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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

Without this Court's review, class actions will be easier to certify in the Ninth Circuit than anywhere else in the Nation. In conflict with the precedent of this Court and other circuits, the decision below holds that individual damage calculations can *never* predominate, and that damages can be calculated using generalized proof, derived from the average experience of class members. Had Plaintiffs filed their complaint not in San Jose, but instead in, say, Philadelphia, Richmond, Chicago, or Miami, they would have faced far more demanding standards under the binding law of those circuits that would have doomed class certification. The impact on forum shopping is predictable; class-action lawyers will now be target-

ing the Ninth Circuit, where many large companies do business. Intel *Amicus* Br. 18-19. This geographic disparity cannot be tolerated on a mature issue, particularly in the class-action context, where national uniformity is crucial. This Court should grant certiorari.

ARGUMENT

I. THIS COURT SHOULD DECIDE WHETHER INDIVIDUAL DAMAGE CALCULATIONS ALONE CAN EVER DEFEAT CLASS CERTIFICATION.

Plaintiffs contend that there is no circuit split and that the Ninth Circuit's decision is correct. Both contentions are wrong. The question presented warrants review.

A. The Circuits Are Genuinely Divided.

1. Plaintiffs dismiss the circuit split on the first question as an inconsequential "mirage," Br. in Opp. (BIO) 10, but the split is both real and meaningful.

a. Five circuits have held that individual damage calculations alone *can* defeat certification. Pet. 10-15. The Fifth Circuit is a prime example. In *Bell Atlantic Corp.* v. *AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003), the court affirmed the denial of class certification under Rule 23(b)(3) for one reason: "the issue of damages defeats predominance." *Id.* at 308.

Plaintiffs minimize this holding as applying only "a narrow exception." BIO 15. Not so; the decision rested on the precise point of divergence between the divided courts of appeals on whether individualized damage issues alone can ever defeat predominance. The Fifth Circuit recognized that "[c]lass treatment

*** may not be suitable where the calculation of damages is not susceptible to a mathematical or formulaic calculation, or where the formula by which the parties propose to calculate individual damages is clearly inadequate." *Bell Atl.*, 339 F.3d at 307. In such circumstances, individual damage issues are more likely to require "separate mini-trials"—and thus predominate over common liability issues. *Id.* (brackets and quotation marks omitted). For the *Bell Atlantic* court, that was dispositive: It affirmed the denial of class certification because individual damage issues predominated. *Id.* at 308.

Plaintiffs employ the same tactic for the Third Circuit, arguing that its holding that individual damage issues can predominate is only a narrow exception. BIO 13. Their argument does not help them because, however characterized, this "exception" exists in some circuits and not others. In the Third Circuit, like in the Fourth, Fifth, Eleventh, and D.C. Circuits—but not in the Ninth Circuit—courts will decline to certify classes when individual damage issues predominate. *See Johnson* v. *GEICO Cas. Co.*, 310 F.R.D. 246, 255 (D. Del. 2015) (decertifying class and citing *Chiang* v. *Veneman*, 385 F.3d 256, 273 (3d Cir. 2004)).

Plaintiffs also contend that the Fourth, Eleventh, and D.C. Circuits have held only that the *combination* of individual issues of liability *and* damages preclude certification—not individual damage issues alone. BIO 14-15, 17-18. Plaintiffs are incorrect. Each of these circuits has expressly recognized that individual damage calculations alone *can* defeat predominance. *See Lienhart* v. *Dryvit Sys., Inc.*, 255 F.3d 138, 147 (4th Cir. 2001) (reversing certification) ("the need for individualized proof of damages does

not necessarily preclude class certification *so long as* common issues continue to predominate over individual issues" (emphasis added)); *Brown* v. *Electrolux Home Prods., Inc.*, No. 15-11455, -- F.3d -- , 2016 WL 1085517, at *10 (11th Cir. Mar. 21, 2016) (vacating certification) ("[I]ndividual damages defeat predominance if computing them will be so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable." (quotation marks omitted)); *Sacred Heart Health Sys., Inc.* v. *Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1178-1179 (11th Cir. 2010) (reversing certification) (rejecting any "rigid distinction between liability and damages" when evaluating "whether common issues predominate over individual ones"); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013) (vacating certification) ("No damages model, no predominance, no class certification.").

b. In contrast to those five circuits, the Ninth Circuit below held that "damage calculations alone *cannot* defeat certification." Pet. App. 14a (emphasis added). So if *Bell Atlantic* or *Johnson*, for example, had been brought in the Ninth Circuit instead of the Fifth and Third Circuits, respectively, the bottom-line result in those cases necessarily would have been different because the Ninth Circuit would *never* conclude that individual damage issues predominate.

