No. 18-987

In The Supreme Court of the United States

MCKESSON CORPORATION;
MCKESSON TECHNOLOGIES, INC., PETITIONERS

v.

TRUE HEALTH CHIROPRACTIC, INC.;
MCLAUGHLIN CHIROPRACTIC ASSOCIATES, INC.

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

REPLY BRIEF FOR PETITIONERS

TIFFANY CHEUNG
MORRISON & FOERSTER LLP
425 Market St.
San Francisco, CA 94015

* Not admitted in the District of Columbia; admitted only in California; practice supervised by principals of Morrison & Foerster LLP admitted in the District of Columbia

JOSEPH R. PALMORE
Counsel of Record
DEANNE E. MAYNARD
SETH W. LLOYD
MICHAEL F. QIAN*
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-6940
JPalmore@mofo.com

Counsel for Petitioners

JUNE 3, 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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Respondents ("True Health") try to rewrite the Ninth Circuit's opinion to save it. But as actually written, the decision cannot be reconciled with class-certification decisions of other courts of appeals. Those courts have (correctly) held that a defendant's burden on the merits of an affirmative defense is "irrelevant" to the plaintiff's burden to establish predominance at class certification.

Yet the Ninth Circuit went out of its way to hold that consent is an affirmative defense under the fax provisions of the Telephone Consumer Protection Act of 1991 ("TCPA"), an issue that no court of appeals had before decided. The Ninth Circuit found it necessary to do so because, in its view, burden allocation on the merits "strongly affects" the predominance analysis at class certification. It then ruled that the district court erred in not certifying a class because petitioners ("McKesson") had not produced sufficient "predominance-defeating" evidence to avoid certification. Requiring the class certification opponent to introduce "predominance-defeating" evidence or else face certification flatly contradicts the holdings of other courts of appeals. Because True Health ignores the Ninth Circuit's actual analysis, it never grapples with the direct circuit conflict the decision creates.

True Health fares no better in attempting to defend the Ninth Circuit on the merits. Like the court of appeals, True Health focuses on what defendant *McKesson* supposedly failed to prove and on evidence

that *McKesson* supposedly failed to produce. But that justification proves the point—True Health, like the Ninth Circuit, shifts the burden to the party *opposing* class certification to introduce individualized evidence to defeat predominance. That approach "creates an almost insurmountable presumption in favor of class certification and, if it is not corrected, will deprive defendants of their right to litigate individual defenses." Chamber-Business Roundtable Amicus Br. 3.

Nor does True Health dispute the importance of the question presented. If anything, True Health confirms it. It contends that class certification is "normal" in TCPA cases and observes that most are filed as class actions because of the availability of statutory damages. That is exactly why courts must rigorously apply Rule 23(b)(3) standards—to ensure that the flood of TCPA litigation (where consent defenses are common) does not overwhelm courts and defendants with the very individualized inquiries that the rule is designed to prevent.

Finally, True Health's argument that review should be denied because proceedings continue in the district court would render a large number of class certification rulings immune from this Court's review. The Ninth Circuit's erroneous ruling will continue to control in this case and others in that circuit where affirmative defenses are asserted. The time for review is now. The petition should be granted.

ARGUMENT

I. THE CIRCUITS ARE DIVIDED ON THE QUESTION PRESENTED

As the petition showed (at 14-20), the dominant rule in the courts of appeals is that, when applying Rule 23(b)(3)'s predominance requirement, it "does not matter" who bears the burden on the merits of an issue. *Myers v. Hertz Corp.*, 624 F.3d 537, 551 (2d Cir. 2010). That is because plaintiffs *always* bear the burden of establishing predominance. Yet the Ninth Circuit came to the opposite conclusion. It held that a defendant's "burden of proving" the merits of an affirmative defense at trial "strongly affects the analysis" at class certification. Pet. App. 16a-17a. When predominance turns on an affirmative defense, the Ninth Circuit held that courts must "assess predominance by analyzing" only the defenses for which a defendant "has provided supporting evidence" *at class certification*. Pet. App 16a-17a. Under that rule, a district court must find predominance satisfied for all those individuals in a putative class for whom a defendant has not *already* "produce[d] evidence of a predominance-defeating" defense. Pet. App. 16a-18a.

True Health wrongly contends that these conflicting approaches are actually consistent.

