No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has repeatedly said that a plaintiff seeking class certification under Federal Rule of Civil Procedure 23(b)(3) bears the burden of proving that common issues predominate over individualized ones. *E.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014).

The question presented is whether the burden at class certification shifts to the defendant when predominance turns on affirmative defenses.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Pursuant to Rules 14.1 and 29.6, petitioners state the following:

The parties to the proceeding are listed in the caption.

McKesson Corporation is a publicly traded company. It has no parent corporation and no publicly held corporation owns 10% of more of its stock. McKesson Technologies, Inc. is now known as Change Healthcare Technologies, LLC. Change Healthcare Technologies, LLC is a wholly owned subsidiary of Change Healthcare LLC. McKesson Corporation is the ultimate beneficial owner of more than 10% of Change Healthcare LLC's membership interests.

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PETITION FOR A WRIT OF CERTIORARI

McKesson Corporation and McKesson Technologies, Inc. (collectively, "McKesson") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 896 F.3d 923. The opinion of the district court (App., *infra*, 21a-35a) is unreported but appears at 2016 WL 8925144.

JURISDICTION

The court of appeals entered judgment on July 17, 2018. App., *infra*, 1a, 20a. McKesson's timely petition for rehearing was denied on August 30, 2018. App., *infra*, 36a-37a. On November 16, 2018, Justice Kagan granted McKesson's application for an extension of time within which to file a petition for a writ of certiorari to and including January 25, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 23(b)(3) provides:

> A class action may be maintained if Rule 23(a) is satisfied and if:
>
> * * *
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and

> that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> > (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> >
> > (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> >
> > (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> >
> > (D) the likely difficulties in managing a class action.

All of Rule 23 and the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, are set forth in the Appendix at 38a-80a.

INTRODUCTION

"[P]laintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014) (emphasis in

original). Does that burden allocation depend on who will bear the burden on the merits?

The Ninth Circuit here said yes. Although it acknowledged plaintiffs' general burden at the class-certification stage, the court held that a special analysis applies when the defendant asserts an affirmative defense. According to the Ninth Circuit, the defendant's merits burden to prove that defense "strongly affects" the predominance analysis, so the defendant must produce sufficient "predominance-defeating" evidence to avoid certification. App., *infra*, 16a. Under that rule, the defendant must develop evidence for individual absent class members at the class-certification stage—contrary to Rule 23's safeguards against undue individualized inquiry in class litigation. Every other court of appeals to address the issue applies the opposite rule. They hold that the defendants' burden on the merits of an affirmative defense is "irrelevant" to the plaintiff's burden at class certification. This petition offers the Court the opportunity to resolve this conflict and reaffirm that the plaintiff seeking class certification always bears the burden of satisfying Rule 23.

The question presented turns on general class-certification principles, but arises from a booming area of class-action litigation—the Telephone Consumer Protection Act of 1991 ("TCPA"). Plaintiffs allege that McKesson sent them faxes without their consent in violation of that statute. The district court declined to certify a class. It concluded that plaintiffs failed to establish any classwide method of resolving the

central question of whether and how putative class members consented to receiving faxes. Plaintiffs thus failed to show that common questions predominated.

The Ninth Circuit reversed. After concluding that McKesson would bear the burden of proving consent at trial, the court held that this later merits burden "strongly affects the analysis" of predominance at class certification. App., *infra*, 16a. It then held the predominance requirement satisfied for most of the putative class because McKesson had failed to meet its evidentiary burden. Because McKesson had not *already* "provided supporting evidence" of individualized consent for those putative plaintiffs, the court held McKesson failed to defeat predominance. App., *infra*, 17a-18a, 20a. As to other putative class members, for whom McKesson had provided plaintiff-specific evidence, the court held that McKesson defeated predominance—but only as to those identified individuals. App., *infra*, 18a-20a. The court thus subtracted them from the class, leaving the rest—for whom McKesson had not met its purported burden—subject to certification. App., *infra*, 18a-20a.

The Ninth Circuit's approach directly conflicts with the holdings of the Second, Fourth, Fifth, and Sixth Circuits. Those circuits adhere to the established rule that a plaintiff seeking class treatment always bears the class-certification burden, even if the defendant will have the burden of establishing a relevant defense on the merits. Unlike the Ninth Circuit, those circuits do not presume that predominance is satisfied for affirmative defenses unless the defendant

proves otherwise. Indeed, the Fifth and Sixth Circuits found predominance lacking in circumstances indistinguishable from those here: TCPA suits in which defendants asserted fax recipients consented, and plaintiffs offered no way of resolving consent on a classwide basis.

The Ninth Circuit's decision subverts Rule 23 by relieving the class proponent of its obligation to justify a departure from ordinary litigation procedure. It also requires defendants to develop individualized evidence proving their affirmative defenses before class certification, mandating the very individualized inquiries Rule 23 is supposed to preclude. And if a defendant develops that evidence after class certification, the Ninth Circuit's decision creates the unwieldy possibility of individual mini-trials during class litigation (or else threatens to deprive defendants of their right to put on a defense).

