No. 15-1101

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Under California law, to state a claim for false advertising or fraudulent business practices, plaintiffs must only show that "members of the public are likely to be deceived." *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009). Once plaintiffs satisfy that threshold, the absence of "exact proof" of restitution does not bar recovery; a reasonable approximation will suffice under state law. *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 938-39 (9th Cir. 1999). The petition presents two questions:

1. Whether individual damage calculations alone defeat class certification under Federal Rule of Civil Procedure 23(b)(3) when state law only requires a reasonable approximation.

2. Whether plaintiffs may use a highly granular, statistical formula used by defendants to reasonably estimate the market price of a service to calculate restitution under California law.

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INTRODUCTION

Petitioner Google Inc. protests that the decision below would result in an unwieldy class comprised of hundreds of thousands of advertisers who purchased millions of ads over several years. In petitioner's view, the Court of Appeals was only able to approve this course by "bending the substantive law of restitution" and "robbing Google of its right to present affirmative defenses." Pet. 4. But this betrays the flaw in Google's argument: its misreading of California's laws concerning false advertising and restitution.

Seeking to create a federal issue, petitioner declares that there is a "clean split" over whether individual damage calculations *alone* will defeat class certification. They do not. In reality, every circuit applies the same settled, black-letter rule. Indeed, it is "well nigh universal." 2 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 4:54, pp. 18-19 (5th ed. Supp. Dec. 2015).

Even if such a split did exist, its resolution would not determine the outcome here. The court below held that respondents had proposed a reasonable, common method of calculating restitution based on California law. Accordingly, this Court would have to reverse the Court of Appeals decision on the validity of that model under substantive state law for petitioner to prevail. But Google never even challenged the model's admissibility below.

Because the Court of Appeals correctly applied California state law, in accordance with its obligations under Federal Rule of Civil Procedure 23 and the Rules Enabling Act, 28 U.S.C. § 2072, certiorari should be denied.

STATEMENT OF THE CASE

A. Google's AdWords Program

Google AdWords is an auction-based, online advertising service. Advertisers provide ads to Google, which places them on Google-owned websites, as well as websites run by third-party partners. Pet. App. 4a. This network of third-party websites is known as the Google Network, and the publishers of sites in the network are referred to as AdSense publishers. ER 01027.[1]

During the Class Period, the Google Network was comprised of "Search" and "Content" websites. ER 01025. The Search Network included third-party websites that "display AdWords ads along with search results after a user searches for information using a particular search term." Pet. App. 5a. The Content Network, by contrast, included "full content sites, like nytimes.com, that publish information independent of search results." *Id.* "Ads would appear on these sites if the ad's keywords matched those of the website." *Id.* Advertisers could choose whether to place their ads in the Search Network, the Content Network, or both. *Id.*

Unbeknownst to advertisers, regardless of which network they chose to advertise in, Google placed advertisers' ads on two additional categories of websites: parked domains and error pages. Pet. App. 6a. Parked domains are "undeveloped domains" that in-

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[1] Unless otherwise specified, all references to the record below refer to the Excerpts of Record ("ER"), which were filed in the U.S. Court of Appeals for the Ninth Circuit, No. 12-16752, Doc. 9 (Dec. 19, 2012), under seal.

clude "pages of ads without content." *Id.* Error pages appear when a person inputs an "unregistered web address" or "something other than a web address" into a web browser's address bar. *Id.* These error pages, instead of displaying errors, serve ads. *Id.*

Respondents alleged that Google knew that advertisers considered parked domains and error pages to be low-quality sites and that they did not believe advertising on these sites would result in a positive return on investment, did not want their businesses associated with such pages, and associated them with various unsavory activities. ER 01066, 01074.[2] Advertisers, journalists, and even Google itself frequently described these sites as "garbage websites," "illegitimate," "link farms," "spammy," and "shady." ER 00661, 00677, 01066, 01074. Each of the named plaintiffs personally viewed advertising on parked domains and error pages as worthless and would not have been willing to pay anything to advertise on them. ER 00406, 00414, 00422.

Google's deception was pervasive. Throughout the Class Period, parked domains and error pages were never mentioned in AdWords sign-up materials. Pet. App. 13a n.7. Google's contracts with advertisers never disclosed that Google would place their ads on parked domains and error pages, regardless of whether they chose Search, Content, or both. *Id.* And Google's frequently asked questions pages did not

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[2] For example, Google placed ads for dog-food manufacturers on dogfighting.com, a third-party parked domain in the Google Network, which is still online today. Other parked domains included pornographic terms. ER 01044.

disclose that their ads would be placed on parked domains and error pages. *Id.*

Google charged advertisers based on a "pay per click" model. Each time an Internet user clicked on an ad, Google would charge the advertiser. Pet. App. 5a. Since AdWords was based on an auction model, the price an advertiser paid depended on the maximum bid it submitted for a specific keyword and the price other advertisers bid for that same keyword. *Id.* Google then adjusted these auction prices based on a "quality score" that measured the quality and relevance of the advertiser's ad and landing page. *Id.*

Google also created Smart Pricing, an internally calculated price adjustment that would "adjust the advertiser's bids to the same levels that a 'rational advertiser' would bid if the 'rational advertiser' had sufficient data about the performance of ads on each website." *Id.* Google maintains robust data regarding advertisers' "conversions"—positive business results defined by the advertisers, e.g., a purchase or sign up. *Id.* Smart Pricing used Google's own data to compare the conversion rate of clicks on an ad on Google's benchmark site, google.com, with the conversion rate of clicks on the same ad on third-party sites. *Id.*

Despite petitioner's repeated assertions, Smart Pricing does *not* provide a "uniform discount." Pet. 7. On the contrary, it is a highly granular formula that individually accounts for (1) the price each particular advertiser paid for each click; (2) the property the ad was placed on when it was clicked; (3) when the particular click occurred; and (4) how well particular ads had recently performed on that property as compared

to Google's benchmark site. ER 01057-70. Smart Pricing accordingly seeks to recreate each auction had the auction participants been accurately informed of which websites their ads would be placed on and the recent performance of ads on those sites. *Id.* And because Google maintains a vast database of data, this formula could be mechanically applied to each advertiser to provide a precise measure of restitution that is tailored to its unique circumstances.