1. True Health seeks to erase the circuit conflict by pointing to a single sentence in the Ninth Circuit's decision. Opp. 10-11. Because the Ninth Circuit began its analysis by reciting that plaintiffs "'retain[ed] the burden of showing that the proposed class satisfies the

requirements of Rule 23, including the predominance requirement of Rule 23(b)(3),'" True Health contends the Ninth Circuit applied the same rule as every other circuit. Opp. 10-11 (quoting Pet. App. 16a; alteration by True Health).

But True Health ignores the sentences coming immediately after, in which the Ninth Circuit modified that general burden allocation rule when predominance turns on an affirmative defense: "But the [defendant's] burden of proving consent strongly affects the analysis. Since McKesson bears the burden [on the merits], we assess predominance by analyzing the consent defenses McKesson has actually advanced and for which it has presented evidence." Pet. App. 16a. That evidence must be "evidence of a predominance-defeating consent defense." Pet. App. 16a. Absent such evidence, the Ninth Circuit "do[es] not consider" whether an affirmative defense presents individualized issues that predominate. Pet. App. 16a-17a. And even in the face of such evidence, the Ninth Circuit merely subtracts from the proposed class definition those individuals identified by the defendant's evidence. Pet. App. 16a-17a.

The Ninth Circuit thus "essentially held that because McKesson had not provided evidence of consent for each and every individual putative class member at the certification stage, class certification was appropriate as to all those for whom no individual proof of consent was offered." DRI Amicus Br. 9. District courts in the Ninth Circuit have received the message—they are now governed by a rule that requires

shifting the burden to defendants when predominance turns on an affirmative defense. *E.g.*, *McCurley v. Royal Seas Cruises, Inc.*, ___ F. Supp. 3d ___, 2019 WL 1383804, at *23-25 (S.D. Cal. Mar. 27, 2019) (in a TCPA case, relying on Ninth Circuit's decision here to certify a Rule 23(b)(3) class because the defendant "has not shown that the issue of consent will likely require individualized inquiries that will predominate").

In sum, the Ninth Circuit recited the (correct) general rule but then immediately carved out and applied an (incorrect) exception to it. True Health discusses only the general rule, but the petition seeks review of the exception—which every other court of appeals to have considered the issue rejects. *Myers*, 624 F.3d at 551; *N.J. Carpenters Health Fund v. Rali Series 2006-QO1 Tr.*, 477 F. App'x 809, 813 n.1 (2d Cir. 2012); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 321-22 (4th Cir. 2006); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 438 (4th Cir. 2003); *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 325-29 (5th Cir. 2008); *Sandusky Wellness Ctr. v. ASD Specialty Healthcare*, 863 F.3d 460, 466-70 (6th Cir. 2017); *see* Pet. 15-20.

2. The Ninth Circuit also reached the opposite result from the Fifth and Sixth Circuits on materially indistinguishable facts, which further shows that these courts are applying different rules. Pet. 18-21. Those circuits found that TCPA plaintiffs failed to establish predominance because they did not offer any method to decide consent using generalized proof. *Gene & Gene*, 541 F.3d at 328-29; *Sandusky*, 863 F.3d

at 468-69. In both cases, as here, there was evidence that at least some class members consented in varying ways. *Gene & Gene*, 541 F.3d at 328-29; *Sandusky*, 863 F.3d at 468-69. Yet the plaintiffs, like True Health, failed to identify any viable way to determine without individualized inquiries which putative class members gave consent and whether that consent was adequate. *Gene & Gene*, 541 F.3d at 328-29; *Sandusky*, 863 F.3d at 468-69. In the Fifth and Sixth Circuits, the plaintiffs' failure to do so defeated predominance.

True Health's effort to distinguish those cases fails. It says almost nothing about *Gene & Gene*, the decision on which the district court here relied in denying class certification. Pet. 18-19. Instead, True Health points to a *later* appeal in the same case. Opp. 15-16 (citing *Gene & Gene, LLC v. BioPay, LLC*, 624 F.3d 698, 704-05 (5th Cir. 2010)). But that decision turned entirely on law of the case and the mandate rule. 624 F.3d at 702-05. It did not analyze predominance at all, much less retreat from the first decision's square holdings that the merits burden is "irrelevant to" predominance and that a TCPA consent defense defeats predominance, notwithstanding a defendant's incomplete records. 541 F.3d at 327-28. The Ninth Circuit's decision cannot be reconciled with those holdings.

