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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in holding that individualized damages issues did not predominate over common issues in this case for purposes of certifying a class action under Federal Rule of Civil Procedure 23(b)(3) where (1) all class members had their credit or debit card information stolen and disseminated during a single data breach incident and (2) an expert identified four categories of resulting injuries and presented reliable class-wide methodologies for estimating the damages incurred within each category by each class member who experienced the corresponding injury.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules

INTRODUCTION

Respondent Shenika Theus is among a group of consumers whose credit and debit card information was stolen during a data breach incident. Theus, along with other affected consumers, brought a class-action lawsuit against petitioner Brinker International, Inc. (Brinker) for its role in the incident. The district court certified a nationwide class pursuant to Federal Rule of Civil Procedure 23(b)(3), holding among other things that issues common to the class predominated over individualized damages issues. In so holding, the district court relied on expert testimony that (1) identified four categories of damages that class members may have incurred as a result of the breach and (2) proposed calculating plaintiff-specific damages within each category by drawing in part on estimates of the average amounts of damages incurred.

On appeal pursuant to Federal Rule of Civil Procedure 23(f), the Eleventh Circuit vacated in part the certification order and remanded to the district court. The court of appeals directed the district court to further consider how the process of identifying uninjured class members so that they could be excluded from recovery would bear on predominance. The court of appeals agreed with the district court, however, that the methodology proposed by Theus's expert adequately established that determining the *amount* of damages that each injured class member had incurred would not defeat predominance, even though the methodology did not altogether eliminate the need for individual damages inquiries.

That holding does not warrant review. Brinker's question presented mischaracterizes the decision below as holding that class members may be

compensated for injuries "even if they did not suffer those injuries at all." Pet. i. In fact, the court of appeals held the opposite, emphasizing that Theus's proposed damages methodology—if adopted by a jury—would *not* "giv[e] class members an award for an injury they could not otherwise prove in an individual action." Pet. App. 17a. The decision below has thus already answered the question presented favorably to Brinker, making review unnecessary.

Brinker's actual gripe is not with the court of appeals' answer to the question presented but rather with how the decision below applied accepted legal principles to the facts of this case. Such case-specific matters do not warrant review. Moreover, the Eleventh Circuit's analysis finds firm support in this Court's precedent and in opinions from other courts of appeals. In *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), for example, this Court held that averages-based evidence can be permissible for establishing *liability* in a class action, provided that "each class member could have relied on that [evidence] to establish liability if he or she had brought an individual action," *id.* at 455. And although the Eleventh Circuit here accepted that some individualized damages inquiries would remain necessary even under the proposed averages-based approach, the courts of appeals agree that the need for such inquiries typically does not defeat predominance.

In any event, this Court's review of case-specific damages issues is doubly unwarranted here because ongoing proceedings in the district court could substantially affect the resolution of those issues. As this case comes to the Court, the court of appeals has vacated the district court's class-certification order and ordered the district court to conduct a new pre-

dominance analysis, potentially using a new class definition. The parties have since submitted supplemental briefing in the district court addressing the predominance issues raised by the Eleventh Circuit. Until the district court has performed the holistic predominance assessment in line with the Eleventh Circuit's instructions, the role that damages issues will play in that analysis remains uncertain.

STATEMENT

District court proceedings

1. In March and April 2018, Brinker, the owner of the Chili's restaurant chain, experienced a cyberattack during which hackers broke into its computer systems through a vulnerability that Brinker had previously identified but failed to correct. Pet. App. 2a, 32a. The hackers stole the information for up to 4.5 million credit and debit cards belonging to Chili's customers, along with other personal data that was linked to individual Chili's customers. *Id.* at 2a, 32a. The hackers then disseminated the stolen material—including information for all 4.5 million payment cards—by publishing it on Joker's Stash, an online marketplace for stolen payment data. *Id.* at 2a–3a.

Among the individuals affected by the cyberattack was respondent Shenika Theus, a customer who made a card payment at a Texas Chili's during the relevant period. *Id.* at 3a. Following the payment, Theus experienced five unauthorized charges on her card and ended up cancelling her card as a result. *Id.*

2. In response to the data breach, Theus, along with other Chili's customers whose claims have since been dismissed, initiated lawsuits against Brinker that were ultimately consolidated in this putative class action. *See* Pet. App. 10a, 33a. Among other

things, the operative complaint sought compensatory damages on behalf of "[a]ll persons residing in the United States who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach," on the grounds that Brinker negligently failed to safeguard customer information. *Id.* at 4a; *see id.* at 32a.

