No. 23-648

In the Supreme Court of the United States

BRINKER INTERNATIONAL, INC.
Petitioner,

v.

ERIC STEINMETZ; MICHAEL FRANKLIN; AND SHENIKA THEUS, ***Individually and on behalf of all others similarly situated, Respondents.***

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Brief of Amici Curiae Restaurant Law Center in Support of Petition for a Writ of Certiorari

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I. AMICI CURIAE'S REQUEST AND STATEMENT OF INTEREST[1]

Amicus Curiae Restaurant Law Center (the Law Center) respectfully submits this Amicus Curiae Brief in support of Petitioner Brinker International, Inc. (Petitioner). The Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. The foodservice industry is a labor-intensive industry comprised of over one million restaurants and other foodservice outlets employing approximately 15.3 million people across the Nation – approximately 10 percent of the United States workforce. Restaurants and other foodservice providers are the Nation's second largest private-sector employers. The restaurant industry is also the most diverse industry in the nation, with 47% of the industry's employees being minorities, compared to 36% across the rest of the economy. Further, 40% of restaurant businesses are primarily owned by minorities, compared to 29% of business across the rest of the United States economy. Supporting these businesses is Amicus's primary purpose.

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[1] Pursuant to Supreme Court Rule 37.6, Amici makes the following disclosure: No counsel for a party to this matter authored any portion of this brief or made a monetary contribution to fund the preparation or submission of this brief. The parties received timely notification of the filing of this brief pursuant to Supreme Court Rule 37.2.

It is well settled that the predominance requirement of Federal Rule of Civil Procedure 23(b)(3) demands that to properly certify a class, questions of individual damage calculations may not overwhelm questions common to the class. Furthermore, any construction of the Federal Rules of Civil Procedure must not run afoul of the Rules Enabling Act. The Law Center's members have learned through experience that class certification can be used as a bludgeon to pressure employers into settlements to avoid highly expensive complex case fees and unnecessary class certification litigation. Even unfounded accusations threaten these businesses with, at worst, their very survival, and at best, tens or hundreds of thousands of dollars in legal fees. Hence, the Law Center and their members have a vital interest in these proceedings.

II. SUMMARY OF ARGUMENT

Federal Rule of Civil Procedure 23(b)(3), like all Federal Rules of Civil Procedure, is controlled by the Rules Enabling Act. Pursuant to the Rules Enabling Act, Rule 23(b)(3) may not "abridge, enlarge, or modify any substantive right." 28 U.S.C.A. § 2072(b). Similarly, court decisions may not interpret the Federal Rules of Civil Procedure in a way that causes a rule to violate the Rules Enabling Act. Here, the Eleventh Circuit interpreted Federal Rule of Civil Procedure 23(b)(3) in way that robs Petitioner of the opportunity to litigate defenses against class

members that it would otherwise have been able to litigate if the cases were instead brought on an individualized basis. The Eleventh Circuit's interpretation thus violates the Rules Enabling Act.

Moreover, the Eleventh Circuit's decision approves a plan to award "average" damage amounts for various categories of purported harms to plaintiffs who concededly did not suffer the corresponding injury, a result that contravenes this Court's prior decisions, and further gives plaintiffs rights they would not enjoy in individual proceedings. Thus, the result both violates the Rules Enabling Act and sets a dangerous precedent for future class litigation, in which employers will be forced to pay damages to purported class members who have likewise suffered no injury. Additionally, the Eleventh Circuit's decision departs from the decisions of its sister circuits, creating a circuit split. It is appropriate for this Court to grant certiorari to settle the newly created split.

Aggregate litigation based on "average" damage amounts being awarded to putative class members who concededly did not suffer any corresponding injury corrupts the class action device and lacks social value. Such class actions are pursued to exert pressure on defendants to settle or risk massive aggregate exposure notwithstanding the realities of and defenses to the individual claims against them. These issues are magnified in the

context of data breaches, where such improper class actions compound the already considerable burdens and costs businesses incur after being hit by cyber criminals. If left undisturbed, the Eleventh Circuit's decision will encourage the filing of additional such improper actions, which already unduly burden the district courts in that Circuit, in the data breach and many other contexts.

For all of the foregoing reasons, this Court should grant a writ of certiorari.