True Health's efforts to distinguish *Sandusky* also fail. Opp. 16. The court in *Sandusky* noted that there was "actual evidence of consent" and that sorting the potential class into consenting and non-consenting members would require impermissible individualized

inquiries. 863 F.3d at 468-70. The same is true here. There is concrete evidence of consent—from McKesson's databases and declarations by sales representatives, Pet. App. 6a-7a, 28a-30a—and the district court thus found that it "would need to make detailed factual inquiries regarding whether each fax recipient granted prior express permission," Pet. App. 32a.

True Health argues that "[t]his case is different" from *Sandusky* because the putative class here (after subtracting members for whom McKesson already produced individualized consent evidence) involves only "two standardized form documents." Opp. 16. That is wrong. McKesson's evidence showed that many customers not listed as consenting in its databases had also provided individualized consent, but further inquiry would be required to determine which ones, such as through account representative and customer testimony. Pet. App. 6a-7a; CA ER 86-88; *see* Chamber-Business Roundtable Amicus Br. 7. *Sandusky* held that "[i]dentifying solicited fax recipients through a form-by-form inquiry is sufficiently individualized to preclude class certification." 863 F.3d at 469. The same should have been true here for the customer-by-customer inquiry that would be required to identify solicited fax recipients. Pet. App. 7a. This class could not be certified in the Sixth Circuit.

II. THE NINTH CIRCUIT'S DECISION IS WRONG

The petition also showed that the Ninth Circuit's rule is wrong. Pet. 22-27. That court's burden-shifting

approach violates the categorical rule that the party seeking class certification "'must affirmatively demonstrate his compliance' with Rule 23" including the predominance requirement. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). Nothing in Rule 23's text, structure, history, or purpose supports changing the predominance analysis when the defendant bears the burden on the merits of an issue. Pet. 22-25.

True Health does not expressly defend the Ninth Circuit's rule. Instead, it insists that the Ninth Circuit found predominance satisfied because True Health carried its burden of proving predominance. Opp. 12-13. But the only support True Health offers for that claim is *McKesson's* purported evidentiary shortcomings. Opp. 12-13. And True Health ignores that the Ninth Circuit analyzed McKesson's evidence through the lens of burden allocation at trial. Pet. App. 16a-17a. McKesson had already produced individualized evidence showing that nearly 1 in 4 class members consented in ways that True Health does not even contend can be assessed using class-wide proof. Pet. App. 6a; D. Ct. ECF No. 297. Also, it was unrebutted that the "limitations of [McKesson's] database do not allow Defendants to identify" other consenting fax recipients "without individualized inquiries." Pet. App. 6a. Yet the Ninth Circuit swept all this aside. Pet. App. 16a-18a. Because McKesson had not produced individualized evidence for the other three-fourths of class members, the Ninth Circuit held that McKesson lacked "predominance-defeating" evidence for that

portion of the class. Pet. App. 16a-18a. In short, McKesson failed to rebut the court's newly fashioned presumption of predominance.

True Health also ignores and does not dispute the effect of the Ninth Circuit's approach—to create impermissible "fail-safe" classes where class membership depends on the validity of each individual class member's claims. Pet. 25-26; DRI Amicus Br. 11-12. Under the Ninth Circuit's rule, a defendant must produce "predominance-defeating" individualized evidence at class certification, but even when the defendant does so, the relevant individuals are simply removed from the class. Pet. App. 16a-18a. Defendants thus cannot win. Class members either become part of the class or, if not, are liberated from the binding effect of any judgment. *See* 1 *McLaughlin on Class Actions* § 4:2 (15th ed.) (warning against this approach). True Health has no response.

True Health argues instead that the Ninth Circuit was correct to ignore McKesson's unrebutted evidence as "surmise and speculation," because a magistrate judge had ordered McKesson to "identify every putative class member who supposedly gave permission and explain how that class member gave permission." Opp. 11-13 (quoting *Bridging Communities Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1125 (6th Cir. 2016); D. Ct. ECF No. 178). Such reasoning exposes why the Ninth Circuit's rule is wrong. According to True Health and the Ninth Circuit, unless a defendant produces—at the class-certification stage—individualized evidence of an affirmative defense for *every class*

member, the predominance requirement should be presumed met. Opp. 12-13; Pet. App. 16a-18a. That rule wrongly requires the very type of individualized inquiries the predominance requirement guards against. Pet. 25-27; DRI Amicus Br. 10-13. In denying class certification, the district court recognized that McKesson could not produce additional evidence of consent without such individualized inquiries and properly found predominance missing on that basis. Pet. App. 28a-32a.