Affirmative defenses are common in causes of action frequently litigated as class actions. The Ninth Circuit's error thus will extend well beyond the TCPA. This Court should grant review to resolve the circuit conflict and clarify that affirmative defenses do not change the class proponent's exclusive burden to prove compliance with Rule 23.

STATEMENT

A. Federal Rule Of Civil Procedure 23(b)(3)

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the

individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). Rule 23 thus authorizes representative litigation only under specific conditions. In particular, a proposed class must clear two sets of hurdles. First, it must satisfy Rule 23(a)'s four requirements of numerosity, commonality, typicality, and adequate representation. Fed. R. Civ. P. 23(a). Second, the class must satisfy one of the provisions of Rule 23(b). Fed. R. Civ. P. 23(b).

Rule 23(b)(3), the provision at issue here, is "an adventuresome innovation" that "is designed for situations in which class-action treatment is not as clearly called for." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (quoting *Wal-Mart*, 564 U.S. at 362) (quotation marks and citation omitted). It imposes two requirements: predominance ("that the questions of law or fact common to class members predominate over any questions affecting only individual members") and superiority ("that a class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy"). Fed. R. Civ. P. 23(b)(3).

B. The Telephone Consumer Protection Act

The putative Rule 23(b)(3) class action here arises under the TCPA. That law, in addition to regulating certain phone calls, imposes conditions on sending "unsolicited" fax advertisements. 47 U.S.C. § 227(b)(1)(C). An "unsolicited" advertisement is one that "is transmitted to any person without that person's prior express invitation or permission, in writing or

otherwise." *Id.* § 227(a)(5). An unsolicited fax advertisement must contain an "opt-out" notice telling the recipient how to refuse future advertisements. 47 U.S.C. § 227(b)(1)(C)(iii), (b)(2)(D).

The TCPA creates a private right of action for a plaintiff who can show an "unsolicited advertisement" was sent in "violation of [Section 227(b)] or the regulations prescribed under" it. *Id.* § 227(b)(3). It provides statutory damages of $500 per impermissible fax, and up to three times that amount for willful violations. *Ibid.* That "stiff penalty" "can add up quickly given the nature of mass business faxing." *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1080 (D.C. Cir. 2017) (Kavanaugh, J.), *cert. denied*, 138 S. Ct. 1043 (2018); *see Brodsky v. HumanaDental Ins. Co.*, 910 F.3d 285, 291 (7th Cir. 2018) ("The consequences for a firm that violates the TCPA can be dire when it is facing not just a single aggrieved person, but a class.").

C. McKesson Sent Faxes To Customers

From 2009-2010, Physician Practice Solutions ("PPS"), a business unit of a McKesson subsidiary, sold practice-management and electronic-health-records software primarily to physicians' offices. As part of that business, PPS employees developed longstanding relationships with the customers who purchased this software. CA SER 68.

McKesson introduced evidence at class certification showing that PPS employees spoke regularly with those customers and learned their preferences, including, for example, that many "used fax machines

as a primary way of communicating." CA SER 68. And the evidence showed that "[i]t was commonplace for customers to ask" sales representatives "on a daily basis to send them information by fax." CA SER 68. The faxes at issue here were part of those communications, informing existing customers of available software upgrades. CA ER 247-53.

McKesson's class-certification evidence showed that customers consented to receiving these faxes in many ways. As just noted, many gave consent orally to sales representatives. CA SER 100-02; CA ER 87-88. For example, some customers told sales representatives that they preferred to receive communications, including promotions, exclusively by fax. CA SER 68, 87-88. Others specifically asked representatives "to fax them information on discounts, promotions, and/or upgrades when available, so they could purchase upgrades or other services and take advantage of discounts or promotions." CA SER 68. Customers also consented when purchasing software by voluntarily providing fax numbers and entering into End User License Agreements providing that McKesson could use their contact information to send offers. CA SER 69.

D. Plaintiffs Sue

True Health Chiropractic, Inc. filed a putative class-action complaint alleging that McKesson sent True Health a single fax advertisement violating the TCPA. CA SER 109-20. In a subsequent amended complaint, plaintiff McLaughlin Chiropractic Associates, Inc. added its TCPA claims, alleging that

McKesson sent it three impermissible faxes. CA ER 236. Plaintiffs alleged that all the faxes were unsolicited and that none contained an opt-out notice. CA ER 237. They sought to certify a class of those who received specified faxes from McKesson. CA ER 101.

