No. 25-1685

In the United States Court of Appeals
for the Ninth Circuit

EDIE GOLIKOV, individually and
on behalf of all others similarly situated,

Plaintiff-Respondent,

v.

WALMART INC.,

Defendant-Petitioner.

On Rule 23(f) Petition for Permission to Appeal from the
United States District Court for the Central District of California
Case No. 2:24-cv-8211
The Honorable R. Gary Klausner

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

Dated: March 20, 2025

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The Chamber of Commerce of the United States of America respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of defendant-petitioner Walmart. Walmart has consented to the filing of the Chamber's brief. Plaintiff-respondent, Edie Golikov, did not consent.

No counsel for any party authored the Chamber's proposed brief in whole or in part. No entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of the proposed brief.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. The Chamber has participated as *amicus curiae* in numerous cases that have addressed the legal standards governing class actions—including at the Rule 23(f) stage. *See, e.g.*, *Drake v. Bayer Healthcare, LLC*, No. 24-5956 (9th Cir. Oct. 7, 2024); *In re Oracle Corp. Sec. Litig.*, No. 22-80048 (9th Cir. May 31, 2022); *Heredia v. Sunrise Senior Living, LLC*, No. 21-80121 (9th Cir. Dec. 7, 2021).

The Chamber has a strong interest in this case. The Chamber's members are often targeted as defendants in class actions, so it is imperative to the Chamber that courts scrupulously enforce the requirements of Rule 23. Here, Ms. Golikov did not satisfy those requirements. The district court's decision to nevertheless certify a class is the latest in a series of decisions where district courts in this Circuit have failed to heed the commands of Rule 23 and Supreme Court precedent. Left unchecked, this surge of improperly certified class actions will harm not just the Chamber's members, but the customers, employees, and other businesses that depend on them.

The Chamber's proposed *amicus curiae* brief will aid this Court's decision-making process by identifying two additional reasons, beyond those discussed in Walmart's Rule 23(f) petition, why the district court's class-certification decision warrants this Court's review.

First, the Chamber's brief shows that the certification decision in this case is part of a growing and troubling pattern in which district courts in this Circuit have increasingly trampled on the commands of Rule 23(b)(3) and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). This line of erroneous decisions shows that the issues here are persistent and important ones on which district courts need this Court's guidance.

Second, the Chamber's brief shows that this Court's review is also warranted because erroneous grants of class certification, like the one in this case, inflict serious harms on the business community and the public. The brief establishes that improperly certified class actions create "the risk of 'in terrorem' settlements," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011), and that businesses must ultimately pass along the costs of those coerced settlements to consumers, employees, other businesses, and the economy as a whole. As the brief shows, Rule 23(f) review is an essential safety valve for

relieving undue settlement pressure and avoiding these harms. Thus, this Court should put Rule 23(f) to its intended use, review the decision below, and overturn the district court's improper grant of class certification.

CONCLUSION

The Chamber respectfully asks that the Court grant leave to file the accompanying *amicus curiae* brief.

Dated: March 20, 2025

Respectfully submitted,

s/ Erik R. Zimmerman

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

STATEMENT OF IDENTITY AND INTEREST*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community—including at the Rule 23(f) stage. *See, e.g.*, *Drake v. Bayer Healthcare, LLC*, No. 24-5956 (9th Cir. Oct. 7, 2024); *In re Oracle Corp. Sec. Litig.*, No. 22-80048 (9th Cir. May 31, 2022); *Heredia v. Sunrise Senior Living, LLC*, No. 21-80121 (9th Cir. Dec. 7, 2021).

The Chamber has a strong interest in this case. The Chamber's members are often targeted as defendants in class actions, so it is

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* No counsel for any party authored this brief in whole or in part. No entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

imperative to the Chamber that courts scrupulously enforce the requirements of Rule 23. The plaintiff here, Edie Golikov, did not satisfy those requirements. The district court's decision to nevertheless certify a class is the latest in a series of decisions where district courts in this Circuit have failed to heed the commands of Rule 23 and Supreme Court precedent. Left unchecked, this surge of improperly certified class actions will harm not just the Chamber's members, but the customers, employees, and other businesses that depend on them.

SUMMARY OF ARGUMENT

A class-certification order warrants this Court's review under Rule 23(f) when that order is manifestly erroneous. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). The order here fits that bill. And the issue on which the district court manifestly erred is one that warrants additional guidance from this Court, at least if the number of improper certifications featuring the issue is any indication. This Court should therefore grant Walmart's petition and reverse the decision below.

The Chamber agrees with Walmart that the district court manifestly erred on both questions in Walmart's petition. *See* Pet. 3.

