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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

Petitioner's statement pursuant to Supreme Court Rule 29.6 appears at page ii of the petition.

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The petition asks whether courts can avoid individualized issues in a putative class action by awarding class members "average" damage amounts for particular categories of injuries they did not suffer. The answer is unequivocally no. In holding otherwise, the Eleventh Circuit contravened this Court's precedents, became a glaring outlier among the Circuits, and "reduce[d] Rule 23(b)(3)'s predominance requirement to a nullity." *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 36 (2013).

Unable to defend the Eleventh Circuit's actual holding, respondents ("Plaintiffs") improperly

attempt to rewrite it. The Eleventh Circuit majority stated that Plaintiffs' expert (Mr. Korczyk) provided "a common methodology for calculating damages based on a standard dollar amount" for three distinct categories of purported injury. Pet. App. 16a. The majority expressly repeated—***three times***—that under that methodology, damages would be awarded to every class member "***whether or not***" they actually suffered the corresponding injury. *Id*. (emphasis added). The majority then approved that methodology because, it believed, individualized issues would not predominate over the "the three categories of ***common damages inquiries*** analyzed by the plaintiffs' expert." *Id*. at 17a-18a (emphasis added). And it did so after describing the methodology as "based on averages," *id*. at 17a, and wrongly approving it under *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U.S. 442 (2016). Judge Branch dissented because awarding class members average amounts "***whether or not***" they suffered the corresponding types of harms "impermissibly permits plaintiffs to receive an award" for injuries "they did not suffer—*i.e.*, an award that a plaintiff could not establish in an individual action." *Id*. at 27a (citing *Tyson Foods,* 577 U.S. at 458) (emphasis added by Judge Branch).

In this Court, Plaintiffs do not even attempt to defend this express holding of the Eleventh Circuit or refute Judge Branch's detailed contrary analysis. Instead, they argue the court did not mean what it said when it expressly upheld a plan to award standard amounts "whether or not" class members suffered the corresponding injury. Pet. App. 16a. In Plaintiffs' imagination, "the court of appeals recognized that Korczyk's methodology did not eliminate the need for individual damages inquiries."

Opp. 14. In fact, the court held the opposite—approving the flawed averaging methodology because it purportedly involved only "common damages inquiries," Pet. App. 17a-18a, which it could not permissibly do. This Court should grant certiorari and reverse the Eleventh Circuit's erroneous decision, which even Plaintiffs cannot bring themselves to defend.

Nor is there any basis, in the Eleventh Circuit's opinion or the law, for Plaintiffs' revisionist description of the decision below. Plaintiffs imply that Rule 23(b)(3)'s predominance requirement does not apply to damages questions ***at all***. *Cf.* Opp. 18-19. And based on this mistaken view, they maintain that the Eleventh Circuit really approved a methodology under which millions of class members would each provide individualized trial testimony—all subject to discovery and cross-examination—on whether and to what extent they took various mitigation actions in response to the data incident. That would include testimony and jury findings on (1) how much time (if any) class members spent on mitigation, (2) whether they had a "rewards" card and, if so, lost opportunities for rewards points if their card was canceled, (3) whether they incurred out-of-pocket losses, and (4) the subjective reason for any actions they took.

This Court has already rejected that flawed view of the law, holding that plaintiffs "cannot show Rule 23(b)(3) predominance" when "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Comcast*, 569 U.S. at 34. That is likely why, in a recent district court filing, Plaintiffs continue to urge the "common damages theory" the Eleventh Circuit approved, without the recharacterization they proffer to this Court. Dist. Ct. ECF No. 195, at 5.

Plaintiffs also do not deny the importance of the Eleventh Circuit's erroneous rule, which will further accelerate the proliferation of, and unwarranted *in terrorem* settlements in, data breach class actions. Nor do they deny the unlikelihood that the Court will get another chance to resolve the question presented if it does not accept review now. *See* Pet. 23-27. Instead, despite having insisted below that remand proceedings must continue notwithstanding this Court's review, Plaintiffs vaguely argue that such review could be complicated by those very proceedings. The opposite is true. If the Court grants certiorari, reverses the Eleventh Circuit, and holds that no class can be certified, further remand proceedings would be unnecessary. The petition should be granted.