In August 2020, Theus moved pursuant to Federal Rule of Civil Procedure 23(b)(3) for certification of the nationwide damages class described in the operative complaint.[1] *See id.* at 34a. As part of her efforts to demonstrate that the class satisfied Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members," Theus submitted expert declarations from Daniel J. Korczyk, a Certified Public Accountant and Senior Managing Director of a financial advisory services firm. D. Ct. Dkt. No. 132-1 (Korczyk Decl.) ¶¶ 1–2; *see also* D. Ct. Dkt. No. 152-5 (Rebuttal Decl.). In the declarations, Korczyk sought to "show that a common *method* of calculating class members' damages exists for purposes of predominance," Pet. App. 34a (emphasis added), albeit without "go[ing] so far" at that stage "as to perform an actual damages *calculation* that could be expressed as a final conclusion," Korczyk Decl. ¶ 8 n.5 (emphasis added). In particular, Korczyk identified four "[p]rimary damages elements" and

[1] Theus also moved for certification of a California statewide class. Pet. App. 4a. The district court initially granted that motion, *id.* at 64a, but the court of appeals has since dismissed the claims of the putative statewide class representative and instructed the district court to "determine the viability of the California class afresh" in light of this development, *id.* at 15a. Accordingly, only the nationwide class is presently at issue.

described "means or method[s] by which to measure each of the Damage Elements on a class-wide basis" while nonetheless retaining the "flexibility … to allow for Plaintiff-specific" circumstances. *Id.* ¶¶ 17–18.

The first element that Korczyk identified was "the value of cardholder card and personal data that was stolen." *Id.* ¶ 18. As Korczyk explained, damages with respect to this element could be approximated by deriving a single "per card" value from "market-based pricing data" and assigning that fixed value to every compromised card. *Id.* This method would be proper, Korczyk noted, because "the data exposed was largely uniform," meaning that any "variations in value" among the class members' card information "would be reasonably constrained." Rebuttal Decl. ¶ 15.

Korczyk's second damages element was "the value of cardholder time spent dealing with consequences of the Breach." Korczyk Decl. ¶ 18. Korczyk explained that this element could be measured by determining a uniform hourly rate based on "the rate one would have to pay a specialist" to perform the tasks needed to address the breach, *id.* ¶ 34, such that "calculating individual damages" would "just be a matter of mechanically applying [that] rate to the number of hours expended by the class member," *id.* ¶ 39. This use of a "consistent" hourly rate "for all class members" who spent time responding to the breach was reasonable, Korczyk concluded, because "the tasks class members [were] forced to perform after the Data Breach [were] similar." Rebuttal Decl. ¶ 26.

Korczyk's third damages element was "the value of lost cardholder reward points" that cardholders missed the opportunity to accrue during the time their compromised cards were being replaced. Korczyk

Decl. ¶ 18. These damages, Korczyk explained, could be calculated based on "market information related to the value of points earned per day and average days cards remain unusable following a payment card cancellation." *Id.* According to Korczyk's preliminary calculations, "those persons holding a rewards card" suffered around $3.21 in lost-rewards damages, which Korczyk calculated by multiplying an average daily "lost amount of reward" in the amount of $0.458 by the "standard timeframe" of seven days that it takes to receive a replacement card. *Id.* ¶ 44. Korczyk further noted that assigning a uniform measure of damages to all rewards cardholders for this element was proper notwithstanding the "different types of rewards cards and cardholders' [unique] spending habits" because "the value of the lost rewards points do not vary significantly when measured over the short period of time in which an individual would be without the card and awaiting a replacement." Rebuttal Decl. ¶ 20.

Korczyk acknowledged the likelihood that not all class members held rewards cards. Korczyk Decl. ¶ 44. He noted, though, that "[e]ven if" the court chose to assign lost-rewards damages to all class members irrespective of whether they held a rewards card, "factor[ing] down" the damages figure "to compute an average" across the entire class would not meaningfully change the amount of lost-rewards damages due to each rewards cardholder, bringing that amount down less than 80 cents, from $3.21 to $2.44. *Id.* And this $2.44 figure, Korczyk went on, would be a proper award for purposes of the lost-rewards damages element "even for class members whose breached card was not a rewards card" because "the loss of use of their preferred card" was "reasonably compensable" at approximately that same figure. Rebuttal Decl. ¶ 21.

Korczyk also addressed Brinker's argument that not all class members suffered lost-rewards damages because not all compromised cards were necessarily cancelled. As Korczyk explained, there was "sound basis for treating [all] the breached cards as cancelled" because "Brinker informed both cardholders and the payment card brands of the data breach," *id.* ¶ 19, and even if cardholders themselves failed to cancel their cards, "Card-Issuing Financial Institutions, without exception, … work diligently to remove data breach compromised cards from circulation," *id.* ¶ 41.

