No. 23-80025

In the

United States Court of Appeals

For the Ninth Circuit

RASESH SHAH, et al.,

Plaintiffs-Respondents,

v.

QUALCOMM INCORPORATED, et al.,

Defendants-Petitioners.

On Petition for Permission to Appeal an Order of the
United States District Court for the Southern District of California, San Diego
Honorable Jinsook Ohta, District Judge
Case No. 3:17-cv-00121-JO-MSB

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae the Chamber of Commerce of the United States of America certifies that it has no outstanding shares or debt securities in the hands of the public, and it does not have a parent company. No publicly held company has a 10% or greater ownership interest in amicus curiae.

Dated: April 10, 2023

Respectfully submitted,

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IDENTITY AND INTEREST OF AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents around 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 briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's members and their subsidiaries are often targeted as defendants in class actions. The Chamber thus is familiar with class action litigation, both from the perspective of individual defendants in class actions and from a more global perspective. The Chamber has a significant interest in this case because the district court's misapplications of Article III and Rule 23 raise issues of immense significance not only for the Chamber's members, but also for the customers, employees, and other businesses that depend on them.

* Counsel for Defendants-Petitioners have consented to the filing of this brief; counsel for Plaintiffs-Respondents have not consented. The Chamber is contemporaneously filing a motion for leave. No counsel for a party authored this brief in whole or in part. No party, no party's counsel, and no person or entity other than amicus, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

ARGUMENT

This Court should grant Qualcomm's 23(f) Petition and reverse the district court's class-certification order. This case is appropriate for discretionary interlocutory review because, among other things, it "presents . . . unsettled and fundamental issue[s] of law relating to class actions, important both to the specific litigation and generally, that [are] likely to evade end-of-the-case review." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005).

First, the district court erred under *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), by certifying a Rule 23(b)(3) damages class without ensuring the necessary fit between Lead Plaintiffs' proposed damages model and the legal theories they intend to assert on behalf of the proposed class. *Comcast* provides an important check to ensure that Rule 23(b)(3)'s predominance standard is satisfied. That check becomes all the more important in securities-fraud cases like this one, since securities plaintiffs enjoy a presumption of market reliance under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), that can obscure individualized issues. The district court here misapplied *Comcast* by failing even to address Qualcomm's strong arguments about the disconnect between Lead Plaintiffs' damages model and their legal theories. That was a clear abuse of discretion.

Second, this case also presents a great opportunity for this Court to join the Fifth Circuit in clarifying that securities-fraud class actions cannot be certified

based on a "materialization of the risk" theory. *See Ludlow v. BP, P.L.C.*, 800 F.3d 674, 689 (5th Cir. 2015). This Court has previously declined to endorse that theory, *see Nuveen Mun. High Income Opportunity Fund v. City of Alameda*, 730 F.3d 1111, 1122 n.5 (9th Cir. 2013), and for good reason, as it is inconsistent with the Supreme Court's articulation of federal securities-fraud class action law. But it continues to come up in district courts within the Ninth Circuit. This case provides a straightforward vehicle to address an important recurring issue.

Finally, the Court's discretionary review is warranted because these important issues will continue to evade review if deferred. Class-action liability presents a substantial financial threat to American businesses, and the mere fact of class certification can provide plaintiffs massive settlement leverage. *See, e.g.*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). The Court should use its discretion to address these important legal issues at this juncture and provide important appellate guidance for this and future cases.

I. It Is Critically Important to Enforce *Comcast* in Securities Class Actions, Requiring a Viable Classwide Damages Model at Certification.

A. *Comcast* requires a viable classwide damages model to satisfy predominance. A district court may not certify a damages class without finding, among other things, 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). *Comcast* holds that, to establish predominance, the plaintiff must proffer

at class certification a model that can establish damages for all class members without individualized adjudications.

Comcast itself involved an antitrust class action in which the plaintiff planned to assert several different theories. At class certification, the plaintiff proffered a damages model purporting to show aggregate damages of $875,576,662 under four different theories. *See* 569 U.S. at 31–32. The district court ruled that only one theory was viable but nevertheless certified a class without requiring an updated damages model. *Id*. The Third Circuit affirmed.

The Supreme Court reversed, explaining that a plaintiff is entitled to only those damages that arise from the asserted theory of injury. *Id*. at 34. The Court held that "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* at 35. Without the required fit, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.* at 34.

