No. 18-987

In the
Supreme Court of the United States

MCKESSON CORPORATION;
MCKESSON TECHNOLOGIES, INC.,

Petitioners,

v.

TRUE HEALTH CHIROPRACTIC, INC.;
MCLAUGHLIN CHIROPRACTIC
ASSOCIATES, INC.,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amici and their members represent a diverse array of businesses and business interests across the United States. *Amici* regularly advocate for the interests of their members in federal and state courts in cases of national concern. They support the petition because they have a strong interest in ensuring that the lower courts comply with this Court's precedents, including undertaking the rigorous analysis required under Federal Rule of Civil Procedure 23 before permitting a case to proceed as a class action.

Amici are concerned that the Ninth Circuit has turned Rule 23 on its head by requiring defendants to prove that individual issues predominate over common ones. This important, recurring issue is worthy of this Court's review. In addition, *amici*'s members devote significant time, energy, and resources to ensure that they comply with federal statutes, including the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.* If it is not corrected, the Ninth Circuit's failure to enforce Rule 23's requirements will significantly increase *amici'*s members' exposure to expansive class action liability for alleged statutory violations.

[1] Counsel for all parties received notice of the Chamber's intent to file this brief 10 days before its due date, and all parties consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel contributed money to fund the brief's preparation or submission.

The signatories to this brief are:

The Chamber of Commerce of the United States of America. The Chamber is the world's largest business federation, representing 300,000 direct members and the indirect interests of more than three million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States. One of the Chamber's central functions is to represent the interests of its members by participating as *amicus curiae* in cases involving issues of national concern to American business, including cases raising significant questions for companies subject to potential class actions.

The Business Roundtable. The Business Roundtable is an association of chief executive officers of leading U.S. companies working to promote a thriving U.S. economy and expanded opportunity for all Americans. Business Roundtable members lead companies that together have more than $7 trillion in annual revenues and employ nearly 16 million employees. The Business Roundtable was founded on the belief that businesses should play an active and effective role in the formation of public policy, and the organization regularly participates in litigation as amicus where important business interests are at stake.

SUMMARY OF ARGUMENT

This case presents an important question of federal class action law: does the burden under Rule 23(b)(3) shift to the defendant to establish that individual issues predominate over common ones when the individual issues relate to a defense. Although the Ninth Circuit stated that it was not shifting the burden, it required McKesson to present individualized evidence of consent, on a class-member-by-class-member basis, at the class certification stage. That not only flipped the burden, it even required McKesson to mount a fact-intensive merits defense at the certification stage. As the petition explains, the Ninth Circuit's decision radically changes settled class action procedures and conflicts with decisions from other circuits. The Ninth Circuit's approach also creates an almost insurmountable presumption in favor of class certification and, if it is not corrected, will deprive defendants of their right to litigate individual defenses.

The Court's intervention is especially warranted because this case arises under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq*. Congress designed that statute to allow for individual claims to be brought in small claims court against unscrupulous telemarketers. In recent years, however, the statute has become the vehicle for sprawling class actions that threaten legitimate businesses with crippling liability if they do not settle even meritless claims. The Ninth Circuit's decision will only exacerbate this significant problem,

undermining Congress's intent and promoting further class action abuse.

ARGUMENT

I. The Ninth Circuit's Decision Improperly Shifts the Burden of Class Certification.

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (internal quotation marks omitted). To justify that exception, the party seeking to certify a class must "affirmatively demonstrate" that the proposed class complies with Rule 23, including proving that common questions of law and fact predominate over individual ones. *Id.* at 348, 350. As this Court has emphasized, "plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014) (emphasis in original).

A. This Case Presents a Classic Example of Individual Issues Predominating Over Common Ones.

This case is a prime example of a dispute that should not be litigated as a class action because individual issues predominate over common ones. Plaintiffs' theory of liability is that McKesson violated the TCPA by sending its customers unsolicited promotional materials by fax. A central issue in the case is whether individual customers consented to receiving the materials by fax. If a customer provided

his or her consent, the customer has no claim under the TCPA. And consent is an inherently individualized inquiry in TCPA cases. *See, e.g., Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460 (6th Cir. 2017) (holding that individual issues of consent preclude class certification for claims that distributor sent unsolicited faxes).

