No. 21-13146

In the

United States Court of Appeals

For the Eleventh Circuit

ERIC STEINMETZ; MICHAEL FRANKLIN, AND SHENIKA THEUS,
individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

BRINKER INTERNATIONAL, INC.,
Defendant-Appellant.

On Fed. R. Civ. P. 23(f) Appeal from the
United States District Court for the Middle District of Florida
Judge Timothy J. Corrigan
No. 3:18-cv-00686-TJC-MCR

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PANEL OR EN BANC REHEARING

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August 21, 2023

Steinmetz, et al. v. Brinker International, Inc., No. 21-13146

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, and 11th Cir. R. 26.1, amicus curiae the Chamber of Commerce of the United States of America states that, upon information and belief, the Certificate of Interested Persons and Corporate Disclosure Statement contained in Appellant Brinker International, Inc.'s August 15, 2023 petition for rehearing identifies all interested persons and entities.

Amicus curiae the Chamber of Commerce of the United States of America further certifies that it has no parent company and that no publicly held company holds 10% or greater ownership interest in the Chamber.

Dated: August 21, 2023

Respectfully submitted,

/s/ Matthew A. Fitzgerald
Matthew A. Fitzgerald

The Chamber of Commerce of the United States of America respectfully moves for leave to file the amicus curiae brief that accompanies this motion in support of Appellant Brinker International, Inc.'s petition for panel or en banc rehearing.

Counsel for the parties was consulted. Appellant Brinker International consented to this motion for leave to file an amicus brief. Appellees Eric Steinmetz, et al. took no position on the motion.

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.

The Chamber's members have a strong interest in promoting fair and predictable legal standards. They are particularly likely to be

defendants in putative class actions. The Chamber's members thus have a strong interest in ensuring that courts comply with the Supreme Court's class action precedents, including undertaking the rigorous analysis required by Federal Rule of Civil Procedure 23. The Chamber has filed amicus curiae briefs in several recent Rule 23 class action cases, including *Tyson Foods, Inc v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Comcast Corp v. Behrend*, 569 U.S. 27 (2013); and *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

ARGUMENT

The proposed amicus curiae brief will assist the Court. In our increasingly digitized world, it is no surprise that large data breaches are increasingly common. But these data breaches generally do not result in any harm to the individual consumers whose information has been accessed. *Tsao v. Captiva MVP Restaurant Partners, LLC*, 986 F.3d 1332, 1343 (11th Cir. 2021). Nevertheless, putative class actions continue to be brought on behalf of the individuals whose data has been accessed. The proposed amicus brief provides recent research showing that data breaches present negligible risks of fraudulent charges or identity theft.

The proposed amicus brief also discusses ways in which the class definition the panel majority approved will require expensive individual adjudications that will predominate over common issues. Each member of the class must show expenses or time spent in mitigation of the consequences of the data breach before he or she can recover. But neither the district court nor the plaintiffs have suggested any way to resolve that inquiry without individual adjudications that would predominate over common issues.

The amicus brief also explains that the district court's approach to damages violates Supreme Court precedent. The district court approved the classes on the theory that damages could be awarded based on an average amount of each category of damages even when a plaintiff had not suffered any damages in such category. The Supreme Court rejected a similar proposal for "Trial by Formula" in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367, 131 S. Ct. 2541, 2561 (2011). *Dukes* establishes that class action defendants must have the opportunity to present their defenses to individual claims. And *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 459 (2016), confirms that representative evidence that would not be sufficient to sustain a jury finding if it were

introduced in each individual action cannot be used to meet that task in a class action. Since the representative evidence in this case does not meet that standard and instead would prevent the defendant from litigating its individualized defenses, the district court's "averaging" method for assessing damages in this suit is impermissible.

Last, the amicus brief provides perspective on costs that the panel majority's approach would impose on the business community and the broader economy.

CONCLUSION

For these reasons, the Chamber of Commerce of the United States requests that this Court grant leave to file its amicus curiae brief.