Plaintiffs further attempt to deny the existence of a split by portraying the Ninth Circuit as embracing only a "general" guideline. BIO 18. That phrasing denudes "general" of any meaning; the Ninth Circuit was categorical. Pet. App. 14a. Having concluded that there are no individual issues of *liability*, *id.* at 11a-14a, the court held that the existence of any in-

dividual issues of *damages* simply did not matter. *Id.* at 14a-18a. Indeed, the court rendered that holding without even bothering to consider whether damages could be calculated on a classwide basis. *See id.* at 18a-21a. Thus, the Ninth Circuit did *not* consider "individual damage issues" in its predominance analysis. BIO 18. Instead, it held that whatever damage calculations might be required, those calculations alone cannot defeat certification. Pet. App. 18a.

2. Plaintiffs try to reconcile the circuits' decisions by arguing that all agree that individual damage calculations alone "*generally*" do not defeat certification. BIO 11 (emphasis added). But "generally" is very different from *never*. In fact, saying that individual damage calculations "generally" (or "ordinarily") do not preclude certification necessarily implies that they *sometimes will*.

Plaintiffs also contend that the circuits agree that "the mere fact that damage awards will ultimately require individualized fact determinations is insufficient by itself to preclude class certification." *Id.* at 17 (quoting *McCarthy* v. *Kleindienst*, 741 F.2d 1406, 1415 (D.C. Cir. 1984)). But that just means that individual damage calculations alone will not *necessarily* defeat certification. No one here is suggesting otherwise. The question is whether such calculations alone can *ever* defeat certification.

Finally, Plaintiffs cite decisions stating that damages need not be capable of measurement on a classwide basis to satisfy the predominance requirement. *Id.* at 19. We have no quarrel with that. No one is arguing that individual damage calculations will *always* predominate. Pet. 13 n.1, 19 n.4. The question

is whether such calculations alone can *never* predominate. The Ninth Circuit has held yes; five other circuits have held no. Review should be granted.

B. The Ninth Circuit's Decision Is Wrong.

Plaintiffs' attempts to square the decision below with this Court's precedent also fail. Plaintiffs spill much ink explaining that *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013), "did not hold that a putative class *must rely* upon classwide damages model to demonstrate predominance." BIO 19. But that is beside the point. The question is not whether a classwide damages model is *always* necessary. It is whether such a model may *sometimes* be necessary, when individual damage calculations would otherwise overwhelm questions common to the class. The answer is yes. As Plaintiffs acknowledge, *Comcast* "held" that the class action in that case "did not satisfy predominance." *Id.* And the "reason" for that holding was because (as Plaintiffs further acknowledge) the plaintiffs in that case "could not" "prove their damages on a classwide basis." *Id.* In other words, individual damage calculations alone defeated predominance, *see Comcast*, 133 S. Ct. at 1433-1434—a holding contrary to the decision below.

Plaintiffs also seek refuge in a number of other authorities, but none actually embraces the Ninth Circuit's categorical rule. *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036 (2016), says merely that individual damage issues will not *always* defeat certification. *Id.* at 1045. The advisory committee's note to Rule 23 says the same thing—that certification "*may*" be appropriate, "despite the need" for individual damage calculations. Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment (emphasis add-

ed). And Newberg's treatise on class actions—like the dissent in *Comcast* that cited it—says merely that "individual damage calculations *generally* do not defeat a finding that common issues predominate." 2 William B. Rubenstein, *Newberg on Class Actions* § 4.54 (5th ed. 2015) (emphasis added); *see also Comcast*, 133 S. Ct. at 1437 (Ginsburg and Breyer, J.J., dissenting) (similar).