McKesson opposed class certification, arguing that plaintiffs could not establish predominance because of individualized issues of consent. Although McKesson maintained that all class members had consented by providing a fax number when purchasing their software, it explained that it had only limited centralized information about which customers had also consented in additional ways. CA ER 86-88; App., *infra*, 5a-7a. For instance, in response to a discovery request from plaintiffs, McKesson produced "Exhibit B" based on its internal customer-database records: a list of customers who had consented to receiving faxes by checking a box during software registration, on a written consent form, or during a phone outreach program. CA ER 87. McKesson also produced "Exhibit C": a list of customers noted in the database as having consented in oral or email communications with sales representatives. CA ER 87-88.

McKesson emphasized, however, that the lists in Exhibits B and C were not exhaustive, in part because sales representatives were not required to note such consent in the database. CA ER 87-88. Other customers consented in the same individualized ways, "but the limitations of the database do not allow Defendants to identify those specific customers without individualized inquiries." CA ER 87-88. To

determine whether and how other customers consented to receiving faxes, therefore, further "individualized inquiries must be conducted." CA ER 88; App., *infra*, 6a-7a.

E. The District Court Denies Class Certification

The district court denied plaintiffs' request to certify a class, concluding that "Plaintiffs have failed to satisfy the predominance requirement" of Rule 23(b)(3). App., *infra*, 27a-35a.[1]

The district court observed that plaintiffs bear the burden of establishing all the requirements of Rule 23, including predominance. App., *infra*, 23a-24a. It concluded that plaintiffs had failed to carry that burden here because "the diversity of ways in which Defendants allegedly received permission suggests that the issue of consent should be evaluated individually, rather than on a classwide basis." App., *infra*, 30a (quotation marks and citation omitted).

The court found that the record "demonstrat[ed] that such individualized inquiries will be necessary." App., *infra*, 28a; *see* App., *infra*, 28a-30a (summarizing evidence). The court noted that "the issue of whether any class member *actually* granted permission is not before the [c]ourt at this stage." App., *infra*, 32a (emphasis in original). But it concluded that to decide the merits, the court "would need to make detailed

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[1] The district court also declined to certify a class under Rule 23(b)(2). App., *infra*, 26a-27a. Plaintiffs did not appeal that part of the order, App., *infra*, 8a n.1, and it is not at issue here.

factual inquiries regarding whether each fax recipient granted prior express permission." App., *infra*, 32a.

Relying on a Fifth Circuit TCPA decision presenting the same issue of individualized consent, the court explained that it did not matter whether the issue of consent was "an element of a TCPA claim" on which plaintiffs would bear the burden at trial or "an affirmative defense" on which McKesson would bear the burden. App., *infra*, 32a (citing *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 327 (5th Cir. 2008)). At class certification, what mattered was that plaintiffs failed to show how the issue of consent could be resolved "via class-wide proof." App., *infra*, 32a (citing *Gene & Gene*, 541 F.3d at 328).

F. The Court Of Appeals Reverses The Denial Of Class Certification In Part

After the Ninth Circuit granted plaintiffs' petition for permission to appeal under Rule 23(f), the court reversed in part and remanded in an opinion by Judge Fletcher.

The court began its analysis of predominance by deciding who would bear the burden of proving consent at trial. App., *infra*, 15a. Plaintiffs had argued that McKesson bore the burden on consent and failed to "escape class certification" because it did "not satisfy [its] burden of proof." CA Opening Br. 44. McKesson had responded that the issue was "irrelevant"—as the district court held—because "[n]othing about who would *later* bear the burden of proof on the merits

eliminates or lessens Plaintiffs' " burden at class certification. CA Answering Br. 38-39; *see* App., *infra*, 32a.

The Ninth Circuit agreed with plaintiffs. App., *infra*, 16a-17a. It held that consent was an affirmative defense that McKesson bore the burden of proving on the merits. App., *infra*, 16a. It rejected the district court's and McKesson's view that the merits burden was irrelevant. App., *infra*, 16a-17a. Instead, it held that the burden allocation on the merits "strongly affects the analysis" at class certification. App., *infra*, 16a.

The court thus shifted the class-certification burden for affirmative defenses, presuming predominance satisfied unless the defendant proves otherwise. The court acknowledged the general rule that "[p]utative class members" have "the burden of showing that the proposed class satisfies the requirements of Rule 23, including the predominance requirement." App., *infra*, 16a. But on the specific question whether consent was an individual issue that predominated, the court saddled McKesson with the evidentiary burden. App., *infra*, 16a-17a. "Since McKesson bears the burden" of proving consent as an affirmative defense, the court held that it would consider in its Rule 23(b)(3) predominance analysis only "the consent defenses McKesson has actually advanced and for which it has presented evidence." App., *infra*, 16a. Unless McKesson "produce[d] evidence of a predominance-defeating consent defense" at class certification, the court would "not consider the consent defenses that McKesson might advance" later on the merits. App., *infra*, 16a.