Google itself has acknowledged that Smart Pricing is a reasonable method of estimating the market value of its advertising service. In an AdWords tutorial that petitioner posted on YouTube, Google's Chief Economist, Dr. Hal Varian, declared, "Smart Pricing is a way to adjust advertiser bids to reflect the value they provide on different publisher sites." Hal Varian, Introduction to Smart Pricing (Mar. 28, 2011), https://www.youtube.com/watch?v=KclAniEZKAk. Varian explained, "Keep in mind that Smart Pricing takes factors other than just site differences into account. Our models weigh characteristics of both the advertiser's campaign and the publisher's page and also how well we expect them to interact in order to arrive at our best estimate of how to adjust the advertiser's bid." *Id.*; *see also* Decl. of Dr. Hal Varian, ER 03210. In other words, Smart Pricing provides anything but a "uniform" discount.

B. Class Certification Proceedings

Respondents alleged that Google's failure to disclose its practice of placing advertisers' ads on parked domains and error pages violated California state law, specifically the Unfair Competition Law ("UCL") and the False Advertising Law ("FAL"), CAL.

BUS. & PROF. CODE §§ 17200 *et seq.* & 17500 *et seq.* Respondents sought restitution of monies unlawfully retained by Google in violation of these state statutes on behalf of a class of AdWords advertisers who were charged for clicks on ads placed on parked domains and error pages during a four-year Class Period. Pet. App. 6a-7a. Google moved to dismiss the third amended complaint, and that motion was denied by the District Court. N.D. Cal., No. 5:08-cv-03369, Doc. 235 (Mar. 17, 2011).

Respondents moved for class certification under Federal Rule of Civil Procedure 23(b)(3). Respondents proposed three possible methods of calculating restitution, each of which was based on class members' out-of-pocket losses. Pet. App. 7a. These methods compared the price advertisers paid for clicks on parked domains and error pages against the estimated "but for" or market price they would have paid had Google disclosed the truth. ER 01047. Under the UCL and FAL, the difference between these two amounts is restitution.

The Smart Pricing method is at issue in this petition.[3] Under this method, the amount of restitution owed a class member would be the difference between the amount the advertiser actually paid reduced by the Smart Pricing adjustment. Pet. App. 7a. Because Google itself has admitted that Smart Pric-

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[3] Respondents also proposed two other methods for calculating restitution, which Google did not raise in its petition: the Content Pricing method and the Full Refund method. Pet. App. 7a-8a. Although the Court of Appeals did not directly analyze these methods, it noted that they "may also be appropriate for calculating restitution." Pet. App. 21a n.9.

ing adjusts advertisers' bids to "the same levels that a rational advertiser would set them to itself if it had sufficient data," it is a reasonable estimate of the "but for" price for clicks on ads placed on parked domains and error pages. ER 01057, 01363.

The District Court found that respondents had satisfied all four of Rule 23(a)'s requirements. Because whether Google's alleged omissions were likely to mislead a reasonable person was "common to all members of the putative class and, when answered, will be dispositive of the issue of liability," the District Court found that the commonality requirement was satisfied. ER 00020.

The District Court nonetheless denied class certification, because it found common questions concerning restitution did not predominate. Pet. App. 8a. While it acknowledged that common issues would resolve liability, the District Court was concerned with how to "systematic[ally] … identify and exclude from [respondents'] 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." Pet. App. 8a-9a. The District Court also concluded that respondents' proposed methods were "insufficient to account for all of the intricacies involved, including benefits received from parked domain[s] and error pages." *Id.* Respondents thereafter filed a motion for reconsideration, which the District Court denied. *Id.*

C. The Decision Below

The U.S. Court of Appeals for the Ninth Circuit granted respondents permission to appeal the interlocutory order under Rule 23(f) and reversed. The

Court of Appeals found that the District Court erred by applying the wrong standards for restitution under California law and by failing to apply its rule in *Yokoyama v. Midland National Life Insurance Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010).

First, on the state-law question, it found that, under California law, "[e]ntitlement to restitution is a separate inquiry from the amount of restitution owed." Pet. App. 11a. To state a claim under California's UCL and FAL based on false advertising, "it is necessary only to show that members of the public are likely to be deceived." Pet. App. 12a (quoting *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009)). Under state law, this inquiry does not require "individualized proof of deception, reliance, and injury." *Id.* "In effect, California has created what amounts to a conclusive presumption that, when a defendant puts out tainted bait and a person sees it and bites, the defendant has caused an injury; restitution is the remedy." Pet. App. 12a-13a (quoting *Stearns v. Ticketmaster*, 655 F.3d 1013, 1021 n.13 (9th Cir. 2009)). The Court of Appeals thus concluded that, because California law holds that entitlement to restitution does not turn on "individual determinations," the District Court erred in holding that such individual questions would predominate. Pet. App. 14a.

The Court of Appeals also found that the District Court applied the wrong legal standard for evaluating the *amount* of restitution due. Under California law, restitution is "the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received." Pet. App. 18a (quoting *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal.

4th 163, 174 (2000)). This value is assessed at "the time of its improper acquisition" and, in false-advertising actions, is based on what an objective purchaser would have paid had she received full information. Pet. App. 19a-20a (quoting *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 698-99 (2006)). Because, in assessing individual issues, the District Court considered the *benefits received after purchase* instead of *the value of the service at the time of purchase*, the Court of Appeals found that the District Court's denial of class certification relied on a misreading of California law. Pet. App. 20a-21a.