Dated: August 21, 2023

Respectfully submitted,

/s/ Matthew A. Fitzgerald

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the type-volume limitations of Fed. R. App. P. 27(d)(2) because it is proportionally spaced, has a typeface of 14-point Century font, and contains 674 words.

/s/ Matthew A. Fitzgerald
Matthew A. Fitzgerald

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2023, the foregoing was electronically filed with the Clerk for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. The system will serve all counsel of record.

/s/ Matthew A. Fitzgerald
Matthew A. Fitzgerald

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STATEMENT OF THE ISSUE

Amicus curiae agrees with Appellant Brinker International's statement of the issue.

STATEMENT OF IDENTITY AND INTEREST[1]

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.

The Chamber's members have a strong interest in promoting fair and predictable legal standards. They are particularly likely to be defendants in putative class actions. The Chamber's members thus have

[1] No party's counsel authored this brief in whole or in part, and 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.

a strong interest in ensuring that courts comply with the Supreme Court's class action precedents, including undertaking the rigorous analysis required by Federal Rule of Civil Procedure 23. The Chamber has filed amicus curiae briefs in several recent Rule 23 class action cases, including *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); and *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

SUMMARY OF ARGUMENT

In our increasingly digitized world, large data breaches are becoming increasingly common. *See* Turner, Walker, and Moore, *Data Flows, Technology, and the Need for National Privacy Legislation*, at 26, U.S. Chamber of Commerce Technology Engagement Center and Political and Economic Research Council (2019) ("Data Flows"), *available at* https://americaninnovators.com/research/data-flows-technology-the-need-for-national-privacy-legislation/. Thankfully, these data breaches generally do not result in any harm to the individual consumers whose information has been accessed. *Tsao v. Captiva MVP Restaurant Partners, LLC*, 986 F.3d 1332, 1343 (11th Cir. 2021) (citing a GAO report

finding that of 24 large data breaches, only 3 "resulted in account theft or fraud").

Even so, putative class actions are often brought on behalf of individuals whose data has been accessed. Permitting these suits to proceed as class actions imposes substantial costs on the business community without redressing even a substantial *risk* of harm to the consumers.

This case is a perfect example of why data breach cases are so ill suited to use of the class action device. Here, the district court approved classes composed of customers who "(1) had their data accessed by cybercriminals and, (2) incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach." Slip op. at 14; *id.* at 15 (recognizing this is still overbroad and remanding for further consideration of the class definition). The panel majority held that, if the district court can somehow ascertain who meets that definition and has standing without the need to engage in predominance-defeating individualized determinations, it will be fine to assess damages by an averaging formula. Slip op. at 18. That decision exposes the defendant to significant costs and settlement pressure in violation of bedrock

protections for defendants. It opens a new path in the Eleventh Circuit to certifying huge data breach classes and awarding millions of dollars in damages divorced from any actual financial injury to each class member.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The class definition here creates a predominance problem by trying to avoid the standing problem inherent in data-breach class actions.

In consumer data breach cases, identification of a putative class that can meet Article III and Rule 23 requirements often proves impossible. *See* Doc. 167 at 36 (acknowledging this case "may be the first" to certify a class in a case like this one).

Modern systems for gathering and storing customer data have made large data breaches increasingly common. *See* Data Flows, at 26. But most data breaches do not result in either fraud on an existing account or identity theft. *Tsao*, 986 F.3d at 1343.

That was true in the early 2000s and it remains true today. Modern research finds that "individuals involved in data breaches (overall) are not at an especially high risk for ID theft or fraud." Data Flows, at 37. In fact, "[o]nly a very small share of all breached records could possibly translate to annual incidents of ID theft." *Id.* Data show that there is

"very little change in the rate of ID theft and fraud" even when there is a substantial increase in data breaches. *Id.* at 35.