III. ARGUMENT

A. The Eleventh Circuit's Decision Violates the Rules Enabling Act.

The Eleventh Circuit's decision violates the rights of Petitioner and the rights of class members, in contravention of the Rules Enabling Act and due process principles. Federal Rule of Civil Procedure 23(b)(3), like all Federal Rules of Civil Procedure, is controlled by the Rules Enabling Act. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 394 (2010). Pursuant to the Rules Enabling Act, Rule 23(b)(3) may not "abridge, enlarge, or modify any substantive right." 28 U.S.C.A. § 2072(b). It follows then, that a court's interpretation of Rule 23(b)(3) may not cause the Rule to run afoul of the Rules Enabling Act. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 454 (2016) (finding that "use of the class device cannot 'abridge . . . any substantive right.'") (*quoting* 28

U.S.C.A. § 2072(b)). However, the Eleventh Circuit's decision expands the class device to capture purported class members who have suffered no harm and could never recover in individual actions. Further, the decision writes the predominance requirement out of Rule 23(b)(3), eviscerating this Court's longstanding jurisprudence and "reduc[ing] Rule 23(b)(3)'s predominance requirement to a nullity." *Comcast Corp. v. Behrend*, 569 U.S. 27, 36 (2013).

That the Eleventh Circuit's interpretation of Rule 23(b)(3) violates the Rules Enabling Act's circumscription is made plain by the text of the Rule. Rule 23(b)(3) focuses on the important public policy interest that a class only be certified where "a class action is superior to other available methods of fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 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, 700–701 (1979)). Departure from that "usual rule" is only justified where all components of the class certification requirements under Rule 23 are met. *Id.* at 348-349. The Rule 23(b)(3) inquiry necessarily "establishes the superiority of *class* adjudication over *individual* adjudication." *Id.* at 364 (emphasis in original). Indeed, Rule 23(b)(3) secures important procedural safeguards that ensure due process is provided to defendants against which class claims are

brought. *Id.* "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." *Comcast Corp. v. Behrend*, 569 U.S. at 34 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623–624 (1997)).

A class is appropriately certified only by satisfying the demanding standards of the Rule 23(b)(3) predominance inquiry, as required by due process. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. at 364–367. The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. at 623 (*citing* 7A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1777, pp. 518–519 (2d ed. 1986)). Indeed, the predominance inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy." *Id.* Thus, where, as here, the purported injuries to any particular class member are necessarily individualized, the predominance requirement cannot possibly be met. The Eleventh Circuit's solution was to eliminate the requirement altogether in the name of expedience. The court upheld a damages model under which plaintiffs expressly proposed to compensate putative class members with standard "average" dollar amounts for certain categories of purported harm ***"whether or not"*** those people suffered the corresponding injury. Pet. App. 16a, 37a (emphasis added). But if these actions were tried

individually, no person could ever recover for an injury that he or she did not suffer. The Eleventh Circuit's approach thus robs defendants of the important due process protections afforded by the structure of Rule 23. *See Wal-Mart*, 564 U.S. at 363–364. Moreover, this Court in *Comcast* directed all courts, including the Eleventh Circuit, to take a "close look" at the Rule 23(b)(3) criterion. *Comcast*, 569 U.S. at 34. Instead, the Eleventh Circuit discarded that criterion.

Going further, the Eleventh Circuit's decision also does violence to the interests of legitimate class members. By awarding damage averages to classes that include members who have suffered no harm, the court robs members who have suffered harm to pay those who have not. As a mathematical function, the members who have suffered harm have their average damages reduced by the presence of each and every class member who has not suffered harm, enlarging the rights of uninjured plaintiffs. This Court held that very approach to be a Rules Enabling Act violation in *Wal-Mart*. *See Wal-Mart*, 564 U.S. at 367; *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. at 458 (finding that the Rules Enabling Act is violated "by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action"). Thus, the Eleventh Circuit's decision calls out for review by this Court and a writ of certiorari should be granted.

B. This Court has Rejected the Eleventh Circuit's Interpretation.

This Court's decision in *Wal-Mart* rejected the "Trial by Formula" approach permitted by the Eleventh Circuit. *Wal-Mart*, 564 U.S. at 367. The Eleventh Circuit relied on *Tyson Foods* in finding that "[i]n our analysis of a damages methodology based on averages, the focus is on 'whether the sample at issue could have been used to establish liability in an individual action.'" *Green-Cooper v. Brinker International, Inc.*, 73 F.4th 883, 894 (11th Cir. 2023) (quoting *Tyson Foods,* 577 U.S. at 458). However, this Court in *Tyson Foods* cautioned that "[r]representative evidence that is statistically inadequate or based on implausible assumptions" may not be relied upon as evidence of predominance. *Tyson Foods,* 577 U.S. at 459. "[A] model purporting to serve as evidence of damages . . . must measure only those damages attributable to [plaintiff's liability] theory." *Comcast*, 569 U.S. at 35. Any such model must further "establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.*

