No. 15-1101

In the

Supreme Court of the United States

GOOGLE, INC.,

Petitioner,

v.

PULASKI & MIDDLEMAN, LLC, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

A class action may be certified only if the four prerequisites listed in Federal Rule of Civil Procedure 23(a) are satisfied (numerosity, commonality, typicality, fair and adequate representation), and the class action falls within one of Rule 23(b)'s defined types. The third subpart of Rule 23(b) is at issue here, and it allows certification only if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In addition, class certification "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

This case presents two questions about these requirements. They are:

1. Whether individual damage calculations alone can overwhelm questions common to the class, precluding certification under Rule 23(b)(3).

2. Whether plaintiffs may use a formula that relies on a uniform measure of harm derived from the average experience of all class members as common proof of damages.

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Bone, Robert G., *The Misguided Search for Class Unity*, 82 Geo. Wash. L. Rev. 651 (2014) 6

Ghoshray, Saby, *Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 Loy. U. Chi. L.J. 467 (2012) 16

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Massaro, John C., *The Emerging Federal Class Action Brand*, 59 Clev. St. L. Rev. 645 (2011) 11, 13

Nagareda, Richard A., *Class Certification In the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009) 16

Parkinson, Alex, Comment, *Comcast Corp v. Behrend and Chaos on the Ground*, 81 U. Chi. L. Rev. 1213 (2014) 10

Stier, Byron G., *Now It's Personal: Punishment and Mass Tort Litigation After Philip Morris v. Williams*, 2 Charleston L. Rev. 433 (2008) 16

Tidmarsh, Jay, *Resurrecting Trial by Statistics*, 99 Minn. L. Rev. 1459 (2015) 13

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2,[1] Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner. PLF was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues at all levels of state and federal courts, representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and free enterprise. PLF's Free Enterprise Project engages in litigation, including the submission of amicus briefs, in cases affecting America's economic vitality, and in particular in cases involving the abuses of class action procedures which harm businesses, and stifle entrepreneurialism and job creation. *See*, *e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146, slip op. (U.S. filed Mar. 20, 2015); *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. filed May 7, 2014); *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Stearns v. Ticketmaster Corp.*, 655

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

F.3d 1013 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1970 (2012); *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009).

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Plaintiffs in this case sued Google, purportedly representing a class of hundreds of thousands of advertisers who contracted with Google over the course of several years. They allege that Google violated California's Unfair Competition Law and False Advertising Law[2] by showing the advertisers' ads on "parked domain" and "error page" websites and that placement on these types of websites offer less value than placement on other types of websites. Pet. App. at 6a. They moved to certify a class of AdWords advertisers who "were charged by Google for clicks on their advertisements that Google placed on parked domains or error pages" between 2004 and 2008. The class proposed a formula for restitution that would apply a uniform discount on all ads placed on the lower value pages in lieu of individual determinations of damages. Pet. App. at 6a-7a.

The district court denied class certification because the need for individual calculation of restitution predominated over common issues. Specifically, the district court explained that the "amount advertisers pay to use AdWords is determined through an auction process that generates a separate cost for *each* advertiser for *each* ad and for *each* click,

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[2] The Ninth Circuit opinion mistakenly refers to Business and Professions Code section 17500, *et seq.*, as the "Fair Advertising Law." Although the statute does not have an official name, courts routinely call it the False Advertising Law. *See, e.g., Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 951 (2002); *California v. Intelligender, LLC*, 771 F.3d 1169, 1174 (9th Cir. 2014).

with the specific amounts determined by the interplay of the bidding strategies of the participating advertisers in a given auction." Pet. App. at 55a. The plaintiffs' model would apply the discount even if an individual advertiser's ads on that web page outperformed ads appearing on other types of websites—that is, some plaintiffs would be eligible for damages even though they *benefitted* from the ad placement. Pet. App. at 57a.

In reversing the district court's denial of class certification, the Ninth Circuit categorically held that individual questions relating to calculation of damages can never defeat certification, thus eliminating the need to determine whether questions of individual restitution amounts would predominate over questions of liability. Pet. App. at 18a; Pet. App. at 20a-21a. The Ninth Circuit's decision conflicts with this Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013), which held that class certification is properly denied where "[q]uestions of individual damage calculations [would] inevitably overwhelm questions common to the class." The court then approved a method of calculating class-wide damages based on a mathematical formula that purported to apply a uniform measure of harm based on the average advertiser's experience, violating Google's due process rights. *See Dukes*, 131 S. Ct. at 2561.