Thus, as this Court correctly held under *Tsao*, "[e]vidence of a mere data breach does not, standing alone, satisfy the requirements of Article III standing." 986 F.3d at 1344. Instead, a putative data breach class must show a "substantial risk" of harm that is "certainly impending." *Id.*

Nor can a plaintiff rely on self-inflicted injuries following a data breach to establish standing. *Id.* at 1345. Mitigation efforts like the cancellation of credit cards in *Tsao* are "inextricably tied" to the plaintiff's "perception of the actual risk of identity theft." *Id.* Since "it is well established that plaintiffs 'cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending,'" these self-imposed harms are insufficient for standing. *Id.* at 1344 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013)). Instead, each plaintiff must show that the data breach presented a substantial and certainly impending threat of harm to him. *See id.* at 1343.

Here, trying to abide by *Tsao*, the district court certified classes of customers who "(1) had their data accessed by cybercriminals and, (2)

incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach." Slip op. at 14. The court believed that this class definition would "avoid later predominance issues regarding standing and the inclusion of uninjured individuals." Doc. 167 at 16; slip op. at 14-15. The court reasoned that "individuals must have some injury in the form of out-of-pocket expenses or time spent to be a part of the class." Doc. 167 at 16.

To be clear, merely having one's information accessed by criminals in a data breach and posted on the dark web does not create a "substantial risk" of "certainly impending" harm. *Tsao*, 986 F.3d at 1344. In today's modern world, there are simply too many data breaches that never result in any actual harm to the consumer, including breaches that result in information being placed on the dark web, for the mere occurrence of a data breach to ground standing. *See In re SuperValu, Inc.*, 870 F.3d 763, 770 (8th Cir. 2017) (holding that allegations that "illicit websites are selling [the plaintiffs'] Card Information to counterfeiters and fraudsters" did not show the kind of misuse that could establish standing).

Attempting to address the standing problems in this case by defining the class to include only individuals who had incurred expenses or lost time in response to the data breach also fails. This case will require thousands or millions of individual mini-trials to determine class membership. Determining whether a plaintiff spent funds or time responding to the data breach will require an individual adjudication. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) (explaining that each plaintiff "must demonstrate standing for each claim that they press"); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1275 (11th Cir. 2019) (decertifying a class where "each plaintiff will likely have to provide some individualized proof that they have standing"). Those individual inquiries would predominate over any common issues in violation of Rule 23.

II. Establishing damages based on "averages" unconnected to harm actually suffered by particular plaintiffs violates the Rules Enabling Act and Supreme Court precedent.

Plaintiffs failed to meet their burden on predominance in this case for a second reason as well: they failed to identify any proper common method for establishing damages. The panel majority erred by accepting plaintiffs' proposed "averaging" tactic. Slip op. at 16-19. The dissent

correctly rejected it. Dissent, slip op. at 6-13 (Branch, J., concurring in part and dissenting in part).

This Court has long held that Rule 23(b)(3) prohibits class certification where individual damages issues will predominate. *See Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc.*, 601 F.3d 1159, 1178-79 (11th Cir. 2010). Claims involving "extensive individualized inquiries on . . . issues of . . . damages" cannot be resolved through a class action. *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1366 (11th Cir. 2002), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). But to avoid this problem, the panel majority approved a method of damages that will alter the substantive rights of the parties.

The panel majority found that individual issues of damages would not predominate because an "averages method" could determine damages. Slip op. at 16. Under this method, class members would receive awards based on the damages incurred by an average class member without showing that the individual class member had sustained any corresponding injury. Citing the district court opinion, the panel majority explained that "all class members would receive 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 time addressing the breach), and out-of-pocket damages (whether or not they incurred any out-of-pocket damages)." Slip op. at 18 & n.14 (noting the plaintiffs' expert had opined that "data breaches typically yield damages . . . somewhere in the ballpark of $38 per plaintiff").