By definition, a model of averages that would award compensation to uninjured class members is necessarily predicated on inadequate statistical data and implausible assumptions. Moreover, that sampling data of uninjured class members obviously cannot be "used to establish liability in an individual

action" demonstrates inherent flaws in the Eleventh Circuit's decision. *Tyson Foods,* 577 U.S. at 458. This Court has already rejected such flimsy, non-representative sampling data as evidence of predominance in *Wal-Mart*. There, this Court found that using sampling data to find averages and applying those averages across an entire class prevents defendants from litigating its defenses as to individual claims. *Wal-Mart*, 564 U.S. at 367. The same is true here.

For example, in dissent, Judge Branch determined that the expert's damages "methodology fails to tie a damages amount to an injury actually suffered by a plaintiff." *Green-Cooper v. Brinker International, Inc.*, 73 F.4th at 897. That failure makes it impossible for a defendant to mount a defense as to the appropriate amount of damages on an individual basis, as required by due process. Further, as elucidated by Judge Branch, the Eleventh Circuit's decision misreads this Court's *Tyson Foods* decision. In *Tyson Foods*, this Court found that "[t]he Court's holding in the instant case is in accord with *Wal-Mart*." *Tyson Foods,* 577 U.S. at 458. As noted above, the crux of this Court's analysis in *Tyson Foods*, in contrast to *Wal-Mart*, was that the sampling data at issue "could have been used to establish liability in an individual action." *Id.* Indeed, as this Court pointed out in *Tyson Foods*, "[p]etitioner, however, did not raise a challenge to respondents' experts' methodology . . . and as a result, there is no

basis in the record to conclude it was legal error to admit that evidence." *Id.* at 459. Here, the opposite is true. As Judge Branch properly reasoned, the Eleventh Circuit's decision accepted a damages methodology that "impermissibly permits plaintiffs to receive an award based on damages they did not suffer–i.e., an award that a plaintiff could not establish in an individual action." *Green-Cooper*, 73 F.4th at 898. The insufficient representative data should not have been accepted by the Eleventh Circuit as evidence of predominance. "The justifications for using representative evidence that were present in *Tyson Foods* are simply not present here." *Id.* at 899. Moreover, *Tyson Foods* was predicated on the idea that sample data may be appropriate to ascertain predominance where "employers violate their statutory duty to keep records, and employees thereby have no way to establish the time spent doing uncompensated work," *Tyson Foods*, 577 U.S. at 456, which, as Judge Branch explained, is not true here. And this Court was clear that it did not hold representative samples or averages were appropriate substitutes for a Rule 23(b)(3) inquiry. *Id.* at 459–460. Thus, *Tyson Foods* does not support the Eleventh Circuit's decision, and *Wal-Mart* and *Comcast* decidedly reject it.

The Eleventh Circuit's decision circumvents the predominance requirement through the fiction of compensating people for injuries they never even suffered. To ensure precision and uniformity among

the many Circuit Courts of Appeals, this Court should grant a writ of certiorari and reverse the Eleventh Circuit's misguided approach.

C. The Eleventh Circuit Decision Created a Circuit Split.

The other Circuit Courts of Appeals that have examined this question disagree with the Eleventh Circuit's interpretation. Accordingly, the Eleventh Circuit's decision has unnecessarily created a circuit split on this issue. For example, the D.C. Circuit, "in conducting the 'hard look' required by Rule 23," upheld the lower court's rejection of an expert's damages model, holding that, to establish predominance, the class members must "show that they can prove, through common evidence, that all class members were in fact injured." *In re Rail Freight Fuel Surcharge Antitrust Litigation – MDL No. 1869*, 934 F.3d 619, 623–624 (D.C. Cir. 2019) (internal punctuation and citations omitted).

The First Circuit expressly rejected a supposedly representative model that ignored the realities of individual cases. *See In re Asacol Antitrust Litigation*, 907 F.3d 42, 51 (1st Cir. 2018). The court held, in accord with this Court's decision in *Wal-Mart*, that a class cannot be certified by "presuming to do away with the rights a party would customarily have to raise plausible individual challenges" to each individual plaintiff's claim. *Id.* at 51-52.