The Ninth Circuit frequently applies overly lax standards to consumer class certification, adversely affecting the economies of the western states and companies nationwide that do business in those states. Class certification is appropriate only when common questions predominate over individual questions. In this case, the Ninth Circuit improperly carved out the

single biggest question of commonality (damages) as irrelevant in order to certify the class. It compounded the error by permitting plaintiffs to apply a mathematical formula to determine damages, even for those advertisers who suffered no harm or even benefitted from their ad placements.

The Ninth Circuit's decision in this case exacerbates a Circuit split as to how and when *Comcast* should be applied when issues of predominance arise in the context of damages rather than liability, and whether statistical modeling suffices to protect defendants' due process rights to defend against damage claims in class action litigation.

The petition for a writ of certiorari should be granted.

REASONS TO GRANT THE PETITION

I

THE DECISION BELOW CATEGORICALLY REFUSES TO CONSIDER PREDOMINANCE IN DETERMINING WHETHER CLASS CERTIFICATION COMPLIES WITH FEDERAL RULES AND DUE PROCESS

A class may be certified only if, "after a rigorous analysis," the district court is satisfied that the prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure are met. *Comcast*, 133 S. Ct. at 1432 (quoting *Dukes*, 131 S. Ct. at 2551). Those prerequisites require showing that: (1) "the class is so numerous that joinder of all members is impracticable"; (2) "there are questions of law or fact common to the class"; (3) "the claims or defenses of the

representative parties are typical" of those of the class; and (4) "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

In addition, the district court must be satisfied that certification is appropriate under Rule 23(b), which allows for certification only if both (1) "questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Predominance is satisfied "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Catholic Healthcare W. v. U.S. Foodservice Inc. (In re U.S. Foodservice Inc. Pricing Litig.)*, 729 F.3d 108, 118 (2d Cir. 2013) (citation and internal quotation marks omitted); *Tyson Foods Inc. v. Bouaphakeo*, No. 14-1146, slip op. at 9 (U.S. Mar. 22, 2016) ("The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.' ") (citation omitted).

In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624-25 (1997), this Court refused to certify an asbestos class because the plaintiffs' liability and damages claims did not meet the predominance requirement. The Court understood the predominance requirement to be "far more demanding" than the Rule 23(a) commonality requirement. *Id.* at 623-24

(predominance not only looks to see whether all class members have something in common, such as exposure to asbestos, but goes further to analyze and compare various common and uncommon questions among the class). *Amchem* introduced a cohesiveness test to determine predominance, looking at "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* This cohesiveness—the predominant commonality of the plaintiffs' claims—is one of the elements underlying the legitimacy of the class action itself. *See* Pankaj Venugopal, Note, *The Class Certification of Medical Monitoring Claims*, 102 Colum. L. Rev. 1659, 1683 (2002); *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 266 (11th Cir. 2011) (no class certification where common evidence cannot establish injury attributable to the defendants; evidence is not "'common' because it is not shared by all (possibly even most) individuals in the class").

In *Comcast*, this Court extended *Amchem*, holding that "under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis." 133 S. Ct. at 1433. The plaintiffs failed to demonstrate the cohesion required by *Amchem* specifically existed in the damages component of the proposed class. *Id.* *See also* Robert G. Bone, *The Misguided Search for Class Unity*, 82 Geo. Wash. L. Rev. 651, 693 (2014) (the *Amchem* Court's requirement of a cohesive class at the liability stage naturally presages the *Comcast* requirement for a cohesive class at the damages stage). This Court's decision in *Tyson Foods* does not resolve the issue presented here. Although *Tyson Foods* allows

certification of common central issues "that can be said to predominate," slip op. at 9, the key to the majority opinion in that case was the commonality of the questions relating to liability. The discussion of predominance is therefore tangential dicta that, even if it were controlling, does not countenance a categorical rule that individualized damages can *never* predominate over common questions of liability. For example, *Tyson Foods* explains that "the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Id.* This acknowledges situations where individualized damages questions may be "important," but they do not predominate. *Id.* *Tyson Foods*, therefore, does not directly address the critical question of whether a court may establish a bright-line rule excluding issues of damages from the predominance factor of Rule 23.