Korczyk's final damages element consisted of any "miscellaneous out-of-pocket costs incurred by cardholders to deal with the consequences of the Breach." Korczyk Decl. ¶ 18. Drawing on "independent and supportable market data," Korczyk calculated "the average out-of-pocket costs" that a cardholder incurs in dealing with a data breach and suggested that this average amount could be awarded to "applicable cardholders," *i.e.*, to those who actually "incurred out-of-pocket costs." *Id.* ¶¶ 18, 47.

Brinker moved to exclude Korczyk's testimony and opposed Theus's motion for class certification. Pet. App. 34a. As relevant here, Brinker argued that Korczyk failed to present a reliable methodology for calculating damages on a class-wide basis and that class certification would accordingly be inconsistent with Rule 23(b)(3)'s requirements because plaintiff-specific damages calculations would predominate over the case's common issues.

3. The district court denied Brinker's motion to exclude Korczyk's testimony and granted Theus's motion for class certification, albeit with some clarifications to the class definition.

As to the admissibility of Korczyk's testimony, the court found that the testimony was helpful in "provid-[ing] a starting point to decide damages." Pet. App. 36a. Emphasizing that the testimony was "offered to show that a reliable damages calculation methodology exists, not to calculate class members' damages," the district court held that Korczyk's methodology was "sufficiently supported by data, reliable, and reliably applied" for purposes of the "class certification stage." *Id.* at 37a. Although Brinker challenged Korczyk's approach insofar as it relied on "an averages method to compute damages," the court explained that this Court in *Tyson Foods* "approved the use of averages methods" and that such a method would be appropriate here because any difference between class members' actual damages would likely be "minimal." *Id.*

Turning to the motion for class certification, the court first addressed Brinker's concern that the proposed class definition was "overbroad because it include[d] possibly many uninjured class members." *Id.* at 43a. The court concluded that "a simple modification to the class definition" would "remed[y]" any concern and "prevent [associated] predominance issues." *Id.* at 43a–44a. Specifically, the court "narrowed" the class definition by "clarif[ying]" that it included only those individuals whose data had been "accessed by cybercriminals" and who "incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach." *Id.* at 44a. These "clarifiers," the court explained, served to "avoid later predominance issues regarding standing and the inclusion of uninjured individuals" in the class. *Id.*

After holding that the proposed class, as narrowed, satisfied Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy, *id.* at 47a–

51a, the court turned to Brinker's argument that the class did not satisfy Rule 23(b)(3)'s predominance requirement due to a degree of variation in class members' individual damages. Beginning with the principle that "individual issues of damages typically do not defeat predominance," the court concluded that this case is not one of those "extreme cases in which computation of each individual's damages will be so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable." *Id.* at 58a (second quoting *Klay v. Humana, Inc.*, 382 F.3d 1241, 1260 (11th Cir. 2004)). As the court explained, Korczyk offered "a common method of calculating damages" that would allow the court to "determine individual class members' damages in a non-complex and non-burdensome way." *Id.* at 59a. While the court acknowledged that Korczyk's findings "likely would be heavily debated on cross-examination and may be discredited by a jury," the court was sufficiently convinced "[a]t this stage" that damages would "not require significant individualized proof such that individual questions predominate over common ones." *Id.* at 60a. The court emphasized, though, that it "ha[d] the option to decertify the class" if it "bec[ame] obvious at any time that the calculation of damages … [would] be overly burdensome or individualized." *Id.*

Court of appeals proceedings

Brinker petitioned the Eleventh Circuit pursuant to Rule 23(f) for permission to take an interlocutory appeal of the district court's class-certification order. The Eleventh Circuit granted the petition, Pet. App. 68a–69a, vacated the district court's order in part, and remanded for further proceedings, *see id.* at 18a.

