *Avritt*, 615 F.3d at 1034.

The court of appeals failed to consider the constitutional problems inherent in its misapplication of Rule 23(b)(3)'s predominance requirement. At a minimum, the constitutional issues raised by the court's position counsel in favor of interpreting the rules to allow variation in the fact of damages to preclude certification. See *CFTC* v. *Schor*, 478 U.S. 833, 841 (1986) (noting that statutes "are to be so construed as to avoid serious doubt of their constitutionality") (quoting *Machinists* v. *Street*, 367 U.S. 740, 749 (1961)).

B. The Ninth Circuit erred, and contributed to a circuit conflict, in holding that a plaintiff may use a formula based on the average class member's experience as common proof of damages

The court of appeals reasoned that "individual determinations regarding entitlement to restitution" do not predominate because such individual determinations are unnecessary in this case. Pet. App. 14a. In the court's view, there is no need to assess the class members' "individual circumstances," including whether they suffered any injury at all. *Id.* at 21a. Instead, the court concluded that it could calculate the restitution owed to the purchasers of advertisements by using a "uniform discount" formula to "approximat[e]" the restitution owed each class member. *Id.* at 20a, 57a.

As the petition explains, the Ninth Circuit's "trial by formula" approach contributes to a conflict among the courts of appeals that existed before this Court's decision in *Tyson Foods*. Pet. 21-26. It is also inconsistent with that decision, which reaffirmed that class certification does not alter the standards of proof that would apply in individual actions.

In *Tyson Foods*, the Court explained that the permissibility of using statistical sampling to estimate plaintiffs' damages "turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." Slip op. 10. Thus, the Court held that "where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed

improper merely because the claim is brought on behalf of a class." *Id.* at 10-11. Because the case arose under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, the Court applied the rule of *Anderson* v. *Mt. Clemens Pottery Co.*, that when an employer has failed to comply with its statutory duty to keep accurate records of an employee's wages and hours worked, the employee need not "prove the precise extent of uncompensated work" but may instead "show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. 680, 687 (1946). Under *Mt. Clemens*, an individual employee seeking to establish entitlement to overtime pay could have introduced a statistical study "to prove the hours he or she worked." *Tyson Foods*, slip op. 12. In other words, "[r]ather than absolving the employees from proving individual injury, the representative evidence" submitted in the class action "was a permissible means of making that very showing." *Ibid.* And the Court stressed that, in the circumstances of the case, and taking account of the FLSA's rule of liability as applied in *Mt. Clemens*, reliance on representative evidence would "not deprive [the defendant] of its ability to litigate individual defenses." *Ibid.*

The Ninth Circuit's approach cannot be reconciled with *Tyson Foods*. The plaintiffs here have alleged claims that are analogous to common-law fraud and misrepresentation, and plaintiffs asserting such claims normally cannot rely on a statistical sample of *other* alleged fraud victims to demonstrate either reliance or damages. See, *e.g.*, *UFCW Local 1776* v. *Eli Lilly & Co.*, 620 F.3d 121, 136 (2d Cir. 2010) (reversing certification of class alleging violations of state consumer

protection laws where the proffered evidence of reliance consisted of "generalized proof"), cert. denied, 131 S. Ct. 3062 (2011). By permitting the use of such evidence, the decision below not only hampers Google's defense but also creates claims for absent class members who would have none if litigating individually. As the petition explains, if Google were litigating against named plaintiff RK West individually, it could defend against the claim for restitution by showing that RK West benefited from Google's practice of placing ads on "parked domains" and "error pages," or that it knew about and accepted the practice, or that it did not rely on Google's alleged misrepresentations or omissions. Pet. 30-31. But under the regime created by the court of appeals, Google will have no practical opportunity to assert any such defenses against hundreds of thousands of absent class members. See *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353-354 (2007) (vacating award of punitive damages on behalf of nonparty cigarette smokers under Due Process Clause because "a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary").

The decision below is contrary to basic principles of due process. While it avoids the need for thousands of mini-trials to determine the amount of damages, if any, to which each class member is entitled, it does so by sacrificing adjudicative accuracy and fairness.

Shorn of context, each parked domain or error page advertisement is to be valued using a mathematical formula that fails to measure whether the individual advertiser profited from such ads or would have purchased them notwithstanding Google's alleged misrepresentations. That approach denies Google its right to present individualized defenses to class members' restitution claims. See *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)). Because Rule 23 may not be interpreted to "abridge, enlarge or modify any substantive right," 28 U.S.C. 2072(b), class certification may not be used to restrict the ability of a defendant to present defenses that it could present in individual actions. See *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 559 U.S. 393, 407-408 (2010) (Under the Rules Enabling Act, a rule may regulate "the process for enforcing [the parties'] rights," but it may not "alter[] the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either."); *Taylor* v. *Sturgell*, 553 U.S. 880, 901 (2008) (explaining that the "procedural protections" of Rule 23 are "grounded in due process").