The Ninth Circuit's categorical approach to class action certification employs sleights of hand that unconstitutionally inures to the benefit of plaintiffs and the detriment of defendants. The federal courts should not be able to recast liability issues as damages issues and then declare that damages issues, even if *predominantly* individual, are off the table.[3] Comparison of two Ninth Circuit decisions demonstrates how this works in practice:

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[3] Courts generally disapprove of parties attempting this kind of reclassification maneuver. *See, e.g.*, *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 320 (5th Cir. 2002) (rejecting class plaintiffs' attempt to recast product liability claim as a contract claim to recover "benefit of the bargain" damages in the absence of an actual injury).

In *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2835 (2015), the Ninth Circuit certified a class based on a theory that foreclosed a defendant's ability to raise individualized liability defenses. The court justified its ruling by explaining that the defendant retained the right to "raise any individualized defense it might have at the damages phase of the proceedings" instead. *Id.* at 1168. The Ninth Circuit essentially reclassified liability defenses as damages issues for the purpose of shuttling all claimant-specific defenses to the damages phase of class proceedings.[4] It thereby certified the class even though the plaintiffs could not show a reliable, common methodology for measuring class-wide damages that was tied to the plaintiffs' theory of liability.

Now, in this case, the Ninth Circuit held that damages issues are categorically exempt from the analysis of whether common issues predominate over individual issues. Pet. App. at 18a. Under *Jimenez*, defendants' due process protections are eliminated at the outset as the Ninth Circuit pushes any consideration of those protections into a later damages phase of litigation; under this decision in this case, the "reserved" rights to challenge the propriety of class certification are extinguished precisely because they arise in the context of damages.

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[4] The Ninth Circuit reclassified the liability issues as relevant only in the damages phase because, by that means, it could protect the class certification and reverse the district court's denial of certification. As in this case, the *Jimenez* court relied on *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 516 (9th Cir. 2013), which established the Circuit's bright-line rule that individual damage calculations can never defeat certification.

The Ninth Circuit's holding stands in stark and irreconcilable conflict with numerous Circuit court decisions, as outlined in the petition. For example, in *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1178 (11th Cir. 2010), the Eleventh Circuit reversed class certification because the district court improperly "minimized the impact" of affirmative defenses that went to individualized damages issues "on the outcome of the predominance inquiry." *See also In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 255 (D.C. Cir. 2013) ("It is now clear . . . that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it."); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 419 (5th Cir. 1998) (class certification properly denied under Rule 23 because "[t]he predominance of individual-specific issues relating to the plaintiffs' claims for compensatory and punitive damages . . . detract[ed] from the superiority of the class action device in resolving these claims").

On the other side of the ledger, the Sixth and Seventh Circuits rejected the holding of the majority in *Comcast* after this Court vacated their prior decisions and remanded for reconsideration in light of that decision. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014). The Second Circuit's decision in *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015), held that *Comcast* did not overrule the Circuit's prior decisions permitting class

certification even if damages had to be assessed on an individual basis. It limited *Comcast* to those situations where the plaintiffs proposed a class-wide damage model, such that the plaintiffs would have to be able to actually measure damages pursuant to that model. *Id.* at 407. With this limitation, the court opined that the need for individualized damages determinations is relevant to whether common issues outweigh individual issues and remanded for the district court to consider that question. *Id.* at 408-09.

In light of the continuing conflicts over the meaning and application of *Comcast*, one commentator noted that "[t]he result of these dueling opinions has been nothing short of lower court chaos." Alex Parkinson, Comment, *Comcast Corp v. Behrend and Chaos on the Ground*, 81 U. Chi. L. Rev. 1213, 1225 (2014). This Court should grant the petition to resolve the entrenched and increasing conflict over whether the intractable individual damages issues in this case preclude class certification under *Comcast*.

II

THE PETITION SHOULD BE GRANTED TO DEFINE DUE PROCESS LIMITS ON STATISTICAL MODELS AS LITIGATION TOOLS

A. Defendants' Due Process Rights Are Equal to Plaintiffs'

Due process protections exist at every stage of litigation from determination of whether plaintiffs have standing (*Summers*, 555 U.S. at 497-98) to determination of liability (*Dukes*, 131 S. Ct. at 2561) to assessment of damages (*Comcast*, 133 S. Ct. at 1433).

