NO. 26-7637

United States Court of Appeals for the Ninth Circuit

IN RE META PIXEL HEALTHCARE LITIGATION

On Appeal from the United States District Court for the Northern District of California
Case No. 3:22-Cv-03580-WHO Honorable William H. Orrick

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RULE 23(f) PETITION FOR PERMISSION TO APPEAL FILED BY META PLATFORMS, INC.

LAWRENCE S. EBNER
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Avenue., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

GRANT W. HOLLINGSWORTH
SHANNON N. PROCTOR
HOLLINGSWORTH LLP
1350 I Street, NW
Washington, DC 20005
(202) 898-5800
ghollingsworth@hollingsworthllp.com
sproctor@hollingsworthllp.com

Counsel for Amicus Curiae

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
IDENTITY AND INTEREST OF *AMICUS CURIAE* 1
SUMMARY OF ARGUMENT 1
ARGUMENT 4
I. ALL THREE *CHAMBERLAN* FACTORS WARRANT IMMEDIATE REVIEW. 4
II. THE DISTRICT COURT DEFERRED THE DISPUTES ON WHICH CERTIFICATION DEPENDS, AND THE EVIDENCE DOES NOT SHOW THAT COMMON QUESTIONS PREDOMINATE OVER INDIVIDUAL ONES. 6
A. Rule 23 Required the Court to Resolve, Not Defer, Disputes on Which Certification Depends. 6
B. The Evidence Does Not Show That Common Questions Predominate Over Developer-Specific Consent Questions. 9
C. The Evidence Does Not Show That Common Questions Predominate Over 5,600 Covered Entity Determinations. 12
III. THE ORDER'S COERCIVE EFFECT MAKES INTERLOCUTORY REVIEW THE ONLY REALISTIC OPPORTUNITY TO CORRECT CERTIFICATION ERROR. 14
A. Aggregation Can Divorce Statutory Liability from Any Rational Relationship to Harm. 14
B. Due-Process Review Comes Too Late Once Certification Compels Settlement. 14
CONCLUSION 15

TABLE OF AUTHORITIES

Cases **Pages(s)**

Calhoun v. Google, LLC,
113 F.4th 1141 (9th Cir. 2024) 5, 11

Chamberlan v. Ford Motor Co.,
402 F.3d 952 (9th Cir. 2005) 4, 5, 15

Comcast Corp. v. Behrend,
569 U.S. 27 (2013) 2, 7

Doe I v. Google LLC,
No. 3:23-cv-02431-VC (N.D. Cal. Apr. 1, 2026), ECF No. 285 3

Epic Sys. Corp. v. Lewis,
584 U.S. 497 (2018) 15

Frasco v. Flo Health, Inc.,
No. 3:21-cv-00757-JD (N.D. Cal. July 30, 2025) 13

Halliburton Co. v. Erica P. John Fund, Inc.,
573 U.S. 258 (2014) 8

In re Meta Pixel Tax Filing Cases,
826 F. Supp. 3d 1217 (N.D. Cal. 2026) 3, 5

Lewis v. Magnite, Inc.,
No. 2:25-cv-03488, 2026 WL 2254788 (C.D. Cal. July 20, 2026) 2, 5

Nolen v. PeopleConnect, Inc.,
No. 24-3894, 2026 WL 2871735 (9th Cir. Sept. 24, 2026) 8

Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC,
31 F.4th 651 (9th Cir. 2022) 5, 6, 7, 8, 9, 10, 12

Tyson Foods, Inc. v. Bouaphakeo,
577 U.S. 442 (2016) 10

Van v. LLR, Inc.,
61 F.4th 1053 (9th Cir. 2023) 10, 13

Wakefield v. ViSalus, Inc.,
51 F.4th 1109 (9th Cir. 2022) 14

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 7, 8, 10

Statutes

18 U.S.C. § 2511 11

28 U.S.C. § 2072 9

Cal. Civ. Code § 56.10 13

Cal. Penal Code § 631 ..... 5, 11

Cal. Penal Code § 632 11

Rules

Fed. R. App. P. 23 ..... *passim*

Fed. R. App. P. 29 1

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Atlantic Legal Foundation ("ALF") is a national, nonprofit, nonpartisan public interest law firm that regularly appears as *amicus curiae* in cases addressing the limits of aggregate litigation, Rule 23, and statutory-damages regimes.

ALF's interest is structural: Using the class device to aggregate statutes designed for individualized enforcement can make certification, not the merits, decide the case.[1]

SUMMARY OF ARGUMENT

This is not a typical class action, in which the defendant's conduct reaches class members directly. Instead, a significant third layer insulates Meta from the plaintiffs: the thousands of website and app developers who chose whether to install Meta's tools, how to configure them, and what to tell their users. The certified classes span more than 5,600 domains. Pet. for Permission to Appeal Class Certification Decision

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its supporters, or its counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Pursuant to Fed. R. Civ. P. 23(f) at 1 ("Meta Pet."). Consent, transmission, and covered-entity status depend on each developer's disclosures, tool configuration, and identity. Those developer-specific inquiries cannot produce the common answers Rule 23(a)(2) and (b)(3) require.