The court of appeals first determined that Theus had suffered a legally cognizable injury and had Article III standing to pursue her negligence claim. *Id.* at 8a–10a, 10a n.10. But the court raised concerns about the district court's reasons for holding that individualized issues of injury and standing would not predominate over common issues for purposes of class certification. As the court of appeals emphasized, the district court had taken the view that certain clarifications to the class definition "avoid[ed] later predominance issues regarding standing and the inclusion of uninjured individuals because now individuals are not in the class unless they have had their data 'misused' … either through experiencing fraudulent charges or it being posted on the dark web." *Id.* at 13a (quoting Pet. App. 44a–45a). The court pointed out, however, that one of the clarifications that the district court had made to the class definition—specifically, that class members' data must have been "accessed by cybercriminals"—was "broader than the two delineated categories" of cases involving "fraudulent charges or posting of credit card information on the dark web." *Id.* at 14a. Accordingly, the court of appeals concluded that it would be "wise to remand this case to give the District Court the opportunity to clarify its predominance finding," either by "refin[ing] the class definition[] to only include th[e] two [delineated] categories and then conduct[ing] a more thorough predominance analysis" or by "conduct[ing] a predominance analysis anew under Rule 23 with the existing class definition[]." *Id.*

Having determined that remand was appropriate, the court of appeals went on to briefly reject Brinker's argument that "individualized damages claims will predominate over the issues common to the class

under Rule 23(b)(3)." *Id.* at 15a. The court of appeals, like the district court, began with the established principle that "the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate." *Id.* (quoting *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003)). And, again like the district court, the court of appeals emphasized that "[a]t the class certification stage, all that [Theus] had to prove was that a reliable damages methodology existed, not the actual damages … sustained." *Id.* at 16a. The court then held that the district court did not abuse its discretion in holding that Korczyk's testimony sufficed to make the requisite showing. *Id.* at 17a–18a. Commending "the District Court's rigorous analysis," the court of appeals explained that "a damages methodology based on averages" was appropriate here because "each Chili's customer fitting within the class definitions experienced a similar injury of a compromised card combined with some effort to mitigate the harm caused by the compromise" and because Korczyk had testified that "the 'delta between class members' damages is minimal.'" *Id.* at 17a. The court acknowledged that "individual inquiry into particularized damages" would remain necessary and that "it would be a 'matter for the jury' to decide actual damages at trial." *Id.* (quoting *Tyson Foods*, 577 U.S. at 459). But the court held that the district court had acted within its discretion in holding that these considerations did not foreclose a finding of predominance.

Judge Branch concurred in part and dissented in part. She agreed with the majority that Theus had Article III standing. *Id.* at 19a. But she would have held that the district court abused its discretion in

relying on Korczyk's damages methodology to support its conclusion on predominance. *Id.* at 30a.

Brinker petitioned for rehearing and rehearing en banc. *Id.* at 67a. The Eleventh Circuit denied the petitions with no judge calling for a vote. *Id.*

REASONS FOR DENYING THE WRIT

I. The decision below does not present the question that Brinker asks this Court to resolve.

Brinker urges this Court to grant review to decide whether "a class can be certified by ignoring individualized issues of damages and injury and instead proposing to award every class member the same 'average' amount for alleged injuries even if they did not suffer those injuries at all." Pet. i. Neither the district court nor the court of appeals, however, foreclosed the possibility of individualized proceedings to address plaintiff-specific damages. Despite finding Rule 23(b)(3) predominance satisfied because "damages [would] not require *significant* individualized proof," Pet. App. 60a (emphasis added), the district court expressly recognized that "some individual proof may be required to establish causation and damages," *id.* at 62a; *see also id.* at 50a (acknowledging that "the amount of damages" will differ among class members). And the Eleventh Circuit similarly anticipated a degree of "individual inquiry into particularized damages." *Id.* at 17a. This case, then, presents no occasion to decide whether a court may "ignor[e] individualized issues of damages" and "award every class member the same 'average' amount." Pet. i.

Arguing to the contrary, Brinker points repeatedly to a quotation from the district court opinion that paraphrases *Brinker's own* imprecise characterization

of Korczyk's methodology. Citing Brinker's brief in opposition to class certification, the district court described Korczyk as proposing to award "all class members … a standard dollar amount for lost opportunities to accrue rewards points (whether or not they used a rewards card), the value of cardholder time (whether or not they spent any time addressing the breach), and out-of-pocket damages (whether or not they incurred any out-of-pocket damages)." Pet. App. 37a; *see also id.* at 16a (court of appeals decision quoting this passage from the district court's opinion). Brinker returns to this language throughout its petition. *See, e.g.*, Pet. i, 2, 4, 7, 8, 9, 10, 13, 26. But this isolated quotation—which, again, derives from Brinker's own briefing—does not accurately describe the methodology that the district court approved.