The Chamber focuses here on the second question: whether Ms. Golikov satisfied her burden under Rule 23(b)(3) and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), to identify a class-wide damages model that fits her theory of liability. She did not. The district court's contrary ruling, like other recent grants of class certifications in this Circuit, tramples on both Rule 23(b)(3)'s predominance requirement and *Comcast*. This Court's intervention is needed to stop this wave of improper certification decisions and protect the business community and the nationwide economy.

ARGUMENT

I. The district court's grant of class certification defies Rule 23(b)(3) and the Supreme Court's decision in *Comcast* on an issue that warrants guidance from this Court.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast*, 569 U.S. at 33 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). This unusual device creates "important due process concerns [for] both plaintiffs and defendants." *Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005); *see also, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363-64, 366-67 (2011); *Amchem Prods., Inc. v.*

Windsor, 521 U.S. 591, 629 (1997). To account for those constitutional concerns, and in keeping with the reality that class actions are excepted from the protective norms of individual litigation, a court must conduct a rigorous analysis to ensure that Rule 23's requirements are met before it certifies a class. *Comcast*, 569 U.S. at 33-34.

One of the requirements against which courts must exactingly analyze a putative class is Rule 23(b)(3)'s predominance mandate. *Id.* at 34. To certify a damages class, a court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This requirement limits certification to cases where class-wide adjudication will achieve judicial economy while maintaining procedural fairness. *See* Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment; *Amchem*, 521 U.S. at 615.

The predominance requirement is a demanding one. *Comcast*, 569 U.S. at 34. A plaintiff who seeks class certification must prove, not merely plead, that her claims satisfy Rule 23(b)(3). *See id.* at 33-34; *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014). To that end, a plaintiff must demonstrate that her claims' essential

elements "will prevail or fail in unison" based on evidence common to the whole class. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013).

In a damages class, one of the essential elements that must be provable with common evidence is, by definition, damages. Thus, in *Comcast*, the Supreme Court held that a plaintiff can establish predominance only if she has a damages model that is capable of being applied on a class-wide basis. *See* 569 U.S. at 34. Without such a model, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.*

Comcast also established an important corollary to the need for a class-wide damages model: The plaintiff's model must fit her theory of liability. *See id.* at 35. In other words, the model "must measure only those damages attributable to" the plaintiff's liability case. *Id.* If not for this rule, "*any* method of measurement" would be acceptable if it could be applied class-wide, "no matter how arbitrary the measurements may be." *Id.* at 36. That would reduce the predominance requirement to "a nullity." *Id.*

In sum, under *Comcast*, a district court must rigorously hold a plaintiff seeking to certify a damages class to her burden to prove that (1) she has a damages model that can be applied on a class-wide basis, and (2) the model fits her theory of liability. The district court's decision to certify a class in this case violated these principles in at least three ways.

First, Ms. Golikov did not prove that she has a damages model that can be applied on a class-wide basis. That is because Ms. Golikov did not offer a damages model in any real sense of that term. Ms. Golikov's "model" was a single paragraph of a declaration from her counsel that looked like this:

> 2. The following are true and accurate copies of listings for Walmart's cooking oil products from the Walmart website (www.walmart.com), accessed December 18, 2024:

Exhibit	Description	Price	Price Per Oz
1	Great Value Avocado Oil – 25.5 fl. oz	$9.72	$.381/oz
2	Great Value Vegetable Oil – 48 fl. oz	$4.37	$.091/oz

ECF No. 36-3 ¶ 2.

This barebones submission—a mere list of two prices on Walmart's website on a single day—does not come close to proving that Ms. Golikov can measure damages on a class-wide basis. As an initial

matter, this "model" does not even establish the price of avocado oil paid by each putative class member, shopping in disparate locations, over the multi-year class period. Nor does it attempt to establish how damages could be assessed for class members who purchased avocado oil more than once, potentially at different locations and price points over time. And critically, this submission does not account for the chemical differences apparently possible between each bottle of oil, which presumably could result in varying so-called "price premiums" across the class. If a plaintiff could satisfy the predominance requirement with a showing as meager as this one, *Comcast* would serve no practical purpose.

Second, even if Ms. Golikov's submission could be viewed as a class-wide damages model, it would not fit her theory of liability.

Ms. Golikov's liability theory is that Walmart mislabeled adulterated avocado oil as pure avocado oil. *See* ECF No. 31 ¶¶ 5-6, 20, 26-27. To fit that theory, a damages model would need to measure the difference between the price that Walmart charged and the value of what class members allegedly received: adulterated avocado oil.

The chart above does not even purport to measure that amount. It instead measures the difference between the price that Walmart charged and the value of something that class members did not even allegedly receive: vegetable oil.

