No. 24-384

In the Supreme Court of the United States

META PLATFORMS, INC., FKA FACEBOOK, INC.,

Petitioner,

v.

DZ RESERVE; CAIN MAXWELL, DBA MAX MARTIALIS,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This case presents the Court with an opportunity to establish uniform standards governing Rule 23(b)(3)'s predominance requirement in the context of a sprawling consumer-fraud class action encompassing millions of differently situated class members. The panel explained that its "common course of conduct" test for predominance is "'readily met'" in consumer-fraud cases, because they are "particularly well suited" to certification. Pet.App.9a-10a. And, the panel declared, the special rules for materiality and reliance that this Court has established for securities class actions "appl[y] equally" to ordinary consumer fraud. *Id.* But those sweeping statements led to an extraordinary result: certification of a class of millions of advertisers—ranging from sole proprietors to Fortune 500 companies, who each received individualized estimates of Potential Reach that varied in critical respects—based on only the most "superficial" of "thread[s] connecting" them. Pet.App.40a (Forrest, J., dissenting). If none of this variation matters for purposes of predominance, it is hard to imagine any fraud class that would not be certified.

Plaintiffs' efforts to recast the decision below fail. Plaintiffs principally claim the Ninth Circuit's "'common course of conduct' test . . . is about *commonality*, which is only one part of the predominance test." Opp.12. But the decision itself describes that "test" as one "for determining whether common issues *predominate* among the class." Pet.App.1a-2a (emphasis added). And, after determining that there were "common issues," the panel spent only a single paragraph concluding that they "predominate[]." Pet.App.18a. In doing so, the

panel conflated Rule 23(a)'s commonality requirement with the "more demanding" predominance standard—a fundamental error that warrants this Court's review. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013).

Nor do Plaintiffs refute the key ways in which the Ninth Circuit's test diverges from other circuits, which have erected meaningful standards to ensure "a common course of conduct is *not* enough to show predominance" in fraud cases. *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1255 (2d Cir. 2002) (Sotomayor, J.) (emphasis added). The decision below expressly adopts the contrary view. The upshot is that fraud classes are easier to certify in the Ninth Circuit than elsewhere in the country.

That geographic disparity is further compounded by the Ninth Circuit's arbitrary, pro-certification standard of review. Plaintiffs do not attempt to defend that standard or deny the entrenched split. This Court should not let a legally indefensible bias continue to infect class-action decisions.

Ultimately, the decision below illustrates just how far the Ninth Circuit's class-action practice has departed from Rule 23's text and purpose. This case presents the ideal opportunity for the Court to finally bring uniformity and order to this important area of the law. The petition should be granted.

ARGUMENT

I. The Ninth Circuit's "Common Course Of Conduct" Test Warrants Certiorari

A. The Ninth Circuit's Test Is Wrong

1. The Ninth Circuit's approach to class certification will lead to virtually automatic

certification of damages classes in consumer-fraud cases. In the panel's view, because materiality is an "objective inquiry" and reliance is "presum[ed]," any individualized differences between class members are irrelevant. Pet.App.12a-13a, 16a-17a. Instead, all a plaintiff must do is posit a "'common course of conduct'" by the defendant and the "demanding" predominance requirement is satisfied. Pet.App.7a, 10a. The message from the panel's decision will be heard loud and clear across the nation's largest judicial circuit: Certification is the norm, not the exception, for consumer-fraud cases.

Plaintiffs' main response is to argue that the "common course of conduct" test is the Ninth Circuit's longstanding test for *commonality* in fraud cases. Opp.11-14. In their view, it is not "properly considered" a test "'for predominance'" because it is "used only in the second step of the Ninth Circuit's predominance analysis." Opp.11. That directly contradicts how the panel itself described the "test." On the very first page of the opinion, the panel described the "primary issue on appeal [as] whether [a] misrepresentation constitutes a 'common course of conduct' under our test for determining whether common issues *predominate* among the class." Pet.App.1a-2a (emphasis added). Its analysis bears this out. The panel spent a solitary paragraph on the supposedly determinative "step three," stating that "predominance [was] necessarily satisfied [because] all questions are common." Pet.App.18a. That totally collapses the standards for commonality and predominance.

Plaintiffs' invocation (at 15) of the Advisory Committee's notes only underscores the Ninth Circuit's error. While the Advisory Committee stated

that certain fraud cases may allow for class treatment even where separate *damages* determinations are needed, it made clear that a "common core" of conduct alone does not justify certification, given potential differences as to "material[ity]" and "reliance." Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment. The Ninth Circuit's test discounts the Rule's concern for these differences.