Finally, this Court should not heed Plaintiffs' suggestion that the first question presented is not outcome-determinative. BIO 1. For starters, even Plaintiffs acknowledge that if the Court granted review and reversed on *both* questions presented, its decision *would be* outcome-determinative. *Id.* That is precisely what the Court should do. But even if Plaintiffs' damages model were appropriate, the Ninth Circuit's predominance analysis would still require reversal. The Ninth Circuit never applied the proper analysis in this case: It never addressed (1) whether there are any individual damage issues, and (2) whether those issues predominate. Instead, the court took a shortcut, applying a categorical rule that individual damage calculations alone can *never* defeat certification. Thus, even if this Court were to decline review of the second question, it should still grant review of the first, reverse the judgment below, and remand for the Ninth Circuit to conduct the proper analysis.

II. THE COURT SHOULD REVIEW THE SECOND QUESTION BECAUSE THE COURTS OF APPEALS REMAIN DIVIDED AFTER *TYSON FOODS*.

A. The Second Question Is An Important, Recurring, And Unresolved Issue Of Federal Law.

1. As for the second question presented, Google's petition explained that the Second, Fourth, Fifth, and Seventh Circuits properly recognize what the Eighth, Ninth, and Tenth Circuits ignore: A class may not manufacture common evidence of recovery by using averages to gloss over differences in the existence or amount of class members' injuries. Pet. 21-26. Plaintiffs nevertheless argue that the circuits' decisions may be reconciled based on the substantive differences in the laws governing the underlying causes of action. BIO 31-34.

Plaintiffs misread the cases. To be sure, some courts that follow the circuit majority rule have observed that the impropriety of an averages-based recovery model may be *reinforced* by the substantive law governing particular causes of action. *See id.* But the conflict arises from the fact that these circuits—unlike those in the minority—recognize that the *unlawfulness* of an averages-based model is grounded in generally applicable federal laws. *See, e.g.*, *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215, 231-232 (2d. Cir. 2008) (citing "the Rules Enabling Act and the Due Process Clause," as well as Article III's rule that "actual injury cannot be presumed"); *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (quoting 28 U.S.C. § 2072(b)); *In re Fibreboard Corp.*, 893 F.2d

706, 711-712 (5th Cir. 1990) (citing Article III, "due process," and "the enabling acts"). The second question is not peculiar to any particular cause of action. It is a question of federal class-certification law generally.

2. *Tyson Foods*, 136 S. Ct. 1036, considered similar issues, but ultimately did not resolve the question presented in this case. *Tyson Foods* held that employees claiming wages violations under the Fair Labor Standards Act (FLSA) may use representative evidence of hours worked in class actions to the same extent that they may do so in individual actions. *Id.* at 1046-1047. The FLSA allows representative evidence in limited circumstances: Because employers are obligated by statute to maintain accurate records of employee working time, employee plaintiffs may "introduce a representative sample" of hours worked but not properly compensated "to fill an evidentiary gap created by the employer's failure to keep adequate records." *Id.* at 1047.[1] But the Court expressly declined to categorically approve the use of repre-

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[1] Plaintiffs' wage-and-hour cases rest on this same rule and therefore are inapposite. *See Reich* v. *Southern New England Telecomms. Corp.*, 121 F.3d 58 (2d Cir. 1997); *Perez* v. *Mountaire Farms, Inc.*, 650 F.3d 350 (4th Cir. 2011); *Chao* v. *Self Pride, Inc.*, 232 F. App'x 280 (4th Cir. 2007); *Donovan* v. *Hamm's Drive Inn*, 661 F.2d 316 (5th Cir. 1981). And Plaintiffs' other court-of-appeals cases do not decide the question presented. *See In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 603 (7th Cir. 2014) (declining to decide whether the class should be certified "on a class-wide damages theory"); *BCS Servs., Inc.* v. *Heartwood 88, LLC*, 637 F.3d 750, 760 (7th Cir. 2011) (statistical evidence may be used to show the extent of individual injury caused by fraudulently manipulated odds of success).

sentative evidence outside of this context. *Id.* at 1049. The question presented here—whether averages-based evidence is permissible, not to fill an evidentiary gap caused by the defendant's statutory violation, but purely to create a common recovery model for class-certification purposes—remains unanswered.

Plaintiffs argue that *Tyson Foods* demonstrates that the second question is fact-bound, fixating on the Court's statement that the propriety of statistical evidence will depend on the circumstances of each case. BIO 30-31. *Tyson Foods* did not render all such questions certiorari-proof, however. There will still be cases raising important and recurring questions concerning the boundaries of permissible averages-based common evidence.