Rather than proposing that the court award each class member "a standard dollar amount," Korczyk identified four categories of damages and explained the "Plaintiff-specific input[s]" that would be needed to calculate individual damages within each category. Korczyk Decl. ¶ 17. First, a plaintiff's recovery for "the value of cardholder card and personal data that was stolen" would vary based on how many of that plaintiff's cards were compromised. *Id.* ¶ 18. Second, a plaintiff's recovery for "the value of cardholder time spent dealing with consequences of the Breach," *id.*, would vary based on "the number of hours expended by the class member," *id.* ¶ 39. Third, although Korczyk proposed using a fixed value for lost cardholder rewards points, he proposed awarding this amount to only "those persons holding a rewards card." *Id.* ¶ 44. Korczyk also calculated and justified an alternative figure that could be used "[e]ven if" the court chose to award lost-rewards damages to all class

members and not just rewards cardholders, but he did not opine on whether the court *should* use this figure. *Id.*; *see* Rebuttal Decl. ¶ 21 (explaining why the alternative figure would "reasonably compensa[te]" class members for "the loss of use of [a] preferred card" even if that card was not a rewards card). Fourth, while Korczyk calculated a fixed amount for out-of-pocket expenses, he proposed awarding this figure to only those class members who "attest[ed]" to having actually "incurred [such] expenses." Korczyk Decl. ¶ 47.

Contrary to Brinker's representations, the district court did not approve a damages methodology that would award "the same 'standard dollar amount' … to every class member 'whether or not' that class member even suffered the corresponding injury." Pet. i (formatting omitted). Theus disclaimed any such understanding of Korczyk's methodology before the court of appeals. *See* Appellees' Br. (11th Cir. Jan. 6, 2022) at 44–45. And as explained above, both the district court and the court of appeals recognized that Korczyk's methodology did not eliminate the need for individual damages inquiries. This case thus does not present the question on which Brinker seeks review.

II. The decision below is consistent with the decisions of this Court and the courts of appeals.

A. The decision below faithfully applies this Court's precedents to a case-specific evidentiary record.

1. Brinker claims that the decision below conflicts with decisions from this Court that foreclose a court, "[c]lass action or not," from "order[ing] [a defendant] to compensate a plaintiff for an injury that the plaintiff did not in fact suffer." Pet. 13. As explained

above in Part I, Brinker's argument rests on a mischaracterization of Korczyk's methodology.

Moreover, Brinker overlooks that no court has yet adopted any theory of damages in this case, let alone calculated a damages award or ordered Brinker to compensate any plaintiff. To the contrary, the Eleventh Circuit expressly acknowledged that it remains "a 'matter for the jury' to decide actual damages at trial." Pet. App. 17a (quoting *Tyson Foods*, 577 U.S. at 459).

In addition, far from suggesting that it would be proper for a jury to award damages that are incommensurate with a class member's injury, the court of appeals held exactly the opposite: It held that the district court did not abuse its discretion in finding Korczyk's methodology "sufficient" to support predominance "at the class certification stage" precisely because that methodology would *not* "giv[e] class members an award for an injury they could not otherwise prove in an individual action." *Id.* To be sure, Brinker disputes the Eleventh Circuit's conclusion on this point. *See* Pet. 15 (claiming that the court of appeals "blindly accepted" Korczyk's testimony that "class members suffered similar types and amounts of damages"). But a case-specific claim that the court of appeals erred in assessing the evidence does not merit review. *See* S. Ct. R. 10.

2. Brinker also falls short insofar as it seeks review of the district court's determination, upheld by the Eleventh Circuit, that a jury may permissibly elect to use a damages methodology "based on averages" to calculate a compensatory award in this case. Pet. 14 (quoting Pet. App. 17a). That determination, after all, follows directly from *Tyson Foods*. There, this Court

declined to "establish general rules governing the use of statistical evidence … in all class-action cases," and held that such evidence can in some cases be used to "establish classwide liability," depending on "the purpose for which the evidence is being introduced." 577 U.S. at 455. Applying this principle, *Tyson Foods* held that an "otherwise admissible" study regarding the average time workers spent performing certain job duties could be "sufficient to sustain a jury finding as to [the] hours" an individual worker spent on those duties and so could similarly form a permissible evidentiary basis for identifying which members of a Rule 23(b)(3) class were entitled to monetary relief for working uncompensated overtime. *Id.* at 459–60. Although "[r]easonable minds" might have "differ[ed]" on the question whether the study was "probative as to the time actually worked by each employee," this Court emphasized that the "persuasiveness" of the evidence was "a matter for the jury." *Id.* at 459.