Finally, the Court of Appeals held that the District Court erred in denying class certification, where all the prerequisites had been met and there were no individual issues concerning liability. Pet. App. 14a-18a. It noted that California law "requires only some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation." Pet. App. 20a (quoting *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 938-39 (9th Cir. 1999)). Furthermore, "[t]he fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery" under state law. *Id.* In this context, the Court of Appeals reaffirmed its prior precedent in *Yokoyama*, holding that damage calculations *alone* cannot defeat class certification. Pet. App. 14a-20a.

REASONS FOR DENYING THE PETITION

This Court should deny certiorari for two independent reasons. First, this Court should deny review because there is no circuit conflict on whether individual damage calculations *alone* defeat class certification. Every circuit agrees: they do not. Second, even assuming that such a split existed, it is of no import here. Because respondents have proposed a reliable, classwide method of calculating restitution under California law—using Google's own formula—the question is not properly presented.

I. This Court Should Deny Certiorari on Whether Individual Damage Issues Predominate under Rule 23(b)(3).

Petitioner proclaims that there is a "clean split" on the question of whether individual damage calculations alone can defeat class certification under Rule 23(b)(3). This is a mirage.

As the leading treatise on class actions explains, "courts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations and a recent dissenting decision of four Supreme Court Justices characterized the point as 'well nigh universal.'" 2 NEWBERG ON CLASS ACTIONS § 4:54, pp. 18-19 (5th ed. Supp. Dec. 2015) (quoting *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1437 (2013) (Ginsburg & Breyer, JJ., dissenting)). In fact, the majority in *Tyson Foods* "relies on the same treatise citations that the *Comcast* dissent invoked to argue that individualized damages calculations should never defeat predominance." *Tyson Foods, Inc. v.*

Bouaphakeo, 136 S. Ct. 1036, 1057 n.2 (2016) (Thomas, J., dissenting).

A. The Circuits Agree That Individual Damage Calculations Alone Generally Do Not Defeat Class Certification.

1. "[T]he black letter rule is that individual damage calculations generally do not defeat a finding that common issues predominate." 2 NEWBERG ON CLASS ACTIONS § 4:54, p. 208 (5th ed. 2012). "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods*, 136 S. Ct. at 1045 (quoting 7AA Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 1778, pp. 123-24 (3rd ed. 2005)). The relevant case law in every circuit makes this abundantly clear.

The First Circuit follows the well-established rule that, where "common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain." *In re Nexium Antitrust Litig.*, 777 F.3d 9, 24 (1st Cir. 2015) (quoting *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003)). In an antitrust challenge to a "pay-for-delay" patent settlement, the First Circuit found that, while liability could be determined on a class-wide basis, damages would be individualized. *Id.* It nevertheless affirmed class certification, noting that

it is a "black letter rule" that "individual damage calculations generally do not defeat a finding that common issues predominate." *Id.*; *see also In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008) ("Predominance is not defeated by individual damages questions as long as liability is still subject to common proof."); *Tardiff v. Knox Cnty.*, 365 F.3d 1, 6 (1st Cir. 2004) (same).

The Second Circuit follows the same rule. *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2nd Cir. 2015) ("The fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification."). In an employment class action under New York law, the district court denied class certification of spread-of-hours and rest-break claims, *only* because it concluded that "damages were not capable of measurement on a classwide basis." *Id.* at 409. The Second Circuit held the district court's decision "was contrary to the law of the Circuit—left undisturbed by *Comcast*—that individualized damages determinations alone cannot preclude certification under Rule 23(b)(3)." *Id.* (citation omitted); *see also Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 81-82 (2nd Cir. 2015) (holding that "the presence of individualized damages issues cannot, by itself, defeat certification"); *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 140 (2nd Cir. 2001) (explaining that, if the argument that individualized damage issues alone could defeat certification was "uncritically accepted, there would be little if any place for the class action device" and that "[s]uch a result … has not been readily embraced by the various courts").

The Third Circuit similarly recognizes that "individual damages calculations [alone] do not preclude class certification." *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 374-75 (3rd Cir. 2015) (quoting *Comcast*, 133 S. Ct. at 1437 (Ginsburg & Breyer, JJ., dissenting)). In a consumer class action concerning defective car sunroofs, Volvo argued that plaintiffs must show that damages were susceptible of classwide measurement. *Id.* The Third Circuit disagreed, finding that, "[h]ad the District Court ruled as Volvo requested, denying certification on that basis alone would have amounted to an abuse of discretion." *Id.* at 375 & n.10 (citing with approval similar holdings from seven other circuits). Although petitioner relies on *In re Chiang*, 385 F.3d 256, 273 (3rd Cir. 2004), it is actually in accord. *Chiang* follows the "commonly recognized" rule that "the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate." *Id.* (quoting *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3rd Cir. 1977)). Although it noted that there might be an exceptional case that defeated this general rule, *Chiang* itself found that, even though damages calculations would "probably be extremely individualized," the predominance requirement was "easily met." *Id.* at 273 & n.11.

The Fourth Circuit follows its sister circuits, holding that "the need for individualized proof of damages alone will *not* defeat class certification." *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 429 (4th Cir. 2003). In an action by beneficiaries of a health-care plan following the plan's collapse, defendants argued that the necessity for individual proof

of damages destroyed predominance. *Id.* at 427. The Fourth Circuit rejected this argument. *Id.* at 428. ("Rule 23 explicitly envisions class actions with such individualized damage determinations."). Even though damage may be individualized, if "common questions predominate over individual questions as to *liability*, courts generally find … predominance." *Id.* (emphasis added). *Lienhart v. Dryit Systems, Inc.*, 255 F.3d 138 (4th Cir. 2001), does not hold otherwise. *Lienhart* only found that proving *causation*, which under state law required individual proof, would require the court to "probe deeply into the individualized details" of third parties, requiring "a full-blown trial on damages *causation* for each putative class member." *Id.* at 147, 149 (emphasis added). *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977), is inapposite. 565 F.2d at 67, 71 (finding that individualized liability and individualized damages were "intertwined"). And petitioner's citation to *Brown v. Nucor Corp.*, 785 F.3d 895, 924 (4th Cir. 2015), is actually to the dissenting opinion. The majority did not even address individualized damages.