The district court never conducted such a developer-by-developer inquiry. The court acknowledged genuine disputes over consent, transmission, covered-entity status, and damages, but held that each could be addressed later, at "summary judgment or trial" or "post-trial." Order at 4, 7, 10–11, 18. It never asked whether that deferred analysis could be carried out consistently with Rule 23's requirements. *Comcast* forbids that approach: a court may not decline to resolve certification-determinative disputes "simply because those arguments would also be pertinent to the merits determination." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013).

Three California federal courts confronting pixel and similar tracking-technology litigation have rejected or questioned the class-wide treatment that the district court adopted here. *See Lewis v. Magnite, Inc.*, No. 2:25-cv-03488, 2026 WL 2254788, at *10 (C.D. Cal. July 20, 2026)

(denying certification of CIPA and Wiretap Act classes because "[t]he many websites and privacy policies at issue cause individual questions to predominate"); *In re Meta Pixel Tax Filing Cases*, 826 F. Supp. 3d 1217, 1235 (N.D. Cal. 2026) (denying class certification involving just two websites because resolving each member's claim would require reviewing that member's data); Order at 1, *Doe I v. Google LLC*, No. 3:23-cv-02431-VC (N.D. Cal. Apr. 1, 2026), ECF No. 285 (finding a nationwide health-provider class "difficult to imagine" because liability would likely "depend on individualized issues," including "the disclosures the web properties made to their patients"). The district court here certified just such a class.

Aggregated per-violation statutory damages, untethered from actual harm, make this certification order outcome-determinative. No defendant can risk trial when facing exposure in the trillions of dollars, so if the order stands unreviewed, the district court's Rule 23 errors will never be corrected, and the merits will never be decided. Immediate review is warranted.

ARGUMENT

I. ALL THREE *CHAMBERLAN* FACTORS WARRANT IMMEDIATE REVIEW.

Rule 23(f) review is "most appropriate" where (1) a death-knell situation is coupled with a questionable certification decision, (2) the decision turns on an unsettled and fundamental class-action question, or (3) the decision is manifestly erroneous. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). All three are present.

Death knell. Plaintiffs seek statutory damages for four classes under a federal statute providing a $10,000 baseline and a state statute providing $5,000 per violation, Pls.' Mot. for Class Cert. at 29, and Meta's petition explains that the classes include tens of millions of Facebook users and exposes Meta to potentially trillions of dollars in claimed damages. Meta Pet. at 1–3, 9–10. That is precisely the death-knell situation in which certification "may force a defendant to settle rather than . . . run the risk of potentially ruinous liability." *Chamberlan*, 402 F.3d at 957. In that scenario, the certification order need only be "questionable," not "manifestly erroneous." *Id.* at 959.

Unsettled question. District courts have divided on materially similar records, declining to certify pixel and tracking-technology classes

where liability turns on website-specific facts. *See supra* p. 2; *Lewis*, 2026 WL 2254788, at *10; *Meta Pixel Tax Filing*, 826 F. Supp. 3d at 1235.

The order below reached the opposite result on a record involving more than 5,600 websites, reasoning that *Calhoun v. Google, LLC*, 113 F.4th 1141 (9th Cir. 2024), made consent a single objective question. Order at 14. Whether *Calhoun*, a case about one developer's disclosure policy, has that effect when *thousands of different* policies are at issue is an unsettled and fundamental question that, given the settlement pressure described in Part III, will rarely survive to final judgment.

Manifest error. Manifest error is clearest where a court "applies an incorrect Rule 23 standard." *Chamberlan*, 402 F.3d at 962. The order did so repeatedly. It held that plaintiffs had shown the connection to California that CIPA § 631 and CDAFA require based on a "plausible showing," Order at 16–17. Plausibility is the *Twombly* pleading standard. At certification, plaintiffs must prove the facts supporting each Rule 23 requirement by a preponderance of the evidence. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 (9th Cir. 2022) (en banc).

The district court also brushed aside evidence that many class members suffered no injury at all—proxy users whose browsing concerned someone else's health, users whose data Meta never linked to their own Facebook account, and users whose ad blockers prevented any transmission—on the mistaken premise that Meta had to show more than a "de minimis" impact, Order at 9. Under the correct standard, the burden runs the other way: plaintiffs must prove, by a preponderance of the evidence, that individualized injury questions like these will not predominate over common ones. *See Olean*, 31 F.4th at 665, 668–69.

Most fundamentally, where the court did not apply the wrong standard, it applied none at all: it deferred contested, liability-determining questions to summary judgment, trial, or "post-trial." *See infra* Part II.

II. THE DISTRICT COURT DEFERRED THE DISPUTES ON WHICH CERTIFICATION DEPENDS, AND THE EVIDENCE DOES NOT SHOW THAT COMMON QUESTIONS PREDOMINATE OVER INDIVIDUAL ONES.