The importance of developing rules for lower courts to approach the factual issues raised by class certification cannot be understated. "A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *See Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013).

The American legal system depends on discovery and evidentiary rules to allow each side to uncover the specific facts necessary to develop its case. With the facts revealed through discovery, each side can test the other sides' assertions and develop appropriate lines of argumentation. "Aggregate litigation does not in any way diminish plaintiffs' ability to do these things. But it can threaten the ability of defendants to do so." John C. Massaro, *The Emerging Federal Class Action Brand*, 59 Clev. St. L. Rev. 645, 677 (2011). Without judicial constraint, the procedural class action device can "turn into a mechanism for putting a defendant under a microscope and then putting that defendant on trial, rather than testing whether a particular plaintiff meets the elements of a cause of action and whether defenses to that cause of action exist in the context of a particular occurrence." *Id.* *Dukes* rejected one particular type of trial by formula because it presented unacceptable risks to both plaintiffs' and defendants' participatory rights. *Tyson Foods* acknowledged the limitations on statistical proof by suggesting that the statistical model must be constructed such that "each class member could have relied on that sample to establish liability if he or she had brought an individual action." Slip op. at 11. The Court declined to adopt a categorical rule disallowing statistical proof, *id.* at 13, holding instead that courts must conduct a

careful inquiry dependant on the "purpose for which the [statistical sampling] is being introduced," the "underlying cause of action," and "the facts and circumstances particular to [each case]." *Id.* at 15.[5]

The efficiencies created by class action litigation cannot be employed at the cost of denying individual litigants justice in the courts. A defendant's "aggregate liability . . . does not depend on whether the suit proceeds as a class action[,]" because "[e]ach of the . . . members of the putative class could . . . bring a freestanding suit asserting his individual claim." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality op.); *Tyson Foods*, slip op. at 14 (The Rules Enabling Act prohibits "giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action."). *See also Stone v. White*, 301 U.S. 532, 535 (1937) (where a plaintiff has a right to make an equitable claim, the defendant has an equal right to present a case to defeat that claim); *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (en banc) ("considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice"), *cert. denied*, 464 U.S. 1040 (1984); James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 Hofstra L. Rev. 329, 329 (2005) ("[W]hile class actions sacrifice individual autonomy in collective claiming processes to achieve consistent

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[5] The decision below did not conduct this type of inquiry or account for the ways in which class certification limited Google's ability to assert individualized defenses. For this reason, this Court may wish to grant, vacate, and remand to the Ninth Circuit to reconsider its decision in light of *Tyson Foods*.

outcomes and economies of scale, the underlying claims remain individual in nature.").

Plaintiffs should be compensated according to their injury, and defendants should only pay for the damages they actually caused. *See* Jay Tidmarsh, *Resurrecting Trial by Statistics*, 99 Minn. L. Rev. 1459, 1470 (2015) ("[T]he linkage between a plaintiff's harm and a defendant's causal contribution to that harm is the only justification for redistribution from a defendant to a plaintiff."). Assessing damages using a statistical formula necessarily overestimates the damages owed to some plaintiffs and underestimates the damages due to others. Even if the formula accurately determines the defendant's total liability, by mismatching the damages owed, using a formula is problematic from a due process standpoint for both defendants *and* plaintiffs. John C. Massaro, *The Emerging Federal Class Action Brand*, 59 Clev. St. L. Rev. 645, 674 (2011).

There has been an increase nationwide in the number of consumer protection lawsuits, often brought under extremely wide-ranging "unfair competition" laws such as California's Business & Professions Code § 17200, *et seq*. These lawsuits may allege a single alleged misrepresentation or omission susceptible to easy common proof, making the individualized questions of damages the most resource-intensive aspect of the litigation.[6] Regardless of the imbalance between proof of liability and damages, the Ninth

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[6] *See, e.g.*, *Loeffler v. Target Corp.*, 58 Cal. 4th 1081 (2014) (consumer class action sued for refund of excess sales tax charged on coffee "to go"); *Quesada v. Herb Thyme Farms, Inc.*, 62 Cal. 4th 298 (2015) (consumer class action based on alleged improper labeling of "organic" herbs).