The Fifth Circuit follows the general rule. *In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir.), *cert. denied*, 135 S. Ct. 754 (2014) ("[E]ven wide disparity among class members as to the amount of damages does not preclude class certification.") (quoting *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 306 (5th Cir. 2003)). *Deepwater Horizon* involved a multitude of claims against British Petroleum ("BP") related to the 2010 offshore-oil spill in the Gulf of Mexico. Even though class members' causation and damages would need to be decided individually, the Fifth Circuit affirmed class certification. *Id.* BP argued that pre-

dominance requires a common methodology for measuring classwide damages. *Id.* at 817. The Fifth Circuit disagreed, calling it a "significant distortion" of the law that had been rejected by the Sixth, Seventh, and Ninth Circuits. *Id.* Petitioner's cases do not conflict. *Bell Atlantic*—cited by the *Deepwater Horizon* court in support of the general rule—recognized that courts in the Fifth Circuit "have certified classes even in light of the need for individualized calculations of damages." *Bell Atl.*, 339 F.3d at 306. *Bell Atlantic* only recognized a narrow exception where damages are "not susceptible to a mathematical or formulaic calculation." *Id.* at 307. Petitioner's other Fifth Circuit cases all turn on individual issues regarding *both* liability and damages. *See Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 602 (5th Cir. 2006) (finding "each plaintiff's claims will be highly individualized with respect to proximate causation," including individual issues of exposure, illness, and physical injuries); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 419 (5th Cir. 1998) (finding liability could be established "only through examination of each plaintiff's individual circumstances"); *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 742 (5th Cir. 2003) (same).

The Sixth and Seventh Circuits have likewise adopted the general rule. *See In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535 (6th Cir. 2008) ("[E]ven where there are individual variations in damages, the requirements of Rule 23(b)(3) are satisfied if the plaintiffs can establish [common liability]."); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 671 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016) ("It has long been recognized that the need for

individual damages determinations … does not itself justify the denial of certification."); *see also Bell v. PNC Bank, N.A.*, 800 F.3d 360, 379 (7th Cir. 2015) (finding individualized damages do not preclude certification); *Arreola v. Godinez*, 546 F.3d 788, 801 (7th Cir. 2008); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *In re Whirlpool Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 861 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).

The Eighth Circuit has not yet decided this question, but district courts within it regularly follow the general rule. *See*, *e.g.*, *In re Target Corp. Customer Data Sec. Breach Litig.*, 309 F.R.D. 482, 488 (D. Minn. 2015) ("[T]he need for individualized damages decisions does not ordinarily defeat predominance where there are … common issues as to liability."); *Powers v. Credit Mgmt. Servs.*, 2016 U.S. Dist. LEXIS 12079, at *19-20 (D. Neb. Feb. 2, 2016) (following Ninth Circuit rule that "individualized damages cannot, by itself, defeat class certification").

Nor does the Tenth Circuit does permit individual damage calculations alone to defeat predominance. *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255 (10th Cir. 2014), *petition for cert. filed*, No. 14-1091 (Mar. 9, 2015), *motion to hold in abeyance pending settlement granted*, 136 S. Ct. 1400 (Mar. 7, 2016) (holding that "individualized damages issues would not change [the] result" when there was a "common question that was capable of class-wide proof"). *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1218-21 (10th Cir. 2013), is inapposite. In *Roderick*, individualized

damage issues were not the only factor weighing against predominance; there were also substantial individualized liability issues, including known variations in the language of roughly 430 leases. *Id.*

The Eleventh Circuit likewise follows the "black letter rule recognized in every circuit … that individual damage calculations generally do not defeat a finding that common issues predominate." *Brown v. Electrolux Home Prods.*, 2016 U.S. App. LEXIS 5112, at *25 (11th Cir. Mar. 21, 2016); *see also Klay v. Humana, Inc.*, 382 F.3d 1241, 1259 (11th Cir. 2004) (finding the necessity for individualized damage determinations "insufficient to defeat class certification"); *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F. 3d 1248, 1261 (11th Cir. 2003) (same), *aff'd on other grounds*, 545 U.S. 546 (2005). Petitioner's reliance on *Sacred Heart Health Systems, Inc. v. Humana Military Healthcare Services, Inc.*, 601 F.3d 1159 (11th Cir. 2010), is particularly inapt. *Sacred Heart* largely concerned individualized *liability* issues, including "striking differences in the material terms" of numerous contracts, "significant quantities of individualized extrinsic evidence," and substantial variations among six state laws. *Id.* at 1175-76, 1183. And *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1306 (11th Cir. 2012), only held that plaintiffs waived the individualized damage issue by failing to raise it on appeal.

Finally, in the D.C. Circuit, "the mere fact that damage awards will ultimately require individualized fact determinations is insufficient by itself to preclude class certification." *McCarthy v. Kleindienst*, 741 F.2d 1406, 1415 (D.C. Cir. 1984); *see also Coleman v. Dist. of Columbia*, 306 F.R.D. 68, 85

(D.D.C. 2015); *Bynum v. Dist. of Columbia*, 214 F.R.D. 27, 39 (D.D.C. 2003). Petitioner misconstrues *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013), which established no rule requiring common proof of damages. *Rail Freight* only held that plaintiffs must demonstrate antitrust injury—an element of *liability*—through common evidence. *Id.* at 252-53. In fact, *Rail Freight* expressly cautioned that plaintiffs need not "demonstrate through common evidence the precise amount of damages incurred by each class member." *Id.*

2. The Ninth Circuit's decision in this case follows the general rule that individual damage calculations *alone* do not defeat predominance. Pet. App. 18a. The court explained that, because all class actions under Rule 23(b)(3) invariably involve variations in damages, "the mere fact that there might be differences in damage calculations is not sufficient to defeat class certification." Pet. App. 16a.