Even if respondents could somehow develop a statistical formula that perfectly captured the overall average damages sustained across their enormous universe of potential plaintiffs, that formula would inevitably overcompensate some plaintiffs and undercompensate others. On the one hand, plaintiffs like RK West (who have suffered no injury and whose actual damages are zero) would recover *something*, that is,

more than they are owed. On the other hand, plaintiffs who actually did rely on Google's alleged misrepresentations (and did lose money on the ads) would recover less than what they should because the non-injured sub-group has brought down the average. Unlike the procedure contemplated in *Tyson Foods*, the decision below thus yields different substantive results than would be obtained in individual actions. While Google would theoretically occupy the same financial position it would have after individual trials, the undercompensated plaintiffs would not. Rule 23, the Due Process Clause, and the Rules Enabling Act protect the rights of those absent class members, too, to a fair, efficient, and accurate adjudication of their claims. *Amchem*, 521 U.S. at 629 ("Rule 23 * * * must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view."). The procedure approved by the court of appeals violates those rights.

C. The questions presented are important and warrant this Court's review now

The decision below conflicts with the decisions of other courts of appeals and therefore warrants this Court's review. Moreover, both of the Ninth Circuit's holdings will have significant consequences for federal class actions. The consequence of the Ninth Circuit's first holding—that individual damages questions can never predominate over common questions—is that individual plaintiffs who could not recover had they sued separately *can* recover because their claims were aggregated with those of others through the procedural device of the class action. This Court has al-

ready recognized the potential significance of that result. In *Tyson Foods*, this Court noted that "the question whether uninjured class members may recover"—that is, the first question presented here—"is one of great importance." Slip op. 16. Similarly, the consequence of the Ninth Circuit's second holding—that in such cases damages may be calculated in the aggregate based on statistical averages, even where such generalized proof would not be admissible in an individual action—is that defendants will lose their chance to challenge the non-injured plaintiffs' claims in the course of the litigation, greatly expanding both the scope of liability and the amount of plaintiffs' recovery.

Although *Tyson Foods* might lead the court of appeals to reconsider its position on the second question presented, the immediate consequences of the rule adopted by that court counsel in favor of granting review now rather than awaiting further percolation in the lower courts. As a result of the Ninth Circuit's resolution of the first question presented—which is logically independent of the second question presented—individualized damages issues can never predominate over common liability issues. That decision will make it easier to certify class actions in cases based on alleged misrepresentations, even when, as here, individual damages issues are likely to be the focus of the litigation.

The Ninth Circuit's new class action regime can be expected to prove enticing to class action lawyers, who have already been flocking to that forum. See Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., *The Impact of the Class Action Fairness Act of 2005*

on the Federal Courts 8-9 (Apr. 2008) (finding that after enactment of the Class Action Fairness Act in 2005, diversity class action original proceedings in the Ninth Circuit "registered more than a fourfold increase"); Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. Pa. L. Rev. 1593, 1613 (2008) ("The district courts within the Ninth Circuit saw by far the biggest post-CAFA increase."). Commentators have advised plaintiffs to "avoid some of the worst federal case law by filing in circuits that are most receptive to class actions," and the Ninth Circuit is now the most favorable forum. Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 823 (2013).

Such forum shopping will not be difficult. Establishing personal jurisdiction and venue in a district within the Ninth Circuit poses little obstacle where the defendant is a large company. Nearly all such companies have sufficient contacts with California or another State within the Ninth Circuit. See 28 U.S.C. 1391(d) (for purposes of venue, a corporate defendant is deemed to reside in any district in a State in which its contacts are sufficient to subject it to personal jurisdiction). That is especially true for large technology companies, many of which are headquartered in the Ninth Circuit. See Erin Griffin, *The Top Technology Companies of the Fortune 500*, Fortune (June 13, 2015), http://fortune.com/2015/06/13/fortune-500-tech (listing the largest American technology companies by revenue, with nine of the top ten having their headquarters in the Ninth Circuit).

The Ninth Circuit's decision will lead district courts in the Ninth Circuit to certify enormous, far-flung

classes similar to that proposed here. While class certification theoretically does not portend any particular result on the merits, that nominally preliminary step has increasingly become the main event in putative class action cases. By vastly expanding defendants' potential liability risk, class certification creates pressure to settle independent of the merits of a case. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification 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."). Thus, "[w]ith vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Nagareda, 84 N.Y.U. L. Rev. at 99. For that reason, the decision below will have immediate effects, and it warrants review and correction now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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