Applying that rule, the court concluded that for all but a sliver of the class, McKesson had failed to show the absence of predominance. The court focused on customers in Exhibits B and C, the fax recipients for whom McKesson had already "provided evidence in the district court" that consent occurred on an individualized basis. App., *infra*, 18a. For the putative plaintiffs listed in McKesson's database as having communicated consent directly to sales representatives (those in Exhibit C), the court held that McKesson's evidence was "enough to support denial of class certification under Rule 23(b)(3)." App., *infra*, 18a. The court thus affirmed the district court's denial of class certification as to that small group of recipients. App., *infra*, 18a, 20a. For the fax recipients identified in Exhibit B, the court remanded for the district court to determine whether McKesson's evidence established consent methods that were sufficiently individualized. App., *infra*, 19a-20a.[2]

But for all other fax recipients, the court held that McKesson's showing was insufficient. Because McKesson had introduced no "predominance-defeating" evidence specific to those individuals at class certification, the court presumed that those putative plaintiffs did not consent in any individualized way. App., *infra*, 16a-18a. It thus held that McKesson's class-certification

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[2] On remand to the district court, plaintiffs abandoned "seeking certification for the class described by Exhibit B." D. Ct. ECF No. 297. Rather, they now seek certification of a class of fax recipients limited to those "not in Exhibit B or Exhibit C." D. Ct. ECF No. 292 at 2.

evidence failed to defeat predominance as to that "subclass" (*i.e.*, the entire class, minus the relatively small number of specifically-identified consenting recipients). App., *infra*, 17a-18a.[3]

REASONS FOR GRANTING THE PETITION

The circuits are divided on whether a defendant's burden to establish an affirmative defense at trial means it also bears the burden of proving that individual defenses predominate. The Ninth Circuit stands alone in placing that burden on defendants—contrary to this Court's consistent holdings that plaintiffs seeking certification must establish all elements of Rule 23. The issue is important. Litigation under the TCPA (where consent is a recurring issue) is pervasive, and the Ninth Circuit's burden-shifting approach to affirmative defenses will also apply to many other common settings for class-action litigation. This Court's review is warranted.

I. THE CIRCUITS ARE DIVIDED ON THE QUESTION PRESENTED

Multiple courts of appeals have held that it "does not matter" when applying Rule 23(b)(3)'s

[3] The court of appeals separately rejected plaintiffs' argument that consent was irrelevant because the faxes, even if solicited, unlawfully lacked opt-out notices required by an FCC regulation. App., *infra*, 10a-13a. The court observed that the D.C. Circuit had invalidated that purported requirement. App., *infra*, 11a-12a (citing *Bais Yaakov*, 852 F.3d at 1083). Plaintiffs thus could not pursue claims (or certify a class) based on faxes sent with consent. App., *infra*, 11a. That portion of the court's decision is not at issue here.

predominance requirement whether a merits issue is an affirmative defense on which the defendant would bear the burden at trial. *Myers v. Hertz Corp.*, 624 F.3d 537, 551 (2d Cir. 2010); *see also*, *e.g.*, *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 327 (5th Cir. 2008) ("irrelevant"). Those courts hold that plaintiffs *always* bear the burden of establishing predominance, even when affirmative defenses are involved. But the Ninth Circuit held here that the defendant's merits burden "strongly affects the analysis" at class certification. App., *infra*, 16a-17a. It concluded that when predominance turns on an affirmative defense, the defendant bears the burden of defeating predominance. App., *infra*, 16a-17a. Those divergent rules have resulted in opposite outcomes in materially identical circumstances. This Court should resolve the conflict.

1. Besides the Ninth Circuit, all other circuits to address the question have held that a defendant's burden to prove an affirmative defense at trial does not affect the plaintiff's burden to establish predominance at class certification. Under this rule, a defendant need not produce individualized evidence of its affirmative defenses for the putative class action to fail the predominance requirement. Instead, the plaintiff bears the burden of establishing that common questions will predominate notwithstanding the defendant's affirmative defenses.

Fourth Circuit. The Fourth Circuit has flatly "reject[ed]" the argument that "because [the defendant] bears the burden of proving the merits of" an

affirmative defense, "it should also bear the burden of demonstrating that resolution of that defense cannot occur on a class-wide basis." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 321 (4th Cir. 2006). That court has "stressed in case after case that it is *not the defendant* who bears the burden of showing that the proposed class *does not comply* with Rule 23, but that it *is the plaintiff* who bears the burden of showing that the class *does comply* with Rule 23." *Ibid.* (emphases in original).