2. Plaintiffs embrace the Ninth Circuit's categorical approach under which materiality and reliance raise *only* common issues under Rule 23. Opp.18-21. But that approach improperly imports securities law concepts into the consumer-fraud context. It also virtually guarantees certification in the mine run of consumer-fraud class actions.

Plaintiffs reiterate the panel's view that because materiality is an objective inquiry, it is necessarily common and can *never* yield individualized issues, citing *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 459-60 (2013). Opp.18-19. But as Judge Forrest explained, nothing in *Amgen* supports that conclusion. Pet.App.46a. In *Amgen*—a fraud-on-the-market securities class action—the misstatement was material to the market as a whole. That's not true in consumer class actions like this one, where the objective materiality of an alleged misrepresentation turns on the particular circumstances under which each individual plaintiff received that misrepresentation. Pet.19-20; *see also* Chamber Amicus Br. 13-15 (discussing Ninth Circuit's improper reliance on securities-fraud cases).

Plaintiffs' only response is to highlight a single sentence in *Amchem Products, Inc. v. Windsor*, noting that "*certain* cases alleging consumer . . . fraud" may satisfy predominance. 521 U.S. 591, 625 (1997)

(emphasis added); Opp.19-20. Needless to say, the Court was not suggesting that *all* such cases should be certified—yet that is the natural result of the Ninth Circuit's approach.

Plaintiffs insist that Potential Reach was objectively "'important,'" Opp.20, but whether that is true (and to what extent) turns on the precise circumstances in which each specific misrepresentation was made and received. The Ninth Circuit's categorical rule—under which materiality is determined across the board as to all class members in one fell swoop—ignores potential differences among plaintiffs.

Those differences are substantial: The challenged statement is that Potential Reach estimates "people" rather than "accounts," but the divergence between the number of people and accounts ranged from 1% to 50% across the potential class. Pet.29-30; Pet.App.42a. Moreover, each Potential Reach estimate was delivered alongside other metrics about the potential audience; some advertisers had objectives other than reach, making Potential Reach insignificant to their decisionmaking; others had access to non-Meta advertising data and expertise; and the advertisers themselves ranged from Fortune 500 companies to sole proprietors. *See* 5-ER-535–39; Pet.9-10. Even if (as Plaintiffs claim) stating Potential Reach as an estimate of people was uniformly false in some sense, it was not uniformly *material* to the astonishingly broad array of differently situated advertisers in the class. Resolving materiality would require innumerable mini-trials addressing each class member, because the inquiry turns on the distinct circumstances of each "transaction in question." Restatement (Second)

of Torts § 538(2)(a) (1977). It cannot invariably be adjudicated on a classwide basis.

As to reliance, Plaintiffs embrace the Ninth Circuit's view that a state-law presumption of reliance eliminates the need to consider individualized issues potentially defeating predominance. Opp.20-21. But predominance is ultimately a matter of *federal* law. Even if the applicability of California's presumption of reliance presents a common issue, that issue will not predominate under Rule 23 if the record shows that the defendant can rebut the presumption for a significant portion of the class. That is the case here, where the class sweeps in highly sophisticated advertisers with access to superior metrics and information, and Meta presented declarations from class members specifically attesting that they did not rely on Potential Reach. Pet.30-31. Indeed, in consumer-fraud cases, consumers frequently have different subjective motivations for purchasing products. That's totally different from securities-fraud cases, where it's reasonable to assume investors generally rely on price alone.

Meta made these points about reliance in its petition (at 20-22). Yet Plaintiffs offer no meaningful response whatsoever—only the conclusory assertion that reliance "can be decided in 'one stroke.'" Opp.21. The emptiness of that rejoinder speaks volumes.

Despite paying lip service to the weighing of common and individualized issues that Rule 23(b)(3) requires, Plaintiffs ultimately read the Ninth Circuit's decision just as Meta does—to hold that no matter the underlying variation in the class, materiality and reliance cannot defeat predominance in any kind of fraud class action. As Judge Forrest

explained, that contravenes the longstanding recognition that the class-action mechanism "often is ill-suited to fraud claims." Pet.App.35a. Plaintiffs' opposition only underscores the Ninth Circuit's departure from that view.

B. The Circuit Splits Are Real

Plaintiffs do not meaningfully dispute that the Ninth Circuit's test diverges from multiple circuits.