Circuit will *always* certify the class pursuant to its categorical rule. By refusing to consider the individualized questions of damages in favor of employing the plaintiffs' flawed mathematical model, the decision below conflicts with ample precedent of this Court establishing the primacy of individual due process rights over efficiency. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011) ("The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power."). It requires that all persons "have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs[.]" *Barbier v. Connolly*, 113 U.S. 27, 31 (1885). Though affording Google its right to defend itself may be inconvenient, and undermine the efficiency and ease that the class action device is meant to provide, "[t]he requirement of 'due process' is not a fair-weather . . . assurance." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951).

B. Statistical Models Are of Limited Utility and Cannot Displace Due Process

The Oxford American Dictionary defines a "model" as "a simplified description, especially a mathematical one, of a system or process, to assist calculations and predictions." Rebecca Haw Allensworth, *Law and the Art of Modeling: Are Models Facts?*, 103 Geo. L.J. 825, 832 (2015) (citation omitted). A model "is a tool . . . used to close the gap between a state of ignorance (or, at best, intuition) about the world and a state of knowledge about the world." *Id.* at 833. A tool—or model—in this context has no inherent value; its use is

determined only by whether it helps create a particular result.

Statistical models simply cannot substitute for the individual weighing of the merits of specific allegations. Even in mathematics, where they are a helpful tool, statistical models are, at best, easily misinterpreted, *see Vaqueria Tres Monjitas, Inc. v. Comas*, 980 F. Supp. 2d 65, 101 (D.P.R. 2013), and at worst, easily manipulated. *See Alba v. Thaler*, 346 Fed. Appx. 994, 997 n.4 (5th Cir. 2009) (noting inmate's manipulation of statistics purporting to show racially-motivated charging decisions). Courts reject statistical arguments as "inherently unreliable, inaccurate and misleading" when they are based on "self-serving selection of data and present results in a way most advantageous to the claim being advanced." *United States v. Triumph Capital Group, Inc.*, 211 F.R.D. 31, 61 (D. Conn. 2002). *See also Chang v. University of Rhode Island*, 606 F. Supp. 1161, 1206 (D.R.I. 1985) (The parties' use of "virtually the same data" to "reach diametrically opposed results" demonstrates "an axiom of the use of statistics in the law: statisticians can manipulate numbers to such a degree that sustenance can be found for an otherwise unsupportable position.").

Moreover, statistics rely on certain assumptions about the fungibility of cases and regularities between categories of data points that have no parallel in law, where a plaintiff must prove each element of her case against each defendant. *See Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (due process requires that a defendant be afforded "'an opportunity to present every available defense'" (citation omitted)); Richard W. Wright, *Causation, Responsibility, Risk,*

Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts, 73 Iowa L. Rev. 1001, 1052 (1988) ("An abstract ex ante causal probability associated with some possibly applicable causal generalization is not evidence of what actually happened on the particular occasion."); Byron G. Stier, *Now It's Personal: Punishment and Mass Tort Litigation After Philip Morris v. Williams*, 2 Charleston L. Rev. 433, 450 (2008) ("[W]hile statistical sampling may provide more detailed evidence of harm to others for purposes of the reprehensibility analysis, incorporating that information may ultimately be more prejudicial than probative to a jury likely to mistakenly infer they can punish for harm to others."). The possibility or even likelihood that an individual has been injured or incurred damages in a concrete and particularized way does not show an *actual* injury or damages.

Both courts and commentators have highlighted the due process concerns generated by judicial acceptance of statistical models in lieu of actual proof of injury or damages. "In this changing landscape for class certification, statistical sampling has taken primacy over due process." Saby Ghoshray, *Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 Loy. U. Chi. L.J. 467, 469 (2012). *See also* Richard A. Nagareda, *Class Certification In the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 101 (2009) ("[T]he flashpoints today over class certification concern the role of aggregate proof of a statistical or economic nature.").

The decision below places far too much reliance on a mathematical model that, by design, cannot assess

individual damages. In so doing, and in conflict with decisions of this Court and several Circuit Courts of Appeals, the court absolves the plaintiffs of their obligation to prove damages, and unconstitutionally restricts Google from asserting individualized defenses.

CONCLUSION

"The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943). The Ninth Circuit decision below diminishes those safeguards in a way that significantly undermines defendants' due process protections. Because of the importance of the issues presented, as well as the conflicting decisions among the Circuit courts, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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