Like the plaintiffs in *Tyson Foods*, Theus introduced expert evidence that was sufficiently reliable to be admissible.[2] As in *Tyson Foods*, that evidence suggests that average values drawn from representative samples can support inferences about plaintiff-specific matters—here, the measure of a plaintiff's damages, and in *Tyson Foods*, the amount

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[2] Brinker maligns Korczyk's testimony as supposedly relying on "unverified, non-peer-reviewed internet sources" rather than "actual evidence regarding the Brinker data incident," Pet. 12–13, despite Korczyk's express caveat that his testimony was "not intended to represent an actual computation of damages, but rather a description of the methodology for such computation," Korczyk Decl. ¶ 17. Brinker, however, has not challenged the district court's holding that Korczyk's testimony met the reliability standards that govern admission of expert evidence.

of time a plaintiff spent on certain job duties. And as in *Tyson Foods*, a jury would be able to consider an argument that it should reject those inferences with respect to the class or with respect to a given plaintiff.

Brinker contends that the decision below "wrongly interpreted *Tyson Foods*," Pet. 13, emphasizing that, under *Tyson Foods*, "representative evidence in a class action is permissible *only* if that evidence 'could have been used to establish liability in an individual [case],' *and* its use would 'not deprive [the defendant] of its ability to litigate individual defenses,'" *id.* at 14 (alterations in original; quoting *Tyson Foods*, 577 U.S. at 457–58). The court of appeals, however, acknowledged precisely these points. *See* Pet. App. 17a ("In 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.'" (quoting *Tyson Foods*, 577 U.S. at 458)); *see id.* (observing that a damages methodology may not "enlarg[e] the class members' substantive rights" against the defendant (quoting *Tyson Foods*, 577 U.S. at 458)). Here too, then, Brinker challenges what it takes to be the "misapplication of a properly stated rule of law," which is the sort of asserted error that only "rarely" warrants review. S. Ct. R. 10. And here too, Brinker's claim of error rests on its erroneous contention that the decision below authorizes "an individual plaintiff who concededly did not suffer a particular injury" to be "compensated for that injury." Pet. 14 (formatting omitted). Again, this contention distorts Korczyk's testimony and the holding below.

3. Unable to identify a conflict between the decision below and the *Tyson Foods* decision on which the court of appeals relied, Brinker claims that the Eleventh Circuit's opinion conflicts with this Court's

decisions in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). These cases, too, are fully consistent with the decision below.

Wal-Mart did not address Rule 23(b)(3) predominance and in fact did not even involve a Rule 23(b)(3) class. *See* 564 U.S. at 345–46, 346 n.2. Rather, *Wal-Mart* addressed certification under Rule 23(b)(2), which, unlike Rule 23(b)(3), "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id.* at 360–61; *see id.* at 362 ("[W]e think it clear that individualized monetary claims belong in Rule 23(b)(3)."). In that context, this Court rejected a proposed averages-based method for calculating class-wide damages as inconsistent with Rule 23(b)(2) because the defendant would nonetheless be entitled to demand "individualized proceedings" to "litigate its statutory defenses to individual claims." *Id.* at 367. *Wal-Mart*, in other words, nowhere opined on whether Rule 23(b)(3), in contrast to Rule 23(b)(2), permits certification where a defendant might choose to invoke individual considerations at the damages stage.

Furthermore, the courts of appeals are in agreement with the decision below that "the presence of individualized damages issues does not prevent a finding" of Rule 23(b)(3) predominance. Pet. App. 15a (quoting *Allapattah Servs.*, 333 F.3d at 1261); *see, e.g.*, *Naylor Farms, Inc. v. Chaparral Energy, LLC*, 923 F.3d 779, 789 (10th Cir. 2019) ("[A] plaintiff can satisfy Rule 23(b)(3) … even if there remain individual issues, such as damages, that must be tried separately."); *Ibe v. Jones*, 836 F.3d 516, 529 (5th Cir. 2016) ("Generally, individualized damages calculations will not preclude a finding of predominance.");

Roach v. T.L. Cannon Corp., 778 F.3d 401, 408 (2d Cir. 2015) (noting that this Court has "not foreclose[d] the possibility of class certification under Rule 23(b)(3) in cases involving individualized damages calculations"); *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010) ("[T]he amount of damages is invariably an individual question and does not defeat class action treatment." (citation omitted)).

The decision below likewise is consistent with *Comcast*. There, a class of cable-television subscribers alleged that their cable provider had engaged in anticompetitive conduct that caused prices to rise for four distinct reasons. 569 U.S. at 29–31. The district court held that only one of the subscribers' four theories of antitrust impact was capable of class-wide proof, but it based its ultimate finding of Rule 23(b)(3) predominance on a proposed damages methodology that "did not isolate damages resulting from [that] theory of antitrust impact." *Id.* at 31–32; *see id.* at 36 (noting that the methodology "assumed the validity of all four theories of antitrust impact initially advanced" by the subscribers). This Court held that certification was improper under these circumstances because "any model supporting a plaintiff's damages case must be consistent with its liability case." *Id.* at 35 (internal quotation marks and citation omitted).