Tyson Foods identified such a question, where a classwide recovery model could be particularly problematic. The Court stated that "the question whether uninjured class members may recover is one of great importance." 136 S. Ct. at 1050. *Tyson Foods* left that question undecided because the petitioner abandoned the class-certification-specific question on which certiorari was granted and instead argued about proper apportionment of a class-damages award—an issue not presented in that case because there had not yet been any determination concerning disbursement. *Id.* at 1049-1050. This case, however, squarely presents the question left unresolved in *Tyson Foods*, in the class-certification context on which the Court had granted certiorari. At the very least, the decision below should be vacated, and the case remanded, for reconsideration in light of *Tyson Foods*.

The better course, however, is to grant plenary review. The case offers the paradigmatic example of class-action overreaching. The Ninth Circuit improperly precluded individualized litigation on entitlement to recovery, and the amount of recovery due, by approving an averages-based formula. This case thus presents the right vehicle to decide the second question. Pet. 27-31; *see also* Pac. Legal Found. *Amicus* Br. 10-17; Intel *Amicus* Br. 13-17.

3. Plaintiffs' remaining merits-based arguments should be rejected. Plaintiffs contend that Google's equitable defenses should be disregarded because they cannot defeat an unfair-competition *claim*. BIO 26. Plaintiffs' conclusion does not follow from their premise. As Plaintiffs concede, the equities *can* and *should* be used to fashion remedies, *id.*—and that is precisely the point. The approved classwide-recovery model precludes consideration of the differing equities that exist between Google and individual class members. *See* Pet. App. 14a, 21a. That is a federal-law problem because class certification changes the substantive rights of the parties, barring Google from litigating its individual equitable defenses.[2]

Plaintiffs also assert that Google's argument presents a Rules Enabling Act problem by altering Plaintiffs' supposed right to present representative

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[2] Google's argument does not rest on the theory that post-purchase benefits must *offset* any restitution. BIO 25-28. Instead, as the District Court held, the variety in post-purchase benefits demonstrates that the reasonable market value of the AdWords service at the time of the auction differs for each class member in a manner not captured by the Smart Pricing Method. *See* Pet. App. 62a-63a.

evidence under California law. BIO 28-29. Wrong again. Google's argument rests on constitutional limits to recovery in federal court. Article III precludes an uninjured plaintiff from recovery, and the due-process guarantee prohibits litigation that unfairly prejudices defendants' ability to present defenses. Plaintiffs cannot bypass these constitutional limits by claiming state law allows them to do so.

B. Review Is Needed Now.

Plaintiffs' final arguments are that this case is not the right vehicle to decide the second question for several reasons. None withstands scrutiny.

1. Plaintiffs suggest a factual dispute exists, and therefore the second question is not squarely presented, by quarreling with Google's description of the Smart Pricing Method as a "uniform discount." BIO 24-25. But as this case comes before the Court, both lower courts are in agreement: the District Court found that the Smart Pricing Method applied a "uniform discount," Pet. App. 57a, 63a, and the Ninth Circuit described it as a single "ratio" that "does not turn on individual circumstances." *Id.* at 21a. Both courts thus identified what Plaintiffs describe as factor (4) of "Smart Pricing" as the relevant and uniform measure of harm: "how well particular ads had recently performed on that property as compared to Google's benchmark site." BIO 24. And both concluded that performance is calculated based on the average experience for all advertisers on those types of sites. Accordingly, there is no factual dispute, and the second question is squarely presented.

2. Plaintiffs next argue that Google waived any challenge to their damages model. BIO 29-30. This argument appears for the first time in Plaintiffs'

Brief in Opposition. They never raised the waiver argument below; therefore, they have waived it.

Moreover, Plaintiffs' late-breaking argument is wrong. The propriety of Plaintiffs' recovery models was litigated before the District Court, and the court agreed with Google that they were not proper common evidence of recovery. Pet. App. 62a-63a.

3. Finally, Plaintiffs argue that review of an interlocutory class-certification order is premature and should await final judgment. BIO 36. Yet they ignore that the petition presents questions about the nature of the evidence that plaintiffs may produce at the *class-certification* stage—questions that can be muddled after a case goes to trial. This case is therefore in the best posture to present questions concerning the standards for class certification.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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