In *In re Petrobras Securities*, the Second Circuit was faced with a problem like the Eleventh Circuit faced below–the nature of the class members' injuries and damages varied from member to member based on the particular securities they held. *In re Petrobras Securities*, 862 F.3d 250 (2nd Cir. 2017). The court vacated the lower court's class certification where, as here, "the fact-finder would have to look at every class member's transaction documents to determine who did and who did not have a valid claim." *Id.* at 274 (internal punctuation and citations omitted). "The predominance analysis must account for such individual questions, particularly when they go to the viability of each class member's claims." *Id.*

The Third Circuit's analysis in *In re Lamictal Direct Purchaser Antitrust Litigation* importantly recognized that the *Tyson Foods* decision specifically identified a unique factual circumstance justifying its ruling–that this Court allowed the representative evidence of predominance to suffice solely because of inadequate recordkeeping in the FLSA context. *In re Lamictal Direct Purchaser Antitrust Litigation*, 957 F.3d 184, 191 (3rd Cir. 2020). There, the court found that an averages methodology is only acceptable as evidence of predominance where it does not "mask individualized injury." *Id.* at 194. The averages methodology accepted by the Eleventh Circuit below does more than mask, distorting individualized injury by taking damages out of the pockets of injured class

members and distributing them to uninjured class members. That result should not be tolerated.

The Seventh Circuit similarly rejected class certification in case that would require defendants to present individualized consent defenses under the Telephone Consumer Protection Act. *Gorss Motels Inc. v. Brigadoon Fitness, Inc.*, 29 F.4th 839 (7th Cir. 2022). The Eighth Circuit upheld a denial of class certification, noting that cases requiring individualized findings on defenses and liability are "ill-suited for class actions." . *Johannessohn v. Polaris Industries Inc.*, 9 F.4th 981, 985 (8th Cir. 2021). Therefore, the majority of the Circuit Courts of Appeals that have examined the issue of whether the predominance requirement can be satisfied by using classwide averages to avoid individualized inquiries have answered that question in the negative. Because the Eleventh Circuit's decision below created a circuit split, this Court should grant a writ of certiorari.

D. The Eleventh Circuit's Decision Will Significantly Harm Restaurants and Other Businesses Defending Class Actions.

The Eleventh Circuit's decision also fails to adhere to Rule 23's limitations on certification. Rejecting this Court's consistent jurisprudence on that point, the Eleventh Circuit's decision collapses the distinct, separate inquiries of commonality under Rule 23(a)(2) and predominance under Rule 23(b)(3)

into one. Plaintiffs would be free to allege mere violation of a duty without offering any proof of injury and could nonetheless obtain aggregate damages otherwise owed to injured class members. Further, a defendant's right to "present every available defense" would be ephemeral, and its due process rights eviscerated. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

That result injures businesses—including restaurants and other retailers—but lacks any redeeming value in the public policy context. Instead, upholding the Eleventh Circuit's decision has a deleterious effect on the public good, allowing plaintiffs' attorneys to wrongfully extort large sums from defendants whose actions have caused little to no harm. Indeed, harming businesses harms consumers, as unneeded litigation costs increase prices and destroy competition. Those challenges are magnified when the target of spurious litigation are local small businesses. "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"). The overwhelming pressure to settle without "testing of the plaintiffs' case" exponentially increases following class certification. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 296 n.7 (2014) (citation omitted); *see also, In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002) (noting "the stakes [are] so large, that

settlement becomes almost inevitable–and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims."). Of course, local small businesses and restaurants, with slim profit margins, can scarcely afford to settle class claims and stay in business. Where attorneys are incentivized to prosecute actions that will never face legitimate scrutiny, the potential for mischief is significantly magnified.

Such "in terrorem" settlements inherently lack social value. Indeed, class action settlements typically result in immense attorneys' fees awards for class counsel despite minimal recovery for class members. *See, e.g.*, Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 659–60 (2010); John H. Beisner et al., *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441, 1445 (2005) ("[O]ne of the most heavily criticized class action abuses has been the use of class action settlements to generate huge fees for lawyers and little or nothing for the allegedly injured consumers.").