Here, in contrast to *Comcast*, the proposed damages model isolated four distinct categories of injury and proposed a methodology that would allow a factfinder to separately calculate the measure of damages attributable to each category. Indeed, far from departing from *Comcast*, the decision below expressly applied its requirement that a damages model must "measure[] only those damages attributable to [a plaintiff's] theory." Pet. App. 16a (quoting

Comcast, 569 U.S. at 35). Brinker's disagreement with the Eleventh Circuit's application of this correctly stated rule of law to the facts of this case is not a reason to grant review.

B. The decision below is not in conflict with other appellate decisions.

Brinker claims that the decision below conflicts with the holdings of "eight other circuits." Pet. 18. Rather than identifying a discrete legal question that has drawn diverging conclusions in the courts of appeals, Brinker contends vaguely that precedents in other circuits "would have required Korczyk's model to be rejected." *Id.* Each case that Brinker cites, though, addresses case-specific circumstances that differ materially from the circumstances here.

Brinker first points (at 18–19) to *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018), in which the First Circuit reversed a district court's certification of an antitrust class containing "apparently thousands" of uninjured members, *id.* at 53. After holding that the plaintiffs had not proposed a suitable method for sifting injured from uninjured class members, *id.* at 52–54, the court of appeals rejected a proposed workaround that would have distributed a "total aggregate damages award" among all class members, injured and uninjured alike, *id.* at 55. As the First Circuit observed, this workaround would violate the principle that "class actions are the aggregation of individual claims, and do not create a class entity or re-apportion substantive claims." *Id.* at 56.

Here, in contrast, there is no proposal to compensate uninjured class members. Indeed, proceedings are ongoing in the district court to address the class definition and whether any uninjured members can be

identified and excluded from recovery without defeating Rule 23(b)(3) predominance. *See* Pet. App. 14a–15a, 14a n.13 (court of appeals remanding for the district court to consider these issues). *Asacol* has no relevance to the Eleventh Circuit's discussion of how damages can potentially be calculated for those class members who *have* been found to have suffered an injury.

Brinker's reliance (at 19) on the Third Circuit's decision in *In re Lamictal Direct Purchaser Antitrust Litigation*, 957 F.3d 184 (3d Cir. 2020), is misplaced for the same reason. In *Lamictal*, a district court had certified an antitrust class with a potentially large number of uninjured plaintiffs. 957 F.3d at 192 (referring to evidence that "up to one-third of the entire class" was uninjured). The Third Circuit vacated, holding that the district court had not adequately explained why individual issues of injury would not defeat predominance. *Id.* at 192–94. *Lamictal*, like *Asacol*, did not address the damages issues that are presented here. Indeed, *Lamictal* emphasized the importance of "distinguish[ing] injury from damages" and noted that the Third Circuit, like other courts of appeals, "appl[ies] a more lenient predominance standard for damages than for injury." *Id.* at 194–95; *see also supra* at 18–19 (citing cases for the proposition that individualized damages issues generally do not defeat predominance).[3]

The final case on which Brinker chiefly relies (at 19–20), the Fourth Circuit's decision in *Broussard v.*

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[3] Brinker cites (at 19), but does not discuss, *Ferreras v. American Airlines, Inc.*, 946 F.3d 178 (3d Cir. 2019). In *Ferreras*, as in *Lamictal*, the Third Circuit addressed a predominance issue that involved legal injury, not damages. *See* 946 F.3d at 186–87.

Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998), is also inapposite. In *Broussard*, the court of appeals reversed certification of "a class comprised of various franchisees" that not only "had different levels of compensable injury" but also "signed different contracts at different times …, relied on different alleged misrepresentations, and based statute of limitations tolling arguments on different facts." *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 147 (4th Cir. 2001); *see Broussard*, 155 F.3d at 343. The opinion does not address whether "minimal" variations in damages, Pet. App. 17a, can defeat predominance in a case where liability is premised on a single event, like the data breach here, that affected the entire class at once. Subsequent case law strongly suggests that the Fourth Circuit would *not* find predominance defeated under such circumstances. *See In re Zetia (Ezetimibe) Antitrust Litig.*, 7 F.4th 227, 238 (4th Cir. 2021) (affirming predominance finding in an antitrust case "even if some individualized-injury inquiry is ultimately required at trial").