I. THE QUESTION IS SQUARELY PRESENTED.

Plaintiffs' core argument is that the decision below never held "that class members may be compensated for injuries even if they did not suffer those injuries at all." Opp. 1-2 (quoting Pet. i). But the decision speaks for itself and held precisely that.

As the panel majority stated, "plaintiffs' expert provided the District Court with a common methodology for calculating damages based on 'a standard dollar amount for lost opportunities to accrue rewards points (***whether or not*** they used a rewards card), the value of card-holder 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. 16a (emphases added). As the court further explained, Korczyk "used a damages methodology based on averages * * *." *Id.* at 16a-17a.

In explaining why that model was in its view acceptable, the Eleventh Circuit further confirmed that the inquiry would not examine individualized circumstances. Purporting to apply *Tyson Foods*, the court accepted without scrutiny (and dispositively relied on) Korczyk's unsupported assertion that the "delta between class members' damages is minimal irrespective of the type of card used or time spent." *Id.* at 17a. That reasoning would have been irrelevant if those damages would be proven individually. Indeed, the court noted that while "individual inquiry" might be needed for ***other*** forms of injury ***not*** covered by Korczyk's model (and never asserted by Plaintiffs below), it held that Plaintiffs' damages model satisfied the predominance requirement because of "the three categories of ***common*** damages inquiries analyzed by [Korczyk]." *Id.* at 17a-18a (emphasis added).[1]

Indeed, while Plaintiffs now accuse Brinker of "mischaracteriz[ing] the decision below as holding that class members may be compensated for injuries 'even if they did not suffer those injuries at all,'" Opp. 1-2 (quoting Pet. i), Judge Branch correctly understood the majority as having held exactly that—and cogently refuted its analysis. She dissented because "the damages methodology offered by Plaintiffs' expert * * * fails to tie a damages amount to an injury actually suffered by a plaintiff," and the majority and district court "improperly relied on *Tyson Foods*" in approving it because "this methodology impermissibly permits plaintiffs to receive an award based on damages that they did not

[1] In the background of their opposition, but not the argument, Plaintiffs note a fourth category Korczyk posited, purportedly measuring the abstract value of stolen data. Opp. 5. Neither the district court nor Eleventh Circuit relied at all on that category.

suffer—*i.e.*, an award that a plaintiff could not establish in an individual action." Pet. App. 24a, 27a. The district court understood Korczyk's methodology precisely the same way. *Id.* at 36a-37a, 59a-60a. And Plaintiffs—who are again seeking to demonstrate predominance in the district court—have declined to offer that court the mistaken recharacterization they offer this Court. *Supra* at 3-4.

Plaintiffs' inability to defend the Eleventh Circuit's precedential opinion on its stated terms is alone reason to grant certiorari and reverse, not let the indefensible decision stand. It is the Eleventh Circuit's actual holding, not Plaintiffs' untenable revision based on their own version of the factual record, that is binding precedent. If that decision is left on the books, other courts, as Judge Branch did, will read it as it is written, and they will apply it that way.

II. THE DECISION BELOW IS IN CONFLICT WITH ALL OTHER AUTHORITY REGARDING THE FOUNDATIONAL QUESTION THE PETITION PRESENTS.

The question presented is surpassingly important, *see* Pet. 22-27, and Plaintiffs' contention that it is factbound is baseless, *cf.* Opp. 15-20. The Eleventh Circuit's holding that a court can award "average" damages to people "whether or not" they suffered an associated injury, Pet. App. 16a, is not "a properly stated rule of law." *Cf.* Opp. 17. Like the rule this Court reversed in *Comcast*, 569 U.S. at 35-36, the decision below would render Rule 23's predominance requirement meaningless.