This decision did not break any new ground. In fact, the court itself explained that its decision was in accord with "our sister circuits [that] have adopted similar positions," referencing decisions from the First, Second, Fifth, Sixth, Seventh, and Tenth Circuits. Pet. App. 17a-18a.

Moreover, petitioner's suggestion that the Ninth Circuit did not even consider individual damage issues is flatly incorrect. Pet. 15. The court devoted significant time to analyzing class members' entitlement to restitution (Pet. App. 11a-14a) and respondents' proposed method for calculating it (Pet. App. 18a-21a). As explained *infra*, the Ninth Circuit ultimately found that, under California state law,

Google's defenses to restitution did not "turn on individual circumstances." Pet. App. 21a.

B. *Comcast* Did Not Overrule This Settled Rule of Law.

This Court's decision in *Comcast* "turn[ed] on the straightforward application of class-certification principles." *Comcast*, 133 S. Ct. at 1433. *Comcast* "did not change the law about the effect of individual damages on predominance." *Brown*, 2016 U.S. App. LEXIS 5112, at *24. Importantly, it "did *not* hold that a class cannot be certified simply because damages cannot be measured on a classwide basis." *Roach*, 778 F.3d at 407 (emphasis added). The other circuits agree on this point. *Id.* at 408; *accord Neale*, 794 F.3d at 374-75 & n.10; *Deepwater Horizon*, 739 F.3d at 817; *Whirlpool*, 722 F.3d at 860-61; *Butler*, 727 F.3d at 801; *Leyva*, 716 F.3d at 513; *Urethane Antitrust Litig.*, 768 F.3d at 1257-58; *Brown*, 2016 U.S. App. LEXIS 5112, at *26.

Comcast's holding was narrower. The issue there was whether plaintiffs could use an expert model to prove their damages on a classwide basis, even though that model did not match their theory of liability. *Brown*, 2016 U.S. App. LEXIS 5112, at *26. This Court held that they could not, and, for that reason, the class action did not satisfy predominance. *Id.* Thus, *Comcast* merely held that "a model relied upon to certify a class must actually measure damages that result from the class's asserted theory of injury." *Roach*, 778 F.3d at 407. It did not hold that a putative class *must rely* upon a classwide damages model to demonstrate predominance. *Id.*

Nor could it have. Because this Court *assumed* that the plaintiffs in *Comcast* relied upon their damages model to demonstrate predominance, the parties had conceded the point below. *See Brown,* 2016 U.S. App. LEXIS 5112, at *26. Such assumptions are not holdings. *See Brech v. Abrahamson*, 507 U.S. 619, 631 (1993).

As this Court has since clarified, "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods*, 136 S. Ct. at 1045.

That straightforward principle flows from the Advisory Committee that drafted Rule 23, which stated that "individual damage calculations should not scuttle class certification." *See* 2 NEWBERG ON CLASS ACTIONS § 4:54, pp. 205-06 (5th ed.). It wrote that "a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class." FED. R. CIV. P. 23 advisory committee's note (1966 Amendment).

Thus, because recognition that individual damage calculations do not preclude class certification is "well nigh universal," it remains the "black-letter rule" that a class may obtain certification when common questions as to liability—but not damages—

predominate. *See Whirlpool*, 722 F.3d at 861. That rule is entirely consistent with the decision below.

II. This Court Should Deny Certiorari Because Respondents Proposed a Reliable Method for Calculating Classwide Restitution.

Even assuming, *arguendo*, that individual damage calculations alone *could* preclude class certification in particular cases, the Court of Appeals properly held they do not here.

The court below held that respondents had proposed a reasonable, common method of calculating restitution under California law. Pet. App. 21a. Google itself has *admitted* that that method, Smart Pricing, which uses Google's own data and algorithms, reasonably estimates the market value of its advertising service. In fact, Google never challenged the method's admissibility below.

As this Court instructed in *Tyson Foods*, "Whether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on the elements of the underlying cause of action." *Tyson Foods*, 136 S. Ct. at 1046. That is precisely the inquiry the court below conducted when it determined that Smart Pricing was a reasonable method for estimating restitution in a false-advertising case under California law.

A. The Decision Below Correctly Applied California State Law.

The predominance analysis "begins, of course, with the elements of the underlying cause of action."

Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2184 (2011).

To state a claim for false advertising under California's UCL and FAL, "it is necessary only to show that members of the public are likely to be deceived." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011) (quoting *Tobacco II Cases*, 46 Cal. 4th at 312). California courts have "repeatedly and consistently [held] that relief under the UCL is available without individualized proof of deception, reliance, and injury." *Tobacco II Cases*, 46 Cal. 4th at 320. Irrespective of whether claims are brought individually or on behalf of a class, the substantive standard is based on objective proof. *Id.* at 312, 326-27.[4] "In effect, California has created what amounts to a conclusive presumption that when a defendant puts out tainted bait and a person sees it and bites, the defendant has caused an injury; restitution is the remedy." *Stearns*, 655 F.3d at 1021.

Restitution is "the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received." *Cortez*, 23 Cal. 4th at 174. Where a perpetrator has wrongfully obtained a victim's property, the "benefit received" is measured by "the value of the property at the time of its improper acquisition … or a higher value to avoid injustice" when the property has changed in value. *Col-*

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[4] Any suggestion that the 2004 amendments to the UCL, passed by voters as Proposition 64, altered its substantive elements would be incorrect. The California Supreme Court has explained that these amendments were merely "procedural modifications" to the statute and "left entirely unchanged the substantive rules governing business and competitive conduct." *Tobacco II Cases*, 46 Cal. 4th at 314.

gan, 135 Cal. App. 4th at 698. In cases where plaintiffs are deceived by false advertising, the economic harm is that the plaintiff has "purchased a product that he or she *paid more for* than he or she might have been willing to pay if the product had been labeled accurately." *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 329 (2011) (emphasis added).