Comcast "turn[ed] on the straightforward application of class-certification principles," not on "substantive antitrust law." *Id*. Indeed, it reflected the core principle that a class action cannot be certified unless it can be efficiently conducted on a classwide basis without extinguishing individualized defenses. *See id.* If a

district court certifies a Rule 23(b)(3) class without a viable damages model, one of two outcomes will result: either the parties will need to conduct individualized proceedings to determine damages, which defeats the efficiencies of the class-action mechanism; or the court will gloss over individualized issues to ensure efficient classwide relief, thereby violating the due process rights of the defendant and "abridg[ing] . . . substantive right[s]," contrary to the Rules Enabling Act. 28 U.S.C. § 2072(b). Neither outcome is palatable, and they are precisely what the predominance requirement is meant to avoid.

Comcast forces a district court to consider *up front* whether the plaintiff's particular legal theories—in all the permutations a trial might yield—are genuinely susceptible to classwide adjudication. The district court should be reversed because it deferred this obligation.

B. Although it is by now clear that the interpretation of Rule 23 announced in *Comcast* applies to all class actions, *see, e.g.*, *Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys.*, 141 S. Ct. 1951, 1960–61 (2021), it is particularly important in the securities-fraud cases because other securities-fraud doctrines can obscure individualized issues. Under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), for example, "if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a

presumption that the misrepresentation affected the stock price." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 279 (2014).

This "*Basic* presumption" makes it easier for a securities-fraud plaintiff to obtain class certification because he need not directly prove price impact. *See id*. The defendant may present evidence at class certification that the misrepresentation did not affect the stock price, but the burden of disproving price impact rests on the defendant. *See Goldman Sachs*, 141 S. Ct. at 1963. This lighter burden creates a risk that securities-fraud classes will be certified without any realistic way of resolving them on a classwide basis. A plaintiff can show *Basic*'s prerequisites—a public and material misrepresentation and a generally efficient market—without any mechanism for disentangling the effect of the allegedly actionable misstatements from the effect of other nonactionable statements.

Comcast helps to avoid that outcome by requiring the district court to disentangle those issues in scrutinizing the plaintiff's damages model. Damages can often be an area where individualized issues end up predominating, particularly in securities-fraud class actions. Holding plaintiffs to their burden to present a viable damages model at class certification helps ensure that Rule 23(b)(3)'s predominance requirement is met.

C. The district court erred in applying *Comcast*. In particular, the district court wrongly found predominance without requiring Lead Plaintiffs to show that their

damages model could distinguish between losses attributable to the materialization of undisclosed risks (which might be compensable under Lead Plaintiffs' theory) and those attributable to *already disclosed* risks, like the general risk of regulatory scrutiny and enforcement (which would not be). Qualcomm squarely raised this *Comcast* problem in opposing class certification. *See* ECF 244 (Qualcomm Opp.), at 33–37.

Lead Plaintiffs' expert, Dr. Tabak, explained his ability to disentangle damages attributable to various allegedly false statements, *see* ECF 217-2 (Tabak Report), ¶¶ 59–63, and the district court cited that assertion in certifying the class, *see* Petition, Ex. 1 (Class Certification Order), at 32. But the court conspicuously did *not* cite (or otherwise address) the expert's discussion of disentangling undisclosed and disclosed risks. *See* Tabak Report, ¶ 64.

Dr. Tabak simply side-stepped the issue. In the final paragraph of his report, he opined:

> To the extent Plaintiffs' loss-causation theory is viewed as "materialization of the risk," . . . Plaintiffs will attempt to show that Qualcomm's allegedly misrepresented licensing and bundling practices ***would inevitably lead*** to the regulatory and customer scrutiny from those practices that caused Plaintiffs' losses . . . . ***If Plaintiffs are able to make such a showing***, the statistically significant declines in Qualcomm's stock price . . . would be used to measure investors' damages under a materialization-of-the-risk theory, while once again accounting for any causes of the price declines . . . unrelated to the allegations.

Id. (emphasis added). In other words, Dr. Tabak eliminated any need to disentangle risks by simply assuming that Lead Plaintiffs could prove they were irrelevant. He would thus assume that regulatory and customer scrutiny was a *certainty* rather than a *risk* and that 100% of the market's reaction was compensable.

The district court should not have accepted that sleight of hand—and cannot do so under *Comcast*. But at the very least, the district court needed to address it to satisfy its obligations under Rule 23. And there was no excuse not to when Qualcomm had teed it up so plainly. Federal courts routinely hold that it is arbitrary and capricious for a federal agency, in adopting a regulation, to "entirely fail[] to consider an important aspect of the problem." *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1010 (9th Cir. 2009) (quotation omitted). By the same token, a district court abuses its discretion if it simply ignores a significant issue with the plaintiff's damages model.