The Fourth Circuit has explained that "the standard justifications for allocating the burden of proving an affirmative defense to the defendant—efficiency and fairness—disappear when the thing to be proved is no longer the merit of the defense but compliance with Rule 23." *Id.* at 322. "There is no reason to believe that the defendant is any better suited than the named plaintiffs to prove whether an issue is common to the class simply because the defendant bears the burden of proving the merits of that issue." *Ibid.*

In the Fourth Circuit, there is thus "no exception to the rule that the plaintiff bears the burden of showing compliance with Rule 23." *Id.* at 322. The court in *Thorn* accordingly affirmed the denial of class certification because the plaintiffs "failed to show that the [defendant's] defense can be resolved on a class-wide basis." *Id.* at 324. That was so even though the defendant's evidence—far from establishing its affirmative defense for particular plaintiffs—at most would have "required the district court to conduct individual hearings" to assess the defense. *Id.* at 316, 321-24; *see also Gunnells v. Healthplan Servs., Inc.*,

348 F.3d 417, 438 (4th Cir. 2003) (holding certification "erroneous" because "it appears that [defendant's] affirmative defenses [of "comparative negligence, assumption of risk, and setoff"] are not without merit and would require individualized inquiry in at least some cases").

Second Circuit. The Second Circuit has also held that, even when a defendant "will ultimately bear the burden of proving the merits" of an affirmative defense, a plaintiff still bears the burden at class certification of "show[ing] that more 'substantial' aspects of this litigation will be susceptible to generalized proof." *Myers*, 624 F.3d at 551. In the Second Circuit, it thus "does not matter" whether a merits issue "may technically be termed an 'affirmative defense.'" *Ibid.*; *see N.J. Carpenters Health Fund v. Rali Series 2006-QO1 Tr.*, 477 F. App'x 809, 813 n.1 (2d Cir. 2012) (explaining that whether the merits burden is on the plaintiff or defendant "does not change our analysis at the certification stage").

Following that approach, the court in *Myers* affirmed the denial of class certification because the "plaintiffs had not satisfied their burden to show that such substantial common issues are present here." 624 F.3d at 549-51. Instead, the defendant's affirmative defense (that many plaintiffs were exempt employees under the Fair Labor Standards Act) required further "individual factual analysis." *Ibid*. The same result holds in the Second Circuit even if the defendant produces only "limited evidence" that "surely would

not have sufficed to prove" the defense "on the merits." *N.J. Carpenters*, 477 F. App'x at 813.

Fifth & Sixth Circuits. The Fifth and Sixth Circuits have applied the same rule as the Second and Fourth Circuits in the specific context of TCPA suits raising questions about fax recipients' consent. The circumstances in those cases were materially indistinguishable from those here—this putative class could not be certified in those circuits.

In a decision relied upon by the district court here, the Fifth Circuit held that whether consent must be "established by [the defendant] as an affirmative defense or by [the plaintiff] as an element of the cause of action" is "irrelevant to" the predominance analysis. *Gene & Gene*, 541 F.3d at 327; *see* App., *infra*, 32a. No matter who bears the burden on the merits, "the burden is on [the plaintiff] to show that the requirements for class certification are satisfied." *Gene & Gene*, 541 F.3d at 329.

Applying that rule, the Fifth Circuit held that a class could not be certified because fax-recipient consent was a central issue requiring individualized inquiry. *Id.* at 325-29. There, like here, the defendant did not have complete records of consent. The defendant's "database entries d[id] not consistently or accurately reflect whether a given recipient had consented to receive fax advertisements," meaning that "individual inquiries of the recipients" would be "necessary to sort out which transmission was consented to and which was not." *Id.* at 328; *cf.* App., *infra*, 6a-7a

(noting McKesson's statement that "the limitations of [its] database" do not allow it to identify all customers who consented in individual interactions with sales representatives "without individualized inquiries").

Unlike the Ninth Circuit here, however, the Fifth Circuit did not treat the defendant's incomplete records of consent at class certification as a reason to find predominance. Instead, that court concluded that the need for further individualized inquiries reinforced that "there is no class-wide proof available to decide consent." *Gene & Gene*, 541 F.3d at 328-29. Certification was inappropriate because the plaintiff had failed to identify any "sensible method of establishing consent or the lack thereof via class-wide proof." *Id.* at 329.

Relying on the Fifth Circuit's decision in *Gene & Gene*, the Sixth Circuit similarly held class certification inappropriate because the plaintiff failed to identify any way of adjudicating fax-recipient consent except on an "*individual*" basis. *Sandusky Wellness Ctr. v. ASD Specialty Healthcare*, 863 F.3d 460, 468 (6th Cir. 2017) (quoting *Gene & Gene*, 541 F.3d at 327) (emphasis in original), *cert. denied*, 138 S. Ct. 1284 (2018). The defendant had not yet proven its affirmative defense as to particular class members. *Id.* at 468-69. But "identifying the[] individuals" who consented to receiving faxes would have required "individualized inquiries," and the plaintiff's attempt to show "a class-wide absence of consent" was "unavailing." *Ibid.* The Sixth Circuit thus held that the plaintiff failed to carry its "'burden of affirmatively demonstrating' compliance with Rule 23." *Id.* at 466-67 (quoting *Wal-Mart*,

564 U.S. at 350) (alteration omitted). The court also rejected the notion that the plaintiff could solve its predominance problem by proposing "subclasses based on the different types of consent," because "[t]o even create subclasses would have required the district court to analyze each individual" putative plaintiff and evidence of its consent. *Id.* at 470.