Nor are the facts here anything like in *Bridging Communities* or *U.S. Foodservice*, the cases on which True Health relies. *Contra* Opp. 13-14. The plaintiff in *Bridging Communities* (a Sixth Circuit decision predating *Sandusky*) produced affirmative "evidence suggesting a class-wide absence of consent." 843 F.3d at 1125. And *U.S. Foodservice* involved only "generalized proof" of a defense, which the plaintiff seeking class certification adequately showed could be reviewed without individualized inquiries. *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 122 (2d Cir. 2013). Neither decision supports the Ninth Circuit's rule that predominance should be presumed satisfied for an affirmative defense unless and until a defendant produces individualized evidence establishing the defense for every putative class member.

III. THE QUESTION PRESENTED IS IMPORTANT, AS RESPONDENTS DO NOT DISPUTE, AND THIS CASE IS AN IDEAL VEHICLE TO ADDRESS IT

True Health does not dispute that whether the burden of proving an affirmative defense changes the predominance inquiry is a recurring and important issue. It does not dispute that affirmative defenses are frequently asserted in cases often litigated as class actions. Pet. 27-28. Nor does it dispute that class-action litigation under the TCPA is booming and that consent is a common defense in those cases. Pet. 28-30; *see* Chamber-Business Roundtable Amicus Br. 11-15. On the contrary, True Health trumpets the prevalence of class certification in TCPA litigation. Opp. 3.

Despite conceding the issue's importance, True Health maintains that this case is a poor vehicle for deciding the issue. Opp. 17-18. It points to the district court's decision on remand to have the parties proceed to summary judgment on the named plaintiffs' individual claims. But the district court's garden-variety sequencing of the litigation is no barrier to this Court's review.

First, there is no dispute that the Ninth Circuit decided the issue of predominance—the issue raised by the petition. Pet. 30. The district court on remand refused to revisit that issue, which True Health contended was law of the case. D. Ct. ECF No. 285 (14:21-24); D. Ct. ECF No. 282 at 4-5. And the district court

refused to allow additional discovery for the subclass that the Ninth Circuit held satisfied the predominance requirement. D. Ct. ECF No. 309 at 3-4. If the district court denies summary judgment on lead plaintiffs' claims (as True Health will vigorously urge it to do, Opp. 17 n.2), the case will proceed to class certification under the Ninth Circuit's erroneous ruling. If the district court grants summary judgment, True Health will undoubtedly appeal, so class certification will remain a live possibility for the foreseeable future.

Second, True Health omits that McKesson asked the district court to stay proceedings on remand until this Court decides whether to grant McKesson's certiorari petition. D. Ct. ECF No. 317. The district court denied that motion only because "the likelihood of any simplification of the case is slight, given how infrequently the Supreme Court grants petitions for writ of certiorari." D. Ct. ECF No. 322 at 2. But that calculus would obviously change were this Court to grant McKesson's petition, in which case McKesson would promptly move again for a stay of the district court proceedings pending this Court's decision.

Third, and in any event, Rule 23(f) exists precisely to allow interlocutory appellate review of unsettled class certification issues, and the default is that district court proceedings continue during appeal. Fed. R. Civ. P. 23(f) ("An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."). True Health availed itself of interlocutory review of the district court's class certification denial by filing a Rule 23(f) petition in the Ninth

Circuit. It cannot now rely on the interlocutory nature of this appeal to argue that further review is improper.

As the petition explained, this Court regularly grants petitions and decides class certification issues on interlocutory appeals under Rule 23(f), which typically is the only way such issues can be decided. Pet. 30-31 (collecting cases). That includes granting review in interlocutory appeals of class certification issues when district court proceedings continued on the merits. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 571 U.S. 1020 (2013) (granting certiorari to review class certification procedures even though merits proceedings continued in the district court, *Erica P John Fund Inc v. Halliburton Co.*, No. 3:02-cv-01152 (N.D. Tex.)). It can and should follow that well-settled path here.

CONCLUSION

The petition should be granted.

Respectfully submitted,

TIFFANY CHEUNG
MORRISON & FOERSTER LLP
425 Market St.
San Francisco, CA 94015

* Not admitted in the District of Columbia; admitted only in California; practice supervised by principals of Morrison & Foerster LLP admitted in the District of Columbia

JOSEPH R. PALMORE
Counsel of Record
DEANNE E. MAYNARD
SETH W. LLOYD
MICHAEL F. QIAN*
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-6940
JPalmore@mofo.com

Counsel for Petitioners

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