This Court's precedents in no way permit the decision below; the opposite is true. *Cf.* Opp. 15-18. *Tyson Foods* and *Comcast* preclude awarding

damages for nonexistent injuries, or "average" amounts to every class member in a case like this, where each person readily possesses the relevant evidence and Brinker would be deprived of its due process right to contest it through individualized examination. *See* Pet. 13-14. Plaintiffs nowhere argue otherwise. And their claim that *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011), has no application to this Rule 23(b)(3) case, Opp. 18, is also unavailing. "The crux of" *Wal-Mart* was Rule 23(a) "commonality—[which] require[es] a plaintiff to show that 'there are questions of law or fact common to the class.'" 564 U.S. at 349 (quoting Fed. R. Civ. P. 23(a)(2)). As *Comcast* explained, "[t]he same analytical principles govern * * * Rule 23(b)(3)'s predominance criterion," except that predominance is, "[i]f anything, * * * even more demanding." 569 U.S. at 34. Thus, *Wal-Mart* is plainly applicable. Indeed, when the Court decertified the Rule 23(b)(3) class in *Comcast*, it relied principally on *Wal-Mart*. *Id*. at 35.

Plaintiffs' effort to deny the circuit split the petition demonstrates, Pet. 18-22, is equally unsuccessful. Plaintiffs seek more to distract than deny, contending that some circuits have held that predominance applies with less force to damages issues. Opp. 18-19, 20-24. But the methodology the Eleventh Circuit approved would not merely award people damages untethered to their individual circumstances; it would award those damages for injuries they ***did not suffer at all***. The question in this case is thus whether individualized issues can be avoided entirely by treating differently situated class members alike through the fiction of awarding them all the same "average" amounts for multiple categories of otherwise personalized damages regardless of whether any

person suffered the corresponding injury. If there is ***any*** predominance requirement for damages issues (and this Court's precedents clearly impose one), the answer to that question is emphatically no. And despite occasionally insinuating otherwise, Plaintiffs concede that such a requirement exists. *See* Opp. 25 (citing Pet. App. 15a; *Brown* v. *Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1240 (11th Cir. 2016)).

Indeed, in *Comcast*, this Court squarely held that a plaintiff "cannot show Rule 23(b)(3) predominance" where "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." 569 U.S. at 34. And Plaintiffs' own authorities confirm that individualized damages issues defeat certification when they predominate.[2] To the extent the Ninth Circuit may have erroneously suggested otherwise, *cf.* Opp. 19, it stands against both *Comcast* and all other circuit precedent, including the Eleventh Circuit's. If anything, the chance to restore uniformity on this issue by reaffirming *Comcast*'s clear holding is yet another reason to grant certiorari.

The predominance requirement could never be satisfied in this case without the ersatz uniformity the Eleventh Circuit approved. *See Comcast*, 569 U.S. at 34; Pet. App. 17a-18a. Without Korczyk's impermissible "averaging," the only way to assess which injuries anyone allegedly suffered (and to what extent) would

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[2] *See Naylor Farms, Inc.* v. *Chaparral Energy, LLC*, 923 F.3d 779, 798 (10th Cir. 2019) (individualized damages issues "destroy predominance" when they "will overwhelm * * * questions common to the class"); *Ibe* v. *Jones*, 836 F.3d 516, 530 (5th Cir. 2016) ("[T]his circuit recognizes that individual damages issues can preclude class certification."); *Roach* v. *T.L. Cannon Corp.*, 778 F.3d 401, 408 (2d Cir. 2015) ("*Comcast* reiterated that damages questions should be considered at the certification stage when weighing predominance issues[.]").

be to try the bulk of each litigant's claim individually, before a jury, with individual discovery and testimony and cross-examination and jury findings and all other required procedural safeguards.[3] Certifying a class that will require possibly millions of such one-by-one trials is precisely what Rule 23(b)(3) prohibits. *See, e.g.*, *Asacol*, 907 F.3d at 51-52; Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment (certification improper where "an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried").

Nor can Plaintiffs distinguish cases from the First, Second, Third, Fourth, Fifth, Seventh, Ninth, and D.C. Circuits by arguing that those cases involved uninjured class members, as purportedly distinct from class members who would be compensated for injuries they did not suffer. *See* Pet. 18-22; *cf.* Opp. 20-23. As Plaintiffs admit, the core "principle" of those cases is that "class actions" cannot "re-apportion substantive claims." Opp. 20 (quoting *Asacol*, 907 F.3d at 56); *see also* Rules Enabling Act, 28 U.S.C. § 2072(b). But as Judge Branch explained, awarding damages to people for injuries they concededly did not suffer—which no plaintiff in an individual case could

[3] *See, e.g.*, *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 431 (2021) (the Constitution applies, "class action or not") (quoting *Tyson Foods*, 577 U.S. at 466 (Roberts, C.J., concurring)); *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018) ("The fact that plaintiffs seek class certification provides no occasion for jettisoning the rules of evidence and procedure, the Seventh Amendment, or the dictate of the Rules Enabling Act[.]") (citing *Tyson Foods*, 577 U.S. at 458); Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity as to persons similarly situated, ***without sacrificing procedural fairness***[.]") (emphasis added).

ever receive—contravenes that fundamental principle.