Data breach class actions are particularly susceptible to abuse. A settlement class in a major data breach case can include hundreds of millions of individuals. *See In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-2752, 2020 WL 4212811, at *24 (N.D. Cal. July 22, 2020) (surveying cases). These

settlements can result in "megafunds" and, in turn, millions of dollars in attorneys' fees. *Id.*; *see also, e.g.*, *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1281 (11th Cir. 2021) (affirming attorneys' fee award of $77.5 million). Class counsel benefit from this windfall even though the "size of the settlement fund is largely a function of the size of the settlement class, and 'not entirely attributable to class counsel's skill.'" *In re Yahoo! Inc.*, 2020 WL 4212811, at *24 (approving nearly $23 million in attorneys' fees after reducing award nearly a third).[2] Accordingly, the temptation to include many uninjured plaintiffs in a class is irresistible where the attorney's fees award is inextricably intertwined with the size of the class.

Here, that mischief is highlighted, as the Eleventh Circuit's decision threatens Petitioner with possibly billions of dollars in damages, asserted en masse on behalf of millions of individuals who admittedly could not have suffered the multiple categories of the corresponding injuries for which they will be compensated, but whose claims Petitioner cannot

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[2] See also Nancy R. Thomas et al., *Privacy Litigation 2020 Year in Review Data Breach Litigation*, Morrison & Foerster (Jan. 4, 2021) (in a survey of data breach settlements, finding the extent of litigation and type of data involved did not impact settlement value, even though "[c]ourts have recognized that payment card information is less sensitive than other types of personal data"), https://www.mofo.com/resources/insights/210104-data-breach-litigation- 2020.html.

meaningfully challenge. By discarding the requirements of Rule 23 in this case, the Eleventh Circuit's decision inevitably encourages more "abusive" plaintiffs to file "largely groundless claim[s] . . . simply tak[ing] up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). The writ must issue.

E. Data Breaches Rarely Cause Cognizable Consumer Injury.

While data breaches have imposed substantial costs on companies, they rarely result in concrete injury to individuals. As the Eleventh Circuit itself has recognized, "most breaches have not resulted in detected incidents of identity theft . . . [or] detected incidents of fraud." *Tsao v. Captiva MVP Restaurant Partners, LLC*, 986 F.3d 1332, 1342–43 (11th Cir. 2021) (citation omitted). Payment card information in particular "generally cannot be used alone to open unauthorized new accounts" and does not "raise[] a substantial risk of identity theft." *Id*. at 1343 (citation omitted). Where fraudulent charges do occur, "federal law and card-issuer contracts ordinarily absolve the consumer from any obligation to pay the fraudulent charge." *In re SuperValu, Inc.*, 925 F.3d 955, 964–65 (8th Cir. 2019); *see also Tsao*, 986 F.3d at 1344 (cancelling cards "effectively eliminate[d] the risk of credit card fraud in the future"); *Whalen v. Michaels Stores, Inc.*, 689 F. App'x 89, 90 (2d Cir. 2017)

(plaintiff was not "in any way liable" for alleged fraudulent charges to her account).

Despite the rarity of concrete injury to consumers, data breach class actions have nonetheless become increasingly pervasive because of the windfall they provide to attorneys seeking enormous fees. For example, between May 2021 and the present, nearly one hundred such actions were filed in or removed to district courts in the Eleventh Circuit.[3] Like Plaintiffs here, these plaintiffs seek

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[3] *See*, e.g., *Hernandez, et al. v. Fidelity National Financial Inc., et al.*, No. 24-00019 (M.D. Fla. Jan. 5, 2024); *Jeffries v. Zeroed-In Technologies, LLC*, No. 24-00013 (M.D. Fla. Jan. 4, 2024); *Curry v. Fidelity National Financial, Inc. et al.*, No. 23-01508 (M.D. Fla. Dec. 27, 2023); *Mintz v. Zeroed-in Technologies, LLC*, No. 23-01137 (M.D. Fla. Dec. 5, 2023); *DiPierro et al. v. Florida Health Sciences Center, Inc.*, No. 23-01864 (M.D. Fla. Aug. 17, 2023); *In re: Accreditation Commission for Education in Nursing Data Breach Litigation*, No. 23-03337 (N.D. Ga. Jul. 27, 2023); *Crowe v. Managed Care of North America, Inc.*, No. 23-61065 (S.D. Fla. June 5, 2023); *Skurauskis et al. v. NationsBenefits Holdings, LLC, et al.*, No. 23-60830 (S.D. Fla. May 4, 2023); *Kolstedt, et al. v. TMX Finance Corporate Services, Inc.*, No. 23-00076 (S.D. Ga. March 31, 2023); *In Re: Overby-Seawell Company Customer Data Security Breach Litigation,* No. 23-03056 (N.D. Ga. Feb. 1, 2023); West v. Overby-Seawell Co. et al., No. 22-03858 (N.D. Ga. Sep. 26, 2022); *Sheckard v. Overby-Seawell Company et al.*, No. 22-03708 (N.D. Ga. Sep. 14, 2022); *Sherwood v. Horizon Actuarial Services*, LLC, No. 22-01495 (N.D. Ga. Apr. 19, 2022); *Morrill v. Lakeview Loan Servicing , LLC* , No. 22-20955 (S.D. Fla. March 29, 2022); *Mullen v. Syniverse Corp.*, No. 21-2363 (M.D. Fla. Oct. 7, 2021); *Baron v. Syniverse Corp.*, No. 21-2349 (M.D. Fla. Oct. 5, 2021); *Weaver v. ParkMobile, LLC*, No. 21-4112 (N.D. Ga., transferred Oct. 5, 2021); *Harrington v. Elekta, Inc.*, No. 21-3997 (N.D. Ga. Sept. 28, 2021); *Phillips v. Coastal Family*