In calculating restitution, it is well-established under California law that while the *fact* of harm must be clearly shown, the *amount* need not be proven with the same degree of certainty. A reasonable approximation or inference will suffice. *See* 6 WITKIN SUMMARY OF CALIFORNIA LAW – TORTS § 1551 (10th ed. 2010). State law requires "only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation." *Marsu*, 185 F.3d at 938-39. "[T]he fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery." *Id.* This is consistent with the UCL's broad remedial purpose "to deter future violations … and to foreclose retention by the violator of its ill-gotten gains." *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442, 449 (1979).

Thus, under Rule 23, if liability can be demonstrated through common proof—as the courts below found it could be—it is relatively straightforward to calculate restitution. And respondents' Smart Pricing method provides a reasonable way to estimate the true market price of each click through Google's advertising service. It can be applied mechanically.

By contrast, petitioner's argument—both in the courts below and now in its petition—rests on two fundamental errors: one of fact and the other of law. First, petitioner mischaracterizes the way in which Smart Pricing works, and then it misreads California's substantive law of restitution.

1. Petitioner repeatedly mischaracterizes Smart Pricing as a "uniform discount." Pet. 7. Google claims that, because the method does not "turn on individual circumstances" and would be applied to all class members "regardless of their circumstances," it would "gloss over … individual differences." Pet. App. 7a-8a, 31a. These are distortions, and they are belied by Google's own admissions about how Smart Pricing works.

Smart Pricing is a highly granular method of adjusting advertisers' bids to the levels that a rational advertiser would bid if it had sufficient data about the performance of ads on each website. Pet. App. 5a. It individually accounts for (1) the price each particular advertiser paid for each click; (2) the property the ad was placed on when it was clicked; (3) when the particular click occurred; and (4) how well particular ads had recently performed on that property as compared to Google's benchmark site. ER 01057-70. The result is a highly specific and well-tailored estimate of the market value of every click. And since Google maintains a vast database of historical data, it can be applied mechanically to provide a custom estimate for each individual class member. ER 01058-61, 02079-83.

Petitioner further claims that Smart Pricing does not adequately account for circumstances sur-

rounding AdWords auctions. Pet. 7. But the record shows the opposite. Smart Pricing actually seeks to recreate each auction had the auction participants been accurately informed as to the websites their ads would be placed on and the likelihood those placements would yield desirable business results. ER 01057-70. Indeed, given that each advertiser's ads were typically placed on hundreds, if not thousands, of parked domains and error pages, any plaintiff—individual or class—would need to rely on an objective formula to estimate the market value of its advertising service.

Google itself has acknowledged that Smart Pricing is a reasonable method of estimating the market value of ads. In its AdWords tutorial, Google's Chief Economist, Dr. Varian, admitted, "Smart Pricing is a way to adjust advertiser bids to reflect the value they provide on different publisher sites." Varian, Introduction to Smart Pricing (Mar. 28, 2011), https://www.youtube.com/watch?v=KclAniEZKAk. Dr. Varian explained, "Our models weigh characteristics of both the advertiser's campaign and the publisher's page and also how well we expect them to interact in order to arrive at our best estimate of how to adjust the advertiser's bid." *Id.*; ER 03210. In other words, Smart Pricing is an exceptionally well-tailored method of calculating restitution.

2. Petitioner also misreads California's substantive law of restitution, erroneously asserting that restitution must account for the actual benefits received by individual advertisers from ads on parked domains and error pages. And therefore Google claims that certification deprived it of "its

ability to raise individualized equitable defenses." Pet. 29-31. Petitioner's error here is twofold.

As a threshold matter, petitioner's argument is predicated on a misconception of its right to offer equitable defenses to restitution under California law. As the California Supreme Court instructed, "equitable defenses may not be asserted to wholly defeat a UCL claim since such claims arise out of unlawful conduct." *Cortez*, 23 Cal. 4th at 179. Although a trial court has discretion to consider equitable defenses in fashioning *remedies*, "[s]uch defenses may not be used, however, to wholly defeat a UCL cause of action, and so they may not be used to prevent class certification." *Ticconi v. Blue Shield of Cal. Life & Health Ins. Co.*, 160 Cal. App. 4th 528, 544-45 (2008) (holding that "equitable considerations at the remedy stage [do not] involve individual issues precluding class treatment") (citations omitted); *cf. Tyson Foods*, 136 S. Ct. at 1046-47 (finding that defenses to the use of classwide statistical evidence are common, not individual, issues); *see generally* 2 NEWBERG ON CLASS ACTIONS § 4:55, p. 211 (5th ed.) (stating general rule disfavoring denial of certification based only on individual defenses).

But even assuming, *arguendo*, that equitable defenses could defeat a UCL claim, the only equitable defense that petitioner has proffered here—accounting for individual advertisers' actual profits—is impermissible under state law. *See Colgan*, 135 Cal. App. 4th at 699; *Birch v. Ciria*, 205 Cal. App. 2d 1, 8 (1962); *see also Kwikset*, 51 Cal. 4th at 332 (holding there is no "benefit of the bargain" defense to UCL claims). Respondents are not seeking to recover the

difference between what they would have earned had Google disclosed the truth and what they actually earned. That difference would constitute damages for lost profits, a form of damage that is not recoverable under the UCL. *See* CAL. BUS. & PROF. CODE § 17203; *Bank of the West v. Super. Ct.*, 2 Cal. 4th 1254, 1266 (1992).