In opposing class certification, McKesson went the extra mile. It introduced declarations, deposition testimony, and documents demonstrating that putative class members consented to receiving faxes and did so in a variety of ways. It then backed up that evidence with numerous, non-exclusive examples of specific class members who had consented in each of those ways. That should have left no doubt that individualized issues predominate.

The evidence showed that McKesson's sales force had long-standing relationships with its customers and that many of those customers used faxes to do business and had asked sales representatives to send them information by fax. All customers consented to receiving the faxes, either by voluntarily providing their fax numbers to McKesson or by entering licensing agreements that permitted McKesson to send offers by fax. In addition, many customers also consented in other ways, including by phone, in person, by email, or through other forms of written consent.

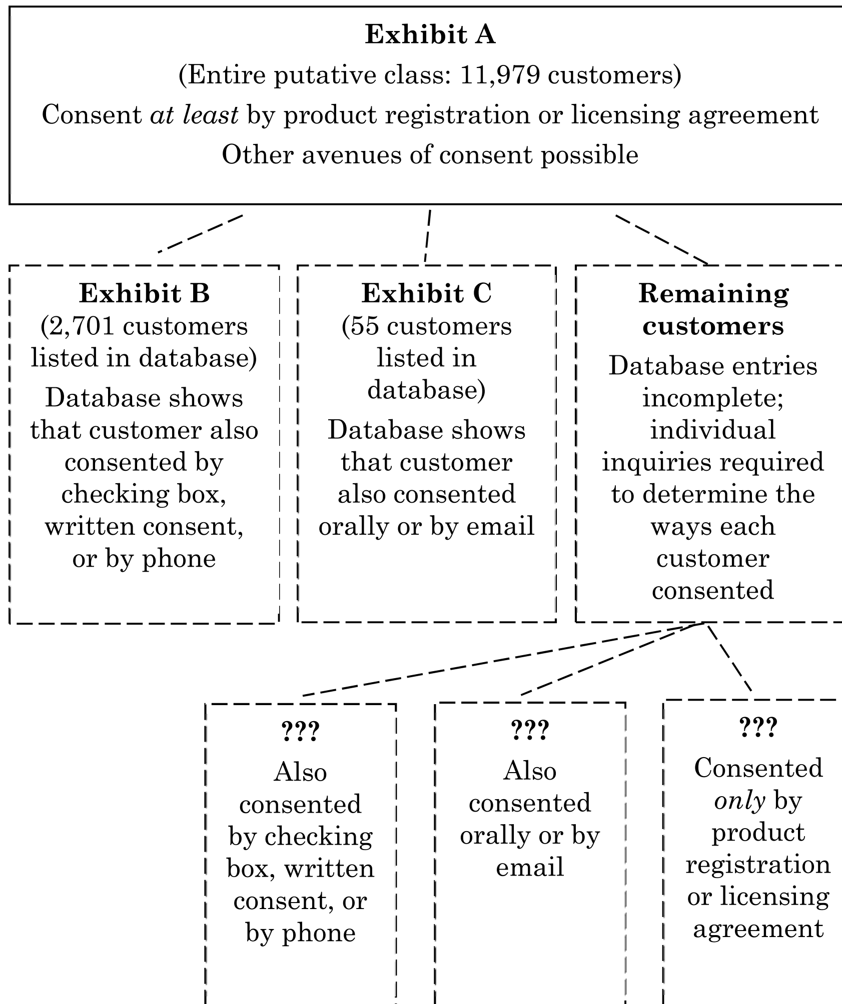
McKesson's discovery responses included three exhibits. **Exhibit A** listed the 11,979 customers who plaintiffs allege received unsolicited faxes. McKesson asserted that all customers listed in Exhibit A

consented to receiving fax advertisements by either providing their fax numbers when registering their products or by signing licensing agreements that permitted McKesson to send information by fax. McKesson also asserted that customers in Exhibit A consented to receiving faxes in additional, individualized ways.