1. ***Common course of conduct.*** The Second and Eighth Circuits reject the "common course of conduct" test. Pet.23-25. The Second Circuit has held that "a common course of conduct is not enough to show predominance" in a consumer-fraud action, because "a common course of conduct is not sufficient to establish liability of the defendant to any particular plaintiff." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1255 (2d Cir. 2002) (Sotomayor, J.). The Eighth Circuit has likewise held that even where there is a "'common core'" to a fraud claim, individualized questions about the nature of the representations and reliance can still prevent class certification. *Grovatt v. St. Jude Med., Inc. (In re St. Jude Med., Inc.)*, 522 F.3d 836, 838 (8th Cir. 2008).

Plaintiffs say that *Moore* involved oral representations that were not necessarily uniform, while this case supposedly involves a "'uniform misrepresentation.'" Opp.21-22. But *Moore*'s key insight is broader. Even though the defendant in *Moore* allegedly engaged in a "centralized . . . scheme" to misrepresent its insurance product, including by distributing "marketing materials and information pieces," 306 F.3d at 1251, that was not enough to establish predominance. Rather, "even" where "fraud is the result of a common course of conduct, each

plaintiff must prove [1] that he or she personally received a *material* misrepresentation, and [2] that his or her *reliance* on this misrepresentation was the proximate cause of his or her loss." *Id.* at 1253 (emphasis added); *see also St. Jude*, 522 F.3d at 838 (same). In other words, predominance must consider individualized, plaintiff-specific differences as to materiality and reliance for each transaction that occurs in the course of an otherwise uniform fraudulent scheme. That's because a class action is only proper if it ultimately establishes the defendant's liability to *each* "particular plaintiff" that transacted with that defendant. *Moore*, 306 F.3d at 1255.

Plaintiffs are therefore wrong to claim this case would satisfy the Second and Eighth Circuits' tests because the Ninth Circuit found a "'uniform misrepresentation.'" Opp.23 (emphasis omitted). Plaintiffs assume that both circuits would apply the Ninth Circuit's flawed categorical approach to materiality and reliance, under which those elements never present individualized issues. *Supra* at 4-7. That assumption is unsupported and unwarranted.

2. ***Presumption of reliance.*** Meta's petition established a 3-2 split over whether a state-law presumption of reliance automatically satisfies commonality and predominance in a consumer class action. Pet.25-28. Plaintiffs deny the split, arguing that the Fourth and Eighth Circuits have not actually rejected that rule. According to Plaintiffs, Meta's cases from those circuits held *only* that the state laws at issue did not require any presumption of reliance in the first place. Opp.25.

Plaintiffs are mistaken. In *Gunnells v. Healthplan Services, Inc.*, the Fourth Circuit held that "even if actual, justifiable reliance could be presumed [under

South Carolina law]," the defendant's right "to introduce evidence to rebut this presumption with respect to individual plaintiffs" posed a significant "problem[] for class certification." 348 F.3d 417, 438 (4th Cir. 2003). That alternative holding is binding precedent in the Fourth Circuit.

Similarly, in *St. Jude*, the Eighth Circuit "assum[ed]" that Minnesota law "d[id] not require the plaintiffs to present direct proof of individual reliance," and allowed courts to presume individualized reliance based on "circumstantial" evidence relevant to the full class. 522 F.3d at 839-40 (emphasis omitted). The court recognized, however, that defendants could rebut that evidence with individualized, plaintiff-specific proof at the class-certification stage—and that in some cases the potential for such rebuttal would defeat certification. *Id.* Both the Fourth and Eighth Circuits thus diverge from the Ninth Circuit's view (shared by the Sixth and Eleventh Circuits) that the potential rebuttal of a state-law presumption of reliance *cannot* defeat class certification. Pet.27-28.

Plaintiffs' only other response is to argue that the Ninth Circuit does not apply a categorical rule favoring certification if the class members do not all receive a "uniform" misrepresentation. Opp.24. But Plaintiffs do not deny that when a uniform misrepresentation is made—as they say happened here—the Ninth Circuit treats a state-law presumption of reliance as automatically satisfying commonality and predominance, regardless of any potential for rebuttal. *See* Pet.App.17a. That approach is flatly incompatible with the Fourth and Eighth Circuits.