Instead, respondents are seeking "out-of-pocket losses"—the amounts that Google overcharged them for the advertising services that it fraudulently sold. Calculating these overcharges simply requires subtracting the estimated "market value" of the service from the price paid for it. *See Colgan*, 135 Cal. App. 4th at 699; RESTATEMENT (FIRST) OF RESTITUTION § 151 cmt. b (1937) (finding actual value synonymous with market value). As California courts have consistently explained, the market value of a service is assessed by applying an objective measure that reflects the price a hypothetical buyer would have paid in an arm's-length transaction to a willing seller. *See*, *e.g.*, *S. Bay Irrigation Dist. v. Cal.-Am. Water Co.*, 61 Cal. App. 3d 944, 996 (1976). It is measured at the time of the purchase. *See* RESTATEMENT (FIRST) OF RESTITUTION § 151.

In the case of AdWords, advertisers' aggregate expectations regarding the value of particular placements is especially important when assessing an objective market value. ER 02807. But individual advertisers' actual profits (or losses) incurred after the purchase are irrelevant to the market price at the time of purchase. Nor would setting off amounts earned *after* the fraudulent transaction even be permissible. *Birch*, 205 Cal. App. 2d at 8; *see also*

Fletcher, 23 Cal. 3d at 451 (explaining that neither the purpose of the UCL nor the equitable principles of restitution permit the perpetrator of a fraud to retain a windfall). These errors are fatal to petitioner's argument against class certification.

3. Moreover, because these legal issues arise under substantive state law, Google's argument that class certification must be reversed based on a flawed understanding of California law also raises a Rules Enabling Act problem. As Google explains in its petition, the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b); *see* Pet. 3. This works both ways.

As explained *supra*, substantive California law holds that restitution may be proved through reasonable approximation or inference. Rule 23 cannot create a more exacting standard of proof. Nor can petitioner raise equitable defenses to defeat a state-law claim in federal court that it could not raise to defeat the same claim in state court. But petitioner tries to do that here too.

As this Court explained, "In a case 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. To so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge … any substantive right.'" *Tyson Foods*, 136 S. Ct. at 1046.

Thus, given that petitioner's arguments turn on critical—and incorrect—interpretations of state law,

this petition presents an especially ill-suited vehicle for reaching the questions presented.

B. Petitioner Waived Any Challenge to Respondents' Expert's Damages Model.

Any review of the issues presented in this petition would be further complicated by petitioner's failure to challenge respondents' expert's damages model and the fact that petitioner's own economist admitted its validity.

Google chose not to object to the admissibility of respondents' expert's report for class certification, either in the District Court or on appeal, and has therefore waived this issue. Respondents' expert, Dr. Stan Smith, presented critical opinions and evidence supporting respondents' methods for calculating classwide restitution, including the Smart Pricing method. *See* Economic Expert Report of Stan Smith, ER 01007-01108. Nor did Google raise any challenge to the qualifications of Dr. Smith under Federal Rule of Evidence 702 or move to exclude his testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Petitioner has therefore waived this issue on appeal. *See Tyson Foods*, 136 S. Ct. at 1048-49 (finding no basis to strike evidence not challenged under *Daubert*).

Moreover, petitioner's own economist, Dr. Varian, admitted the validity of Smart Pricing. Dr. Varian, in fact, publicly promoted Smart Pricing, describing the formula as "a way to adjust advertiser bids to reflect the value they provide on different publisher sites." Decl. of Dr. Varian, ER 03240. This case therefore does not present the classic "battle of the economists." Instead, both respondents' economist,

Dr. Smith, and petitioner's economist, Dr. Varian, *agree* that Smart Pricing is a reasonable method to estimate the market value of clicks on the Google Network. Although petitioner now claims that the Smart Pricing method is improper, this issue is not properly before the Court. *See Tyson Foods*, 136 S. Ct. at 1049 ("Once a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury."). This additional obstacle would prevent this Court from reaching the merits.

C. The Use of Statistical Evidence as Common Proof of Damages Is Inherently Fact-Bound.

Petitioner asserts that there is a square circuit conflict over the use of what it characterizes as a "statistical-averages-derived model" to prove class-wide monetary relief. Pet. 21. But what petitioner sees as a split is, in reality, nothing more than the fact-bound application of settled circuit law.

1. Statistical evidence, like all evidence, is simply a "means to establish or defend against liability." *Tyson Foods*, 136 S. Ct. at 1046. "Its permissibility turns not on the form a proceeding takes—be it 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." *Id.*

Courts, *inter alia*, consider the purpose for which statistics are used, the specific models and methods employed, how and to what extent class members' circumstances materially vary, factual and legal context, potential cognitive biases, and available alternatives. *See generally* Federal Judicial Center, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (3rd ed.

2011) (devoting 297 pages to the use of statistical evidence). *Tyson Foods*, therefore, declined to "establish general rules governing the use of statistical evidence … in all class-action cases." *Tyson Foods*, 136 S. Ct. at 1046.

Thus, the question "[w]hether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on the elements of the underlying cause of action." *Id.* "The fairness and utility of statistical methods … will depend on facts and circumstances particular to [the] case." *Id.* at 1049.

2. The pre-*Tyson Foods* decisions from other circuits that petitioner relies on do not hold otherwise. These cases do not prohibit the use of statistical methods as common proof of damages, nor do they categorically disallow the use of "averaging." Each simply evaluates the specific statistical method proposed based on the purpose for which it was offered and the elements of the cause of action at issue.

The Second Circuit's decision in *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2nd Cir. 2008), makes no broad pronouncements about the use of statistical evidence. *McLaughlin* was a sprawling class action brought by smokers under the Racketeer Influenced and Corrupt Organizations Act ("RICO") for deceiving them about the health benefits of light cigarettes. *Id.* at 220. Plaintiffs proposed conducting "an initial estimate of the percentage of class members who were defrauded" and then calculating total damages based on this estimate. *Id.* at 231. The Second Circuit rejected this approach—not because it used an impermissible statistical method—but be-

cause RICO requires that "*each* plaintiff must prove reliance, injury, and damages." *Id.* at 219-20. Because individual smokers' reliance and knowledge would vary widely, "determining the portion of plaintiffs' injury attributable to defendants' wrongdoing would [have] require[d] an individualized inquiry." *Id.* at 227. In other cases, however, the Second Circuit has expressly approved the use of statistical averaging. *See*, *e.g.*, *Reich v. S. New England Telecommunications Corp.*, 121 F.3d 58, 67 (2nd Cir. 1997) (allowing "the testimony of a representative sample of employees" as proof of lost wages).