To support its argument, McKesson presented records from a company database. As McKesson emphasized, the database information was illustrative and not comprehensive. The company had no obligation to use an electronic database to track when and in what form customers consented to receiving information by fax. Nor were sales representatives required to enter information into the database. Nonetheless, **Exhibit B** identified 2,701 customers for whom the database records indicated that the customer had consented to receiving information by fax, including by checking a box when registering a product, completing a written consent form, or consenting during phone calls with sales representatives. **Exhibit C** listed 55 customers who, according to records in a separate database, had also consented orally or by email.

McKesson made clear that Exhibits B and C reflected instances where a sales representative had entered relevant customer information into a database. Individual inquiries were therefore needed to determine whether the other customers listed in Exhibit A consented to receiving faxes in ways beyond providing their fax number or entering into a licensing agreement.

The following diagram illustrates the extent to which consent turns on individualized issues:



B. The Ninth Circuit Mounted an Almost Insurmountable Barrier to Prevailing on Predominance.

McKesson thus made an overwhelming showing that customers individually consented to receiving faxes and, because it is entitled to litigate its defenses with respect to each customer, individual issues would overwhelm any common questions of law and fact. The burden was on plaintiffs to identify a legal theory that would allow the court to adjudicate McKesson's affirmative defenses on a class-wide basis by determining in a single stroke how and in what ways customers had (or had not) consented to receiving faxes. *See Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 328 (5th Cir. 2008) ("plaintiffs must advance a viable theory employing generalized proof to establish liability with respect to the class involved"). Plaintiffs could not meet that burden. Instead, they urged the court to relax Rule 23's requirements and treat all customers as part of the class unless McKesson could prove its defenses on a customer-by-customer basis.

That is what the Ninth Circuit did by holding that the case could proceed as a class action with respect to all customers not listed in Exhibits B and C because, for those customers, McKesson had failed to "defeat[]" predominance. App. 17a–18a. In other words, the Ninth Circuit refused to take into account any of McKesson's individualized defenses except the ones for which McKesson had *already* produced customer-specific evidence. App. 16a ("[W]e do not consider the consent defenses that McKesson might advance or for which it has presented no evidence."). In the Ninth Circuit's view, because McKesson had not conducted

at the class certification stage individualized inquiries into thousands of customers who interacted with various sales representatives to determine the various ways in which customers may have consented, McKesson had failed to show that individual issues predominated over common ones.

But the whole point of the predominance requirement is that, if individual issues would predominate, a defendant should not have to undertake individualized inquiries. Requiring a defendant to undertake those inquiries *at the class certification stage* to prove that it should not have to undertake that same inquiries *at the merits stage* subverts the very purpose of Rule 23. It deprives defendants of their due process right "to litigate [their] . . . defenses to individual claims" by allowing class treatment of inherently individualized issues. *Wal-Mart*, 564 U.S. at 367; *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."). It also imposes unreasonable costs on defendants. Here, for example, those costs would include conducting a customer-by-customer inquiry into consent given on various forms, over the phone, or through other oral or written communications for tens of thousands of customers. The drafters of Rule 23 expressly recognized that when such individual inquiries are required class certification is improper. *See* Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment (noting that when "defenses of liability" are present and "affect[] the individuals in different ways," a class action would be improper and "would degenerate in practice into multiple lawsuits").