Plaintiffs also cannot credibly claim that this case involves only "minor variations in class members' damages." Opp. 21-23. As to each supposed injury Korczyk's methodology purports to measure, the majority and Judge Branch agreed that some class members did not suffer that injury at all, which is no minor variation. And as the petition notes without contradiction from Plaintiffs, even Korczyk hypothesizes large variations among the three different claimed injuries. Pet. 15. For example, even accepting his flawed averages, people who lost reward points but suffered no other injury would receive ***more than fifteen times*** what they were entitled to. *Id.* That variation is hugely significant even in individual cases, and is potentially massive across a class that could include millions of people.

Similarly, the Eleventh Circuit approved awarding every class member the same "average" amount for lost rewards points "whether or not" they even had a rewards card, much less canceled one (and regardless of individualized factors like disparate card rules and personal spending amounts). Pet. App. 16a. Plaintiffs attempt to justify that approach by claiming that someone who had no rewards card still suffered "the loss of use of [their] preferred card," which Plaintiffs conveniently assert has the exact same value. Opp. 6. But even if that flawed premise were true (and it is not), that would only show that those with rewards cards should recover ***more*** than those without them.

Certiorari is therefore warranted to correct the Eleventh Circuit's egregious legal error and restore uniformity among the circuits on the important issue the petition presents.

III. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE AN IMPORTANT QUESTION THAT MAY OTHERWISE ELUDE THIS COURT'S REVIEW.

The petition explained why this may be the Court's only chance to review the Eleventh Circuit's rule, which will likely metastasize while evading review if left undisturbed. Pet. 22-27. This appeal has already been certified under Federal Rule of Civil Procedure 23(f), but given the discretionary nature of that rule, the recognized "death knell" effect of class certifications, and the fact that the Eleventh Circuit has now opined in a precedential decision, it is unlikely this Court will ever be presented with this issue in the future. *Id.* Plaintiffs nowhere dispute that discussion.

Instead, they contend that the Court should deny review because remand proceedings are ongoing. Opp. 24-25. Yet Plaintiffs never explain why that would preclude this Court from reviewing the purely legal question the petition presents. Plaintiffs wrongly argue that if they could unilaterally "define[] the class so that it includes no uninjured members," the question presented "would be obviated." *Id.* The petition challenges the Eleventh Circuit's holding that merely alleging that someone is injured in ***some*** way entitles that person to recover "standard" average damages for entirely different injuries they did not suffer. That issue is central to the methodology the Eleventh Circuit approved, no matter what class definition it is applied to or what happens on remand.

The Eleventh Circuit has answered the question presented—in a precedential opinion issued over a thorough dissent—and denied rehearing *en banc*. As in *Comcast*, 569 U.S. at 34, if this Court grants review

and reverses, any remand proceedings would be unnecessary. Indeed, the remand proceedings in *Comcast*—which involved class certification and summary judgment issues litigated before the Court even granted certiorari—were far more extensive than anything involved here. *See, e.g.*, ECF Nos. 471, 497, 499, *Glaberson et al.* v. *Comcast Corp.*, No. 2:03-cv-06604 (E.D. Pa. 2012). Moreover, having insisted that remand proceedings should continue despite the pendency of this petition, *see* Dist. Ct. ECF No. 192, at 4-5, Plaintiffs are in no position to complain about them now. And if those proceedings did threaten to complicate this Court's review, the Court could simply stay them in the unlikely event the district court did not do so first. *See, e.g.*, 28 U.S.C. § 1651(a); *see also* Dist. Ct. ECF No. 193, at 3 ("If the Supreme Court of the United States grants the petition, Defendant may renew the request to stay the case.").

CONCLUSION

For these reasons and those in the petition, this Court should grant certiorari and hold—summarily or on plenary review—that no class can be certified.

Respectfully submitted,

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