II. The Ninth Circuit's Pro-Plaintiff Standard Of Review Warrants Certiorari

Plaintiffs' responses on the second question presented are even weaker. Most notably, they do not even try to defend the Ninth Circuit's unabashedly one-sided standard of review, under which appellate courts must give more deference to *grants* of class certification than to denials. Nor do Plaintiffs dispute that there is an entrenched and acknowledged circuit split on the issue. Pet.32-35.

Instead, Plaintiffs assert that the Ninth Circuit's test—even if formally wrong—has "no real-world impact," either here or in any other case. Opp.27-28. But Plaintiffs' citation of a single class-certification reversal does not come close to establishing that sweeping assertion. Opp.27.

This Court should reject Plaintiffs' plea to let a legally indefensible, pro-certification standard prevail in the nation's largest judicial circuit. The unmistakable message that standard sends to district courts is that close cases should be certified, even when the text of Rule 23 contemplates no such thing.

Here, that standard tilted the playing field against Meta, guiding the Ninth Circuit's ultimate holding that the district court's bottom-line certification ruling was not an abuse of discretion. Although Plaintiffs assert (at 27) that Meta's appeal involved only legal issues resolved *de novo*, the Ninth Circuit repeatedly invoked the abuse-of-discretion standard—not *de novo* review—throughout its opinion. Pet.App.2a, 4a, 6a, 18a, 21a. And the Second and Ninth Circuits have plainly relied on this one-sided standard to uphold class-certification orders in other cases, too. *See, e.g.*, *Owino v. CoreCivic, Inc.*, 60

F.4th 437, 441, 443-44 (9th Cir. 2022) (noting deferential standard three times in affirming certification); *Barrows v. Becerra*, 24 F.4th 116, 130 (2d Cir. 2022) (affirming certification under deferential standard).

Plaintiffs may think standards of review have little real-world importance. But this Court routinely grants certiorari to resolve questions about such standards, in a wide range of contexts. *See, e.g.*, *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 389 (2018); *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 322 (2015). It should do the same here.

III. The Questions Presented Are Important

The Ninth Circuit's flawed interpretation of Rule 23 will invite district courts to routinely certify classes that do not meet the Rule's demanding requirements. Those decisions will frequently escape review because so few companies can risk litigating through trial. The Ninth Circuit's errors therefore threaten to skew class litigation in a forum that already resolves an enormous proportion of the nationwide class-action docket. Pet.35-36.

Plaintiffs respond by repeatedly invoking (at 1, 4) this Court's DIG in *Facebook v. Amalgamated Bank*, No. 23-980 (U.S. Nov. 22, 2024)—a securities case presenting an entirely different question about risk disclosures in SEC filings. That case has nothing to do with the weighty Rule 23 issues presented here. And Plaintiffs' apparent implication that petitions filed by Meta should now be singled out for skeptical treatment is baseless. This Court's certiorari criteria do not turn on the party presenting the petition. The

issues here are important, recurring, and worthy of review.

The need for this Court's guidance is now especially acute. It has been eight years since the Court last grappled with Rule 23's requirements, and almost a decade and a half since its seminal ruling in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), which is still cited over 600 times a year. Courts and judges continue to vigorously debate how to interpret Rule 23's sparse language, against the backdrop of only a handful of cases from this Court. *See* Pet.36-37. Meanwhile, thousands of class actions are filed each year, including hundreds of consumer-fraud cases, involving billions of dollars. *See* Brian Eckert, *Report: Milberg* (May 6, 2024), https://milberg.com/news/most-active-class-action-law-firms; Duane Morris LLP, *Class Action Review 2024* at 143 (2024), https://online.flippingbook.com/view/954167557/61 (top 10 consumer-fraud class action settlements in 2022 totaled $8.596 billion); Chamber Amicus Br. 19 (class action defense alone cost nearly $4 billion in 2023).

This case is the right vehicle for the Court to step in. As Plaintiffs acknowledge, it tees up the key question of how to balance common and individualized issues—a question that arises in every damages class. And while Plaintiffs accuse Meta of seeking "factbound error correction," they elsewhere admit Meta's petition challenges only "legal" rules. Opp.1, 4, 26-28. If this Court grants review, it will be able to clarify the law of class certification by (1) rejecting the Ninth Circuit's "common course of conduct" test for predominance, (2) holding that the legal rules governing materiality and reliance in securities cases do not automatically carry over to

consumer class actions, and (3) scrapping the Ninth Circuit's one-sided standard of review for class-certification rulings. Only this Court can provide this necessary guidance.

CONCLUSION

Meta's petition should be granted.

Respectfully submitted,

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