As a result, Ms. Golikov's damages "model" does not measure the damages attributable to her liability theory. It instead calculates an amount of damages that is completely arbitrary, and thus flunks Rule 23. As *Comcast* held, a damages "model [that] does not even attempt to" measure the damages attributable to the plaintiff's theory of liability "cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." 569 U.S. at 35. That holding controls here.

Finally, the district court did not conduct the rigorous analysis that *Comcast* demands. Instead of engaging with the above problems, the court dismissed them as "quibbles" over the "finer points" of Ms. Golikov's model. ECF No. 62 at 11. The court also revealed the leniency of its analysis when it stated incorrectly that Ms. Golikov had submitted "expert testimony setting forth" a damages model. *Id.* In

fact, Ms. Golikov's only submission from a purported expert went to liability, not damages. *See* ECF No. 36-2; Pet. 21.

For these reasons, the district court's decision to certify a class in this case is manifestly erroneous. That decision strikes at the heart of *Comcast* and would turn the predominance requirement into "a nullity." 569 U.S. at 36.

The certification decision in this case is also part of a growing and troubling pattern. In recent years, district courts in this Circuit have increasingly ignored the commands of Rule 23(b)(3) and *Comcast* by certifying damages classes in cases, like this one, where the plaintiffs lack a class-wide damages model. *See, e.g.*, *City of Sunrise Firefighters' Pension Fund v. Oracle Corp.*, No. 18-cv-4844, 2022 WL 1459567, at *7-9 (N.D. Cal. May 9, 2022), *Rule 23(f) pet. voluntarily dismissed after settlement*, No. 22-80048 (9th Cir. Mar. 13, 2023); *In re Qualcomm Inc. Sec. Litig.*, No. 17-cv-121, 2023 WL 2583306, at *15-16 (S.D. Cal. Mar. 20, 2023), *review denied*, No. 23-80025 (9th Cir. June 1, 2023).

For example, in *Oracle*, the district court certified a class even though the plaintiffs' expert directly admitted that "he was not retained to propose a particular damages model and he did not do so." 2022 WL

1459567, at *8. Despite that admission, the court held that a class could be certified because the expert had suggested "how such a model *could be* constructed" at a later time. *Id.* (emphasis added). The court also reasoned that some district courts in this Circuit had certified classes based on submissions that provided even "less detail" than the submission in *Oracle*. *Id.* at *9 (citing multiple decisions).

There is no safety in numbers, however, for violations of Rule 23 and Supreme Court precedent. To the contrary, this long line of erroneous decisions shows that the issues here are persistent and important ones that warrant this Court's attention. To provide guidance on these issues, and to ensure that district courts in this Circuit follow Rule 23(b)(3) and *Comcast*, this Court should grant review and reverse the decision below.

II. Rule 23 violations like the one here harm American businesses and the national economy.

This Court's review is doubly needed because decisions that run roughshod over Rule 23, like the one in this case, inflict serious harms on the business community and the public.

Class actions are expensive to defend. American companies' total spending on class-action defense grew to almost $4 billion in 2023, and

that figure is expected to have grown again in 2024. *See* Carlton Fields, *2024 Carlton Fields Class Action Survey* 6-7 (2024), https://bit.ly/3y4n7TM. A defendant can spend more than $100 million to fight even a *single* class action. *See* Adeola Adele, Dukes v. Wal-Mart: *Implications for Employment Practices Liability Insurance* 1 (2011).

These extraordinary defense costs, combined with massive damages exposure when a class is certified, often compel defendants to settle even meritless claims. In other words, "even a small chance of a devastating loss" creates "the risk of 'in terrorem' settlements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

This hydraulic pressure to settle even dubious claims was a key motivation for adopting Rule 23(f) itself. As the Advisory Committee observed when that provision was created in 1998, a grant of class certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. Thus the need to ensure district courts are applying the

requisite scrutiny to plaintiffs' showings under Rule 23—and to correct those courts at once if they are not.

The exorbitant costs of defending and settling wrongly certified class actions harm the businesses that pay them. But the harms go further. Businesses need to pass along at least some of these costs to others in the form of higher prices and lower wages. *See* U.S. Chamber of Commerce Institute for Legal Reform, *Nuclear Verdicts: An Update on Trends, Causes, and Solutions* 46-49 (2024), https://bit.ly/3BNqoc5. Ultimately, the costs of erroneous decisions like the one below fall on consumers, employees, other businesses, and the economy as a whole. *See id.*

To prevent those reverberating harms, this Court should put Rule 23(f) to its intended use, review the decision below, and overturn the district court's improper grant of class certification.

CONCLUSION

This Court should grant Walmart's petition and reverse.

Dated: March 20, 2025

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 25-1685

I am an attorney for *Amicus Curiae* the Chamber of Commerce of the United States of America.

This brief contains 2,298 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature: s/ Erik R. Zimmerman **Date:** March 20, 2025