redress for time and money spent mitigating the "increased risk of identity theft" following a data breach. *E.g.*, Compl. ¶ 6, Travieso, No. 21-2496 (N.D. Ga. June 18, 2021). Some plaintiffs even acknowledge that "fraudulent activity resulting from the Data Breach may not come to light for years." Compl. ¶ 44, Mullen, No. 21-2363 (M.D. Fla. Oct. 7, 2021). Nonetheless, these plaintiffs purport to represent millions of class members and seek millions of dollars in damages even though any conceivable harm is inherently individualized and rare. The Eleventh Circuit's decision below opens the floodgates, allowing plaintiffs to present spurious evidence predicated on flimsy statistical models to certify classes replete with uninjured class members. That result is precisely what the "hard look" required by Rule 23 was designed to prevent.

Health Ctr., No. 21-0404 (S.D. Ala. Sept. 20, 2021); *Tracy v. Elekta, Inc.*, No. 21-2851 (N.D. Ga. July 16, 2021); *Hoffman-Mock v. 20/20 Eye Care Network, Inc.*, No. 21-61406 (S.D. Fla. July 8, 2021); *Kurmangaliyev v. ParkMobile, LLC*, No. 21-2745 (N.D. Ga. July 8, 2021); *Fraguada v. 20/20 Eye Care Network, Inc.*, No. 21-61302 (S.D. Fla. June 23, 2021); *Hayes v. Automation Pers. Servs. Inc.*, No. 21-0859 (N.D. Ala. June 23, 2021); *Bowen v. 20/20 Eye Care Network, Inc.*, No. 21-61292 (S.D. Fla. June 22, 2021); *Desue v. 20/20 Eye Care Network, Inc.*, No. 21-61275 (S.D. Fla. June 21, 2021); *Travieso v. ParkMobile, LLC*, No. 21-2496 (N.D. Ga. June 18, 2021); *Nielsen v. MEDNAX, Inc.*, No. 21-61233 (S.D. Fla. transferred June 14, 2021); *A.W. v. Pediatrix Med. Grp. of Kan., P.C.*, No. 21-61181 (S.D. Fla.,transferred June 7, 2021); *George v. ParkMobile, LLC*, No. 21-2252 (N.D. Ga. June 1, 2021); *Baker v. ParkMobile, LLC*, No. 21-2182 (N.D. Ga. May 25, 2021), to name a few.

Flooding the courts with such class actions burdens the judiciary, and harms businesses, their employees, and the consumers they serve. These cases create enormous risks of aggregate exposure for businesses and deprive them of a meaningful opportunity to raise defenses. Adherence to the fundamental safeguards embedded in Rule 23 is not only mandated by controlling precedent, but also necessary to ensure fundamental fairness to class action defendants, including restaurants and retailers, in this case and all others. At the heart of Rule 23 is the indispensable principle of due process. Rule 23, in accordance with the Rules Enabling Act, is a framework constructed to ensure that in the class context, the rights of plaintiffs and the rights of defendants are protected just as they would be in an individual action. Thus, the Eleventh Circuit's decision below cannot stand.

IV. CONCLUSION

For all of the reasons discussed in Brinker International, Inc.'s Petition for Writ of Certiorari and above, Amicus respectfully requests that the Court grant the petition.

Respectfully submitted,

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