The Fourth Circuit's decision in *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331 (4th Cir. 1998), did not "disallow the use of averages-based evidence as a 'shortcut' to prove classwide damages" in every case. *See* Pet. 21. It only found that, under North Carolina law, a claim for lost profits based on franchisees' contracts was "inherently individualized." 155 F.3d at 342. *Broussard* concerned a "hodgepodge" of plaintiffs who had different contractual rights, received different representations, and faced different business circumstances. *Id.* Since North Carolina required that damages for lost profits be determined on "an individual case-by-case basis," the aggregate damage award contravened state law. *Id.* In other cases, however, the Fourth Circuit has sanctioned the use of statistical evidence. *See*, *e.g.*, *Chao v. Self Pride, Inc.*, 232 F. App'x 280, 285 (4th Cir. 2007) (approving interpolation of damages through a "universal average"); *Perez v. Mountainaire Farms*, 650 F.3d 350, 370-72 (4th Cir. 2011) (approving use of random sample to calculate average donning-and-doffing times).

Like *Broussard*, the Fifth Circuit's decision in *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990), concerned a class that contained members in widely varying circumstances. *Fibreboard* involved 3,031 individual asbestos cases that were consolidated for trial, including plaintiffs who suffered from different diseases, were exposed in different manners and degrees, and sued different defendants. *Id.* at 707-08. Since Texas law required plaintiffs to prove causation *individually*, the Fifth Circuit rejected a plan to try only 11 "representative" cases. *Id.* at 709, 712. But *Fibreboard* created no rule barring statistical averaging. The Fifth Circuit's decision in *Donovan v. Hamm's Drive Inn*, 661 F.2d 316 (5th Cir. 1981), by contrast, found that averaging was an "accepted practice." *Id.* at 318 (approving awards of back pay based on average hours by certain groups).

Finally, petitioner invokes the Seventh Circuit's decision in *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), as barring the use of averages. But *Espenscheid* did not involve any statistical method at all. *Id.* at 774. Instead, *Espenscheid* concerned a proposal for 42 "representative" class members to testify at trial from which a jury would infer lost wages for a class of over 2,000. *Id.* There was "no suggestion that sampling methods used in statistical analysis were employed," and the court suggested class counsel might have "hand picked" the representatives to "magnify the damages sought by the class." *Id.* But like the other circuits, the Seventh Circuit has green-lighted class damage models based on statistical averages. *See In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 603 (7th Cir. 2014) (approving use of average market price in model

measuring consumer overcharges); *BCS Servs. v. Heartwood 88, LLC*, 637 F.3d 750, 760 (7th Cir. 2011) (approving use of large, random sample to estimate damages in fraud case).

At most, petitioner's cases demonstrate that the specific models used in these actions were deficient in light of their purposes and the underlying causes of action. They certainly do not hold that statistical methods based on averaging are *always*—or even generally—barred.

3. Nor did this Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), establish any categorical rule prohibiting the use of statistical evidence in calculating classwide damages. It did not even establish such a rule for determining liability. *Tyson Foods*, 136 S. Ct. at 1048 ("*Wal-Mart* does not stand for the proposition that a representative sample is an impermissible means of establishing classwide liability.").

The underlying question in *Wal-Mart*, as in *Tyson Foods*, was "whether the [statistical evidence] at issue could have been used … in an individual action." *Id.* The answer to that question, however, is highly dependent on its factual context and the underlying cause of action at issue. *See*, *e.g.*, *Urethane Antitrust Litig.*, 768 F.3d at 1256-57 (finding that *Wal-Mart* does not prohibit certification based on the use of statistical extrapolation for common proof of damages in an antitrust action).

D. This Court Should Not Vacate the Judgment in Light of *Tyson Foods*.

Petitioner may invite the Court to grant the petition, vacate the judgment, and remand this case in light of *Tyson Foods*. This Court should decline any such invitation. To the extent *Tyson Foods* created any new rules, categorical or otherwise, the court below applied a closely overlapping standard.

1. In its decision below, the Court of Appeals did precisely what *Tyson Foods* instructs. First, it conducted a rigorous analysis of the *purpose* for which the Smart Pricing method had been introduced: calculating common proof of restitution. Pet. App. 18a-21a. Second, it evaluated the *elements* of a California UCL claim, including the relevant standards for proving liability and restitution and the allowable methods of determining both whether class members are entitled to restitution and how it may be reasonably measured. Pet. App. 11a-14a, 18a-21a.

The Court of Appeals ultimately concluded that because California law only requires a reasonable approximation of restitution based on objective evidence—and not the actual benefits received by individual class members—the method accurately measures monetary loss. Pet. App. 21a. Because the UCL focuses on "the difference between what was paid and what a *reasonable consumer* would have paid" absent the fraud, an individual plaintiff could have relied on the Smart Pricing method to reasonably estimate restitution. Pet. App. 20a (emphasis added). As in *Tyson Foods*, to the extent petitioner preserved *any* defenses to Smart Pricing, they did not "turn on

individual circumstances." Pet. App. 21a. Any remand, therefore, would not alter the outcome.

2. Finally, considering that the petition seeks review of an interlocutory class certification order, it is premature. Because the Ninth Circuit remanded the case for further proceedings, additional expert testimony will undoubtedly be introduced. Following any final judgment by the District Court in favor of the class, petitioner may appeal as of right and renew its challenge to class certification at that time. And after the Ninth Circuit decides its appeal, petitioner may again file a petition for a writ of certiorari in this Court. That is the normal procedure. Indeed, instead of reviewing class certification in the abstract, this Court would undeniably benefit from a complete evidentiary record on the merits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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