The Ninth Circuit's approach also misuses the sub-class mechanism and puts an impossibly heavy thumb on the scale in favor of class certification, turning every class into a fail-safe one. Although there was no basis for concluding that customers listed on Exhibits B and C were differently situated from other customers, the Ninth Circuit declared those customers to be part of two different sub-classes and allowed plaintiffs to carve them out from the class. A court is permitted to create subclasses when class members have a conflict of interest that requires separate counsel to protect the interests of absent class members. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). But the use of subclasses must be "appropriate," and each subclass must independently satisfy Rule 23's prerequisites. Fed. R. Civ. P. 23(c)(4)(B) ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule"). Subclasses cannot be used to rescue a class that does not comply with Rule 23 by simply carving off class members whose individual claims have been shown to be meritless, leaving all other class members for class adjudication of individualized issues. *See Sprague v. General Motors Corp.*, 133 F.3d 388, 399 n.9 (6th Cir. 1998) ("Subclasses are not a substitute for compliance with Rule 23."); *see also* Scott Dodson, *Subclassing*, 27 CARDOZO L. REV. 2351 (2006) (discussing split in authority as to when subclasses are appropriate).

Under the Ninth Circuit's approach, even if a defendant "succeeds" in presenting proof in its defense as to a particular class member, the "defeated" class member simply drops out and the case continues as a

class action. That is what happened here: with respect to customers for whom an individualized inquiry would be required to evaluate the merits of their claims, the court improperly presumed that plaintiffs satisfied the predominance requirement by deeming any defenses related to individualized consent too "speculati[ve]" to defeat class certification. App. 17a.

The impracticality of proving defenses on an individual-by-individual basis at the certification stage means that the Ninth Circuit's standard is all but impossible to satisfy. And because defendants must, under the Ninth Circuit's approach, investigate and present individualized proof for each class member at the class certification stage, defendants bear a *heavier* burden when the issues are *more* individualized and the class size is *greater*. That turns the predominance inquiry inside out and deprives defendants of Rule 23's protections when they need them most.

II. The Ninth Circuit's Decision Is Especially Harmful in the Context of TCPA Litigation.

The Ninth Circuit's aberrant approach to class certification is particularly problematic in the context of the TCPA. Because the TCPA provides statutory penalties of $500 to $1,500 per communication, plaintiff lawyers have exploited the TCPA to subject legitimate U.S. businesses to "staggering, and potentially annihilating, amounts of statutory damages tied to new technologies." U.S. Chamber Institute of Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* 1 (Aug. 2017). TCPA litigation has exploded

in recent years. In 2007, only fourteen TCPA actions were filed in the United States. Stuart L. Pardau, *Good Intentions and the Road to Regulatory Hell: How the TCPA Went from Consumer Protection Statute to Litigation Nightmare*, 2018 U. ILL. J. L., TECH. & POL'Y 313, 322 (2018). In 2015, that number rose to 3,710, *id.*, and in 2016, the figure reached approximately 5,000. ACA News, *TCPA Cases Approach Milestone for 2016* (Nov. 17, 2016).

The massive number of cases belies the comparatively small number of firms and plaintiffs responsible for this torrent of litigation. A recent, nationwide study of TCPA lawsuits over 17 months found that just 44 law firms were responsible for 60 percent of TCPA filings—approximately 1,800 cases total. *Litigation Sprawl* at 11. The four most prodigious TCPA firms were responsible for 711 cases, or about 23 percent of the total. *Id.* This "cottage industry" of TCPA lawyers "actively recruit[s]" plaintiffs and target companies with "deep pocket[s]." U.S. Chamber Institute for Legal Reform, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages* 6 (Oct. 2013).

The popularity of TCPA lawsuits stems from two factors: (1) the class mechanism, which allows for thousands of potential plaintiffs, and (2) the statutory damages available ($500 per violation, which can be trebled for "willful" violations). 47 U.S.C. § 227(b)(3). Damages can thus accumulate very quickly. For example, a company that makes three calls to each of its 50,000 customers could easily face a class action lawsuit seeking $225 million. In *Holtzman v. Turza*, the Seventh Circuit upheld a $4.2 million summary

judgment verdict against a single attorney who sent periodic faxes to approximately 200 accountants. 828 F.3d 606 (7th Cir. 2016). These extreme damages amounts far outweigh any harm suffered by the plaintiff on the receiving end of a nuisance phone call or bothersome fax—and, too often, exceed a TCPA defendant's ability to pay.