The Supreme Court has rejected this kind of "averages" proof of damages in a class action. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011), the class-action plaintiffs proposed to prove their claims by having a special master determine "liability for sex discrimination and the backpay owing as a result" for a "sample set of the class members." *Id.* "The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set . . . without further individualized proceedings." *Id.*

The *Wal-Mart* Court "disapprove[d]" of "that novel project," noting that "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge,

enlarge or modify any substantive right.'" *Id.* (quoting 28 U.S.C. § 2072(b)). Since the defendant must be able to present "defenses to individual claims," this scheme to avoid individual proceedings could not proceed. *Id.* The same problem exists in this case. *See* Dissent, slip op. at 10.

As the dissent properly recognized, *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 459-61 (2016), did not generally approve the use of averages methods to calculate damages. Dissent, slip op. at 12.

Tyson Foods allowed the use of an averaging method on very different facts, and only in limited circumstances. In that case, the Court allowed the plaintiffs to use an average amount of time that it would take to don and doff protective clothing. Importantly, in that case every class member worked in meat-cutting departments of the same plant in Iowa, and it was undisputed that all needed the protective gear and had to don and doff it. The Court also noted that the absence of specific records about how long it took each class member to don and doff was caused by the defendant's "failure to keep adequate records." 577 U.S. at 456. Thus, *Tyson Foods* used averages in only the same way that averages could be used in any one individual worker's case. *Id.* at 458.

Tyson Foods has little to nothing in common with this case. *See* Dissent, slip op. at 12 ("unlike *Tyson Foods*, here, the use of damages averages would deprive Brinker of its ability to litigate individual defenses where a class members' individual damages are discoverable."). Using averages here "would . . . violate[] the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods*, 577 U.S. at 458.

Unlike in *Tyson Foods*, the averaging here aims to combine dissimilar experiences and award everyone an "average" damages number, regardless of what they actually did or why. For instance, some class members may have cancelled their cards and paid, say, $3 in ATM fees to get cash while they awaited new cards from their bank. Most probably did not, and paid no ATM fee. Yet the averaging model turns some (estimated) small number of $3 fees into damages for many thousands or millions of people. This makes no sense for the 95 or 99 percent of people who never paid any ATM fee. Similarly, the expert explained that he would also be building in "bank charges to replace cards," which he explained is "unusual" but "does occur on occasion." Slip

op. at 18 n.14. The expert essentially admits that he is spreading a few dollars *possibly* paid by a few people and turning them into damages recoverable by everyone. Transforming that rare injury into compensable damages for everyone in the data breach makes no sense and contravenes bedrock Supreme Court precedent and the Rules Enabling Act. It is self-evidently a way to avoid the proper analysis—customer by customer—which is too individualized to support class treatment.

III. Improper class actions impose substantial costs on the business community.

The failure to rigorously police class actions imposes substantial harms on the business community and the public more broadly.

Class-action litigation costs in the United States are huge. They totaled a staggering $3.64 billion in 2022, continuing a rising trend that started in 2015. *See* 2023 Carlton Fields Class Action Survey, at 4-5 (2023), *available at* https://ClassActionSurvey.com.

This case provides an example of how the failure to enforce limits on class actions imposes costs with no countervailing benefit. The panel majority accepted a flawed damages model that would apply equally well to many data-breach cases.

If such a damages model is permitted to stand, class actions based on data breaches—which, again, rarely inflict actual financial harm on the consumers whose data is breached—will proliferate. Most of the millions of consumers whose data may allegedly have been posted to the dark web in this case probably never even knew about it, much less had their identities stolen or credit card wrongly used to make a purchase. Yet the class definition here inherently requires somehow identifying those who did *something* in response. Then the court plans to award all those people an equal sum of money based on averaging out the costs to the handful of *that group* who undertook unusual acts that did incur cost. Many class members stand to recover something for essentially nothing.

If not corrected, the panel majority decision will only incentivize more litigation and prolong suits that should never have been certified in the first place. This harms the entire economy because the costs of defending and settling abusive class actions are ultimately absorbed by consumers and employees through higher prices or lower wages.

CONCLUSION

This Court should grant en banc review, and ultimately reverse.

Dated: August 21, 2023

Respectfully submitted,

/s/ Matthew A. Fitzgerald

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