II. This Case Presents an Important Opportunity to Address (and Reject) the "Materialization of the Risk" Theory.

This case also presents an opportunity for this Court to join the Fifth Circuit in holding that securities-fraud class actions cannot be certified under Rule 23(b)(3) based on a "materialization of the risk" theory, *see Ludlow*, 800 F.3d at 689—an issue this Court has previously left open, *see Nuveen*, 730 F.3d at 1122 n.5.

Some federal courts have held that, even if a securities-fraud plaintiff cannot show a fraudulent statement or omission and a corrective disclosure, *see generally*

Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005), one can nevertheless state a claim based on "foreseeable" but undisclosed risks that later result in "losses suffered by the class . . . due to the materialization of the risk." *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 513 (2d Cir. 2010). But as the Supreme Court explained in *Dura*, federal law provides a securities-fraud cause of action, "not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." 544 U.S. at 345. Allowing recovery based on the materialization of foreseeable but undisclosed risks—without requiring the traditional showing under *Dura* of an actionable false statement or fraudulent omission *plus* a corresponding corrective disclosure—essentially creates the insurance plan for investors that *Dura* rejected.

As the Fifth Circuit recognized in *Ludlow*, this theory is also not "'susceptible of measurement across the entire class for purposes of Rule 23(b)(3),' as required by *Comcast*." 800 F.3d at 690 (quoting *Comcast*, 569 U.S. at 35). Lead Plaintiffs' theory confirms the point; at least as envisioned by Dr. Tabak, their "materialization of the risk" theory "hinges on a determination that each plaintiff would not have bought [the defendant's] stock at all were it not for the alleged misrepresentations—a determination not derivable as a common question, but rather one requiring individualized inquiry." *Id.* That is because damages would vary depending on whether the individual investor, armed with full awareness of the risk, would have

(a) not bought the stock at all or (b) bought the stock at the accurate price. *See id*. A "materialization of the risk" theory also generally "presumes substantial reliance on factors other than price" (*e.g.*, risk tolerance), and thus is "not supported by *Basic* and the rationale for [the] fraud-on-the-market theory." *Id.* at 691.

This Court should take this opportunity to join the Fifth Circuit in holding that the "materialization of the risk" theory is, at a minimum, not susceptible to class certification under *Comcast* and Rule 23(b)(3)'s predominance requirement.

III. These Important Issues May Evade Review If the Court Does Not Grant Rule 23(f) Review.

The Court should grant interlocutory review because, without it, the parties may be pressured into a settlement that deprives them—and parties to future cases within in the Ninth Circuit—of this Court's guidance on important issues of suitability to class treatment.

Class action litigation costs in the United States are enormous and growing. In 2022, those costs surged to $3.5 billion, continuing a long-running upward trend. *See* 2023 Carlton Fields Class Action Survey, at 4–6 (2023), *available at* https://ClassActionSurvey.com. Defending even one class action can cost over $100 million. *See, e.g.*, Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (July 2011). And those class actions can persist for years, accruing legal fees, with no resolution of class certification—let alone the whole dispute. *See* U.S. Chamber Institute for Legal Reform, *Do Class Actions*

Benefit Class Members? An Empirical Analysis of Class Actions, at 1, 5 (Dec. 2013), *available at* http://bit.ly/3rrHd29 ("Approximately 14 percent of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis.").

The extraordinary exposure of class certification also creates immense pressure on defendants to settle even cases they should win. Judge Friendly aptly termed these "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). As the Supreme Court explained, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand*, 437 U.S. at 476; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"). Since 2018, well over half of class actions have resulted in settlements—including over 73% of class actions in 2021. *See* 2023 Carlton Fields Class Action Survey 22.

Rigorous enforcement of *Comcast* would be a step in the right direction. It would ensure that parties do not waste time and money—and defendants are not faced with undue settlement pressure—litigating a certified class action through trial only for a court to conclude that damages cannot be determined on a classwide basis and thus that class treatment was not appropriate. By contrast, if courts skip over the

predominance inquiry, then the already immense pressure on businesses to settle improperly brought class actions will continue to balloon based on procedural laxity, not substance. That coercion hurts the entire economy, because the attorney's fees and costs accrued in defending and settling overbroad class actions are ultimately absorbed by consumers and employees through higher prices and lower wages.

CONCLUSION

For the foregoing reasons, the Court should grant Qualcomm's 23(f) Petition and reverse the district court's class-certification decision.

Dated: April 10, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Fed. R. App. P. 29(a)(5) because it contains 2,744 words, which, when divided by 280 as provided by Rule 32-3, yields a page count less than or equal to ten pages as required by Rule 5-2(b).

2. This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point size Times New Roman font.

Dated: April 10, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2023, the foregoing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system, which will also serve counsel of record.

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