Brinker also briefly references a hodgepodge of opinions from the Second, Fifth, Seventh, Eighth, Ninth, and D.C. Circuits, and it claims without extended discussion that each opinion would "foreclose" the Eleventh Circuit's holding. Pet. 20–21. But most of these cases, like *Asacol* and *Lamictal*, involve issues of liability, not damages, and are not relevant here. *See In re Petrobras Sec.*, 862 F.3d 250, 271–72 (2d Cir. 2017) (vacating certification order where the district court neglected to consider the presence of individualized questions on an issue relevant to whether "a putative class member … ha[d] a viable cause of action"); *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 424 (5th Cir. 2004)

(finding certification improper where plaintiffs had not proposed a viable class-wide method for showing injury); *Gorss Motels, Inc. v. Brigadoon Fitness, Inc.*, 29 F.4th 839, 844 (7th Cir. 2022) (affirming denial of class certification where "the key issue to be resolved in order for the proposed class to recover" was not amenable to class-wide proof); *Castillo v. Bank of Am., NA*, 980 F.3d 723, 732 (9th Cir. 2020) (emphasizing that certification was improper because the class representative was "unable to provide a common method of proving the fact of injury" and "*not*" because she was "unable to prove the extent of the damages suffered by each individual plaintiff" (emphasis added)); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 627 (D.C. Cir. 2019) (affirming denial of class certification where plaintiffs had not "prove[d] that injury could be established on a class-wide basis").

The one cited case that does address damages, meanwhile, held only that the district court, which was "uniquely positioned to assess [litigation] management concerns," acted "within its discretion" to deny class certification where the presence of individual damages issues was one of many manageability concerns. *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 986 (8th Cir. 2021); *see id.* (noting that the proposed classes would have "require[d] application of the laws of four different states to forty-three different" allegedly defective products, "with changing … standards through the years, and various attempts by [the defendant] to remedy the problems").

Nowhere in its litany of cases has Brinker identified an appellate decision finding an abuse of discretion where a district court has held that minor variations in class members' damages do not foreclose certification of an otherwise proper class. The absence

of such a decision should come as no surprise. As the courts of appeals agree, individual damages issues generally do not defeat predominance.

III. This case is a poor vehicle for addressing the question that Brinker says it presents.

Review is unwarranted for the further reason that this case is a poor vehicle for this Court to opine on Brinker's question presented. Even putting aside that the case does not present that question in the first place, *see supra* Part I, ongoing proceedings in the district court could substantially affect the analysis of how Rule 23(b)(3)'s predominance requirement applies in this case.

Despite holding that the district court did not abuse its discretion in concluding that Korczyk's testimony can support a finding of predominance, the court of appeals vacated the district court's determination that predominance is satisfied. *See* Pet. App. 14a–15a. The court of appeals emphasized that injured and uninjured class members will at some point need to be distinguished to prevent the latter from sharing in any recovery, and it remanded for the district court to address how this requirement bears on predominance. *Id.* On remand, the court of appeals explained, the district court may elect to "refine the class definition[]" before conducting this analysis. *Id.* at 14a.

Consistent with the Eleventh Circuit's order, proceedings are underway in the district court to define the putative class and to determine whether the class, as ultimately defined, satisfies Rule 23(b)(3). The outcome of these proceedings could substantially bear on the issue presented here. For example, if the district court defines the class so that it includes no uninjured members—as the district court had initially

attempted to do, *see id.* at 44a–45a—any dispute over whether Korczyk's methodology countenances awarding damages to uninjured class members (which it does not) would be obviated. Indeed, many of the predominance arguments Brinker makes to this Court are better directed to the district court on remand. *See, e.g.*, Pet. 6–7 (claiming that determining which class members have suffered cognizable injury "would require extensive individualized adjudication").

Because predominance is a holistic inquiry, the lack of a complete predominance analysis from the district court or the court of appeals creates a serious impediment to review. *See Tyson Foods*, 577 U.S. at 453 (noting that the predominance inquiry requires applying "careful scrutiny to the relation between common and individual questions in a case"). Brinker claims that the issue of damages can be meaningfully segregated from the remainder of the ongoing predominance inquiry because the Eleventh Circuit "made clear that it would be impossible for [Theus] to establish predominance without Korczyk's 'averaging' methodology." Pet. 26. The decision below, however, is silent on whether computing individual damages would be "so complex, fact-specific, and difficult" absent Korczyk's methodology "that the burden on the court system would be simply intolerable" and predominance would be defeated. Pet. App. 15a (quoting *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1240 (11th Cir. 2016)). The potential for further proceedings in the lower courts to shed light on this and numerous other open questions is yet another reason that this Court should deny review.

CONCLUSION

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

Respectfully submitted,

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