2. The Ninth Circuit here announced and applied a contrary rule.

After acknowledging the general principle that plaintiffs "retain the burden of showing that the proposed class satisfies the requirements of Rule 23," the court held that affirmative defenses present a special case. App., *infra*, 16a. According to the court, the defendant's "burden of proving" an affirmative defense at trial "strongly affects the analysis" at class certification. App., *infra*, 16a. The court thus rejected the district court's holding—consistent with the other circuits—that the merits burden is irrelevant to the predominance analysis. *See* App., *infra*, 32a (citing *Gene & Gene*, 541 F.3d at 327); *see also Thorn*, 445 F.3d at 322; *Myers*, 624 F.3d at 551; *Sandusky*, 863 F.3d at 466-67.

Based solely on the defendant's merits burden, the Ninth Circuit saddled the defendant with the evidentiary burden of establishing a *lack* of predominance. The court held that it would "assess predominance by analyzing" only "the consent defenses" for which McKesson "has presented supporting evidence" at the class-certification stage. App., *infra*, 16a-17a. In other

words, predominance should be found unless the defendant "produce[s] evidence of a predominance-defeating" defense. App., *infra*, 16a.

That burden-shifting rule was dispositive. Following the settled rule of other circuits, the district court had held that the need for plaintiff-by-plaintiff inquiries to assess a substantial affirmative defense precludes a finding of predominance. App., *infra*, 30a-32a (citing *Gene & Gene*, 541 F.3d at 329); *see Thorn*, 445 F.3d at 316, 321-24; *Gunnells*, 348 F.3d at 438; *Myers*, 624 F.3d at 549-51; *N.J. Carpenters*, 477 F. App'x at 813; *Sandusky*, 863 F.3d at 470.[4] Under the Ninth Circuit's rule, however, the same fact led to the opposite conclusion. App., *infra*, 17a-18a, 20a. That court treated the defendant's failure to conduct those plaintiff-specific inquiries at the certification stage as a failure to "produce evidence of a predominance-defeating" defense. App., *infra*, 16a-18a.

Thus, when it comes to affirmative defenses, the Ninth Circuit finds the predominance requirement satisfied unless the defendant proves otherwise. If the defendant "presented no evidence" at the class-certification stage, the Ninth Circuit "do[es] not consider" whether the affirmative defense presents an individualized issue that predominates. App., *infra*, 16a. And if the defendant does present evidence, that merely

[4] The Ninth Circuit cited the Sixth Circuit's decision in *Sandusky* for the point that defendants may produce evidence of consent "in a variety of ways." App., *infra*, 16a. But it did not justify reaching the opposite outcome from the Sixth Circuit. App., *infra*, 16a-20a.

supports subtracting from the class definition the individual putative plaintiffs identified in that evidence. App., *infra*, 18a-19a. In the absence of "predominance-defeating" evidence from the defendant for the rest of the class, the predominance requirement is deemed satisfied. App., *infra*, 16a-18a, 20a.

II. THE NINTH CIRCUIT'S DECISION IS WRONG

1. The Ninth Circuit's burden-shifting approach violates this Court's categorical rule that it is the "party seeking to maintain a class action" who "'must affirmatively demonstrate his compliance' with Rule 23." *Comcast*, 569 U.S. at 33 (quoting *Wal-Mart*, 564 U.S. at 350). The plaintiffs here should have borne the burdens of production and proof in the class-certification inquiry: "plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)." *Halliburton*, 573 U.S. at 275 (emphasis in original); *see Comcast*, 569 U.S. at 33 (holding that the plaintiff must "satisfy through evidentiary proof at least one of the provisions of Rule 23(b)").

The class-action proponent bears those burdens because "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast*, 569 U.S. at 33 (quoting *Califano*, 442 U.S. at 700-01). As the one who "seeks to change the present state of affairs," that party "naturally should be expected to bear the risk of

failure of proof or persuasion." 2 *McCormick on Evidence* § 337 (7th ed.); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56, 58 (2005).

Nothing in Rule 23's text supports the Ninth Circuit's holding that the predominance analysis changes when the defendant bears the burden on the merits of an issue. Instead, Rule 23(b)(3) refers generally to "questions of law or fact" and "*any* question affecting only individual class members" without regard to the merits burden allocation on those questions. Fed. R. Civ. P. 23(b)(3) (emphasis added). Nor does Rule 23(b)(3) mention the merits burden allocation in its enumerated list of "matters pertinent to" the predominance and superiority inquiries. *Ibid.* And the drafters of Rule 23(b)(3) drew no distinction between questions "of liability and defenses of liability" in explaining how significant questions "affecting the individuals in different ways" can frustrate class treatment. Fed. R. Civ. P. 23(b)(3), advisory committee's note to 1966 amendment.