When a class is certified, TCPA defendants are almost always strong-armed into settlement, even when they have strong defenses. As this Court has recognized, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also* Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1878 (2006) (explaining that aggregation of "statutory damages that have been decoupled from claimants' actual losses" causes immense pressure to settle).

These *in terrorem* settlements impose untenable burdens on legitimate businesses. Although Congress enacted the TCPA to combat "telephone terrorism" by unscrupulous telemarketers, 137 Cong. Rec. S 16205 (Daily ed. Nov. 7, 1991) (statement of Sen. Hollings), TCPA defendants today are often companies trying to communicate with prospective or existing customers. The Chamber recently found that financial institutions made up a significant portion of all TCPA defendants—35.7 percent. *Litigation Sprawl* at 7.

Healthcare and education institutions made up another 15 percent of defendants. *Id.*

Yet the benefits to customers from this sprawling TCPA litigation are vanishingly small. In 2010—well before the current high-water mark of TCPA class action lawsuits—21 TCPA class actions settled for $10 million or more, and nine for $30 million or more. *See Litigation Nightmare* at 322. But despite the scores of extortionary settlements TCPA defendants are forced into making each year, the individual customers themselves see little recompense. In 2016, the average recovery for members of a TCPA class action lawsuit was just $4.12 (far less than what they would recover in small claims court). *Id.* By contrast, the average pay for class counsel totaled $2.4 million. *Id.*

This state of affairs is not what Congress had in mind when it enacted the TCPA. Congress designed the statute to provide a mechanism for consumers to seek legal redress in the case of excessive and intrusive telemarketing schemes. And indeed, the great weight of the statute's legislative history makes clear that class actions were never intended to be brought under the TCPA at all. The TCPA was originally envisioned as a remedial scheme under which *individual* consumers would bring suit "in small claims court" to litigate their cases "without an attorney." 137 Cong. Rec. S 16205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings). Moreover, the TCPA's damages provisions—which are ruinous in the class action context—were never meant to compensate a plaintiff's actual harm. Instead, Congress designed TCPA damages to "encourag[e]

enforcement" by "individual citizens." *S. 1462, The Automated Telephone Consumer Protection Act of 1991; S. 1410, The Telephone Advertising Consumer Protection Act; and S. 857, Equal Billing for Long Distance Charges: Hearing Before the S. Subcomm. on Communications of the S. Comm. of Commerce, Science and Transportation*, 102 Cong. 42 (1991) (statement of Michael Jacobson, Cofounder, Ctr. for the Study of Commercialism). The TCPA's damage figures are thus the result of a careful balance between "deterring violations" and incentivizing individuals to bring suit in small claims court on the one hand, *id.*, while also being "fair to both the consumer and the telemarketer" on the other. 137 Cong. Rec. S 16205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

Nationwide class actions disrupt the remedial scheme that Congress intended, enabling aggressive plaintiffs' lawyers to strong-arm excessive settlements and chilling legitimate communications between businesses and their customers. This case represents a quintessential example of a TCPA class action—one in which the issue of consent is central and varies on a customer-by-customer basis. Pet. 29. The Ninth Circuit's burden-shifting approach, which requires a TCPA defendant to provide individualized evidence of consent in order to defeat class certification, will almost certainly further the proliferation of abusive TCPA class actions.

* * * *

This case presents another example of the Ninth Circuit adopting an innovation in class action law that is inconsistent with this Court's precedents and conflicts with decisions from other courts of appeals. The Ninth Circuit has created a heavy presumption in favor of class certification in the context of a statute that Congress never intended to result in class actions that target legitimate businesses for communicating with their customers. The Court should grant review to resolve the circuit split, clarify the extent of a defendant's burden at the class certification stage, and address the ongoing abuse of the TCPA that has resulted from lower courts failing to enforce Rule 23.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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