Rule 23's indifference to the merits burden allocation makes sense because class certification and the merits present distinct inquiries. As this Court has recognized, proof "on the merits" is "not a prerequisite to class certification." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013). Rather, "Rule 23(b)(3) requires a showing that *questions* common to the class predominate," not how "those questions will be answered, on the merits." *Ibid.*; *Thorn*, 445 F.3d at 323 ("[T]he question at this stage in the proceedings is not whether the district court will arrive at the same

conclusion in resolving each class member's accrual issue, but whether it can resolve those issues *in a class-wide manner*." (emphases in original)).

And because class certification and the merits present different inquiries, they require different proof. There is thus no reason to treat their allocations of burden as interchangeable. A plaintiff seeking certification must prove that the predominant issues "are capable of [resolution] on a classwide basis," *Comcast*, 569 U.S. at 34, such as with proof that individual evidence "is generalizable" or that class members "do not vary materially," *Myers*, 624 F.3d at 549. Such proof would not, however, resolve the merits of an affirmative defense. And because both the ultimate issues and forms of proof differ between certification and the merits, pre-certification discovery is unlikely to equip a defendant to prove affirmative defenses for individuals not even before the court. *See* 1 *McLaughlin on Class Actions* § 3:9 (15th ed.) ("Discovery from absent members of the putative class is not the norm.").

The justifications for allocating burdens at each stage are also distinct. The rationale for requiring a plaintiff seeking class certification to prove compliance with Rule 23 applies even when the defendant would bear the merits burden on an issue. The plaintiff's request is no less "an exception to the usual rule" of individual litigation. *Comcast*, 569 U.S. at 33 (citation omitted). By contrast, "the standard justifications for allocating the burden of proving an affirmative defense to the defendant—efficiency and fairness—disappear when the thing to be proved is no longer the merit of

the defense but compliance with Rule 23." *Thorn*, 445 F.3d at 322. "There is no reason to believe that the defendant is any better suited than the named plaintiffs to prove whether an issue is common to the class"—a different issue requiring different proof—"simply because the defendant bears the burden of proving the merits of that issue." *Ibid.*

2. The Ninth Circuit's rule has untenable consequences. A defendant under that rule must show at the class-certification stage whether it has an individualized defense for each putative plaintiff. The rule thus forces defendants and courts to engage in the very types of individualized inquiries that Rule 23 is supposed to preclude. Requiring fact development on the merits of plaintiff-specific defenses also adds undue cost and delay at the certification stage. *See Amgen*, 568 U.S. at 466 (warning against "free-ranging merits inquiries at the certification stage").

And under the Ninth Circuit's rule, the defendant cannot win. Even if the defendant presents proof of its affirmative defense as to a particular class member, that putative plaintiff simply falls out of the class. Here, for example, McKesson provided evidence of individualized consent for 55 fax recipients. App., *infra*, 18a. So the Ninth Circuit denied "class certification under Rule 23(b)(3) *for th[ose] putative class members*." App., *infra*, 18a (emphasis added). But it permitted certification for others, for whom predominance was still presumed. App., *infra*, 20a. With that result, the defendant not only fails to avoid class certification, but also cannot win a judgment binding the

stricken putative plaintiffs, who never become parties to the suit. *See* 1 *McLaughlin on Class Actions* § 4:2 (15th ed.) (warning against so-called "fail-safe class" definitions, under which "either the class members win or, by losing, by definition they are not in the class and thus not bound by the judgment"). Instead of merely ejecting those individuals from the case, the court should have recognized that they were emblematic of a larger predominance problem that made class treatment unwarranted.

Finally, the Ninth Circuit's rule will produce unwieldy merits proceedings melding class and individual litigation. "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart*, 564 U.S. at 367 (citations omitted); *see Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."); *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues.").

McKesson will thus have a right to assert individual consent defenses even if a class is certified. For that reason, "myriad mini-trials cannot be avoided." *Gene & Gene*, 541 F.3d at 329. Serial adjudications on whether particular plaintiffs consented to receiving

faxes would be unworkable and fundamentally inconsistent with class treatment. *Wal-Mart*, 564 U.S. at 350 ("What matters to class certification * * * is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." (citation omitted)).

III. THE QUESTION PRESENTED IS IMPORTANT AND THIS CASE IS AN IDEAL VEHICLE TO ADDRESS IT

1. Whether the burden of proving an affirmative defense affects the predominance inquiry is a recurring issue of substantial importance. The circuit decisions discussed above illustrate both the frequency with which this issue arises and the diversity of its settings. *E.g.*, *Myers*, 624 F.3d at 542, 551 (Fair Labor Standards Act); *Thorn*, 445 F.3d at 316, 321-22 (discrimination claims under 42 U.S.C. §§ 1981 and 1982); *Gunnells*, 348 F.3d at 422, 438 (breaches of contract and fiduciary duties); *N.J. Carpenters*, 477 F. App'x at 813 (Section 11 of the Securities Act of 1933).

As those cases show, courts commonly must analyze predominance when affirmative defenses are at issue. "In most cases predominantly seeking money damages, the inquiry under Rule 23(b)(3) is the keystone of the certification analysis." 1 *McLaughlin on Class Actions* § 5:22 (15th ed.). And "[d]efendants often plead affirmative defenses," making them a "[r]ecurring issue[] in the predominance analysis." 2 *Newberg on Class Actions* § 4:55 (5th ed.).

Such individualized affirmative defenses are common in cases for which class treatment is often sought. For example, "most affirmative defenses in mass torts and product liability cases, such as comparative negligence, reliance, the learned intermediary rule, and the statute of limitations, raise particularized questions." 2 *Business & Commercial Litigation in Federal Courts* § 19:99 (4th ed.). Likewise, affirmative defenses often raise individualized issues in other suits frequently litigated as class actions, such as those involving labor, discrimination, consumer fraud, and securities. *See*, *e.g.*, *Myers*, 624 F.3d at 547-52 (labor); 1 *McLaughlin on Class Actions* § 5:49 (15th ed.) ("The effect of any statute of limitations affirmative defense interposed by defendant frequently is a key inquiry in the predominance analysis in commercial discrimination cases."); *id.* § 5:54 (explaining that in consumer fraud cases, "[n]umerous courts have denied certification where the plaintiff and/or a broad swath of the class may be subject to an affirmative defense based on the voluntary payment doctrine, which raises individual issues about their claims"); *N.J. Carpenters*, 477 F. App'x at 813 (securities); *cf. 2018 Carlton Fields Class Action Survey*, available at https://classaction survey.com/pdf/2018-class-action-survey.pdf (identifying products liability, labor and employment, consumer fraud, and securities as among the most common types of class-action cases).

The question presented also arises frequently just as it did here: in putative class actions under the TCPA. The TCPA, with its promise of statutory

damages, has become a major source of class-action litigation. *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8073 (2015) (Commissioner Pai, dissenting) ("[T]he TCPA has become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014."), *vacated in part*, *ACA Int'l v. FCC*, 885 F.3d 687, 693 (D.C. Cir. 2018); U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl* 3 (Aug. 2017) (finding over 1,000 newly filed TCPA nationwide class actions in a recent 17-month span); *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) (describing "the pervasive nature" of TCPA litigation, which "has blossomed into a national cash cow for plaintiff's attorneys" (quotation marks and citation omitted)); Adonis Hoffman, Commentary, *Sorry, Wrong Number, Now Pay Up*, Wall Street J. (June 15, 2015) ("In the past two years, TCPA lawsuits have extracted large settlements from companies. * * * Plaintiffs' lawyers received an average of $2.4 million.").

As here, "[i]n most cases defendant will oppose certification on the ground that TCPA claims are inherently individual because of the statutory requirement that only 'unsolicited' faxes may give rise to a claim." 1 *McLaughlin on Class Actions* § 2:20 (15th ed.). In these cases, "[t]he question of what suffices for consent is central, and it is likely to vary from recipient to recipient." *Brodsky*, 910 F.3d at 291. Whether the defendant must provide individualized evidence of

consent at class certification is thus critically important to TCPA litigation.

2. This case is an ideal vehicle for resolving the question presented. The burden allocation was outcome-determinative here. The Ninth Circuit agreed that the issue of consent is a predominant issue: because consent predominated, it affirmed the denial of class certification as to a subset of the class. App., *infra*, 18a. It also agreed that consent is an individualized issue when it requires examination of "individual communications and personal relationships between McKesson representatives and their customers." App., *infra*, 18a. The Ninth Circuit's sole disagreement with the district court was its view that McKesson failed to carry its burden of demonstrating its individualized consent defenses for each putative class member. App., *infra*, 17a-18a. On that basis alone, the Ninth Circuit held that predominance was satisfied and reversed the district court's denial of class certification. App., *infra*, 20a.

Although this case arises on an interlocutory appeal, the purely legal question presented has been definitively resolved by the Ninth Circuit. And while other elements of Rule 23 remain before the district court on remand, it has already determined that the court of appeals' finding on the critical issue of predominance was conclusive and not subject to change based on any supplementation of the record. D. Ct. ECF No. 285 at 14:21-24. This Court frequently reviews interlocutory appeals of class certification orders. *See*, *e.g.*, *Halliburton*, 573 U.S. 258; *Amgen*, 568 U.S. 455;

Comcast, 569 U.S. 27; *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011); *Wal-Mart*, 564 U.S. 338. Indeed, an interlocutory appeal is often the only opportunity for appellate review of class-certification issues because "[a]n order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f), advisory committee's note to 1998 amendment; *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). This Court's review is warranted now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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