A. Rule 23 Required the Court to Resolve, Not Defer, Disputes on Which Certification Depends.

A party seeking certification must "affirmatively demonstrate" compliance with Rule 23, and certification is proper "only if the trial court

is satisfied, after a rigorous analysis," that it has done so. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011). In *Comcast*, the Supreme Court reversed a certification order because the lower courts declined to resolve disputes bearing on certification "simply because those arguments would also be pertinent to the merits determination." 569 U.S. at 34. The en banc Court agrees that a district court "must . . . resolve disputes about historical facts if necessary" to determine whether a common question is *capable* of class-wide resolution. *Olean*, 31 F.4th at 667.

The order acknowledges that the parties' experts sharply dispute whether common evidence can establish which developers transmitted which data, for which users. Order at 1–2, 6–7, 9–10. It concedes that Meta's oldest class-wide data dates only from March 2022, although the class period begins in June 2018, calling that gap the "admittedly more difficult" issue for plaintiffs. *Id.* at 6. Yet rather than resolving these disputes, the court held that the evidence would "be tested at summary judgment or trial" and that "the classes or aggregate damages or restitution will be conformed accordingly." *Id.* at 10. That is certification first and proof later. The court reasoned that it could "narrow or

decertify" the classes if problems arose. *Id.* at 6 (citing *Nolen v. PeopleConnect, Inc.*, No. 24-3894, 2026 WL 2871735, at *17 (9th Cir. Sept. 24, 2026)). But that flexibility presupposes a class properly certified in the first place. Plaintiffs "must actually prove—not simply plead—that their proposed class satisfies each requirement of Rule 23," and must carry that burden "before class certification." *Olean*, 31 F.4th at 664 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275–76 (2014)).

The deferred questions are not case-management details. Liability turns on what data each developer transmitted and whether each user consented—questions that depend on developer-specific policies, configurations, and practices. Meta Pet. at 5–6, 9–10, 14–20.

This is the Rules Enabling Act problem the Supreme Court identified in *Dukes*. Class actions are procedural devices that cannot strip litigants of defenses otherwise available. A class therefore "cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." 564 U.S. at 367. For that reason, the Court rejected "Trial by Formula"—the practice of deciding a sample of claims and extrapolating the results to the entire

class in place of adjudicating each defendant's individual defenses. *Id.*; *see also* 28 U.S.C. § 2072(b) (rules of procedure "shall not abridge, enlarge or modify any substantive right"). Here, Meta's consent defense is precisely the kind of individual defense *Dukes* protects, and a certification order that postpones the question whether it can be adjudicated class-wide risks the same result.

Had the court undertaken the analysis it deferred, it could not have certified these classes. The two questions it postponed—whether each user consented and whether each listed website or app is a covered healthcare provider—turn on the facts of thousands of individual developers. No common evidence can answer them, and individualized inquiries of that scale necessarily "overwhelm common ones." *Olean*, 31 F.4th at 669.

B. The Evidence Does Not Show That Common Questions Predominate Over Developer-Specific Consent Questions.

Rule 23(b)(3) permits certification only if "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The inquiry "asks whether the common, aggregation-enabling, issues in the case are more prevalent

or important than the non-common, aggregation-defeating, individual issues." *Olean*, 31 F.4th at 664 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)). And "if the discovery and trial process must assess thousands of claims one claim at a time, then the individualized issue will weigh heavy in the predominance balancing." *Van v. LLR, Inc.*, 61 F.4th 1053, 1067 n.11 (9th Cir. 2023).

Predominance builds on commonality's demand for a contention whose "truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. The question is whether a class-wide proceeding can generate common *answers* despite "[d]issimilarities within the proposed class." *Id.* (internal quotation marks omitted). Here, whether a user consented depends on the disclosures of the particular websites and apps that user visited, and across the class those disclosures come from hundreds of thousands of different developers. Consent is therefore an individualized question, and because it can defeat plaintiffs' Wiretap Act and CIPA claims outright, it overwhelms whatever common questions remain.

Developers' disclosures were inconsistent across key areas, including what data they shared, who received it, and how they obtained

consent—and these practices shifted over time even within the same company. Meta Pet. at 6. Furthermore, while some consent banners blocked data transmission until a user agreed, others transmitted data by default until a user actively opted out. *Id.*

Because both statutes (the Wiretap Act and CIPA) prohibit interception subject to consent exceptions, collapsing thousands of consent inquiries into one proceeding would approach strict, class-wide liability. 18 U.S.C. § 2511(2)(d); Cal. Penal Code §§ 631(a), 632(a).

The order reasoned that consent is "an objective question" resolvable "on a classwide basis" because *Calhoun* asks what a reasonable user would understand. Order at 11, 14. That reasoning treats a uniform standard as though it guaranteed uniform answers. A common test yields a common answer only when applied to common facts: every negligence plaintiff is measured against the same "reasonable person," yet no court would try 10,000 car accidents in one proceeding. *Calhoun* involved a single defendant's disclosures to users of a single product. 113 F.4th at 1147. Here, the disclosures are those of thousands of independent developers, each with its own policy, banner, and configuration, each changing over time. Meta Pet. at 6, 10–11.

The order's response confirms rather than cures the problem. The court recognized that it "may have to review disclosures of specific websites or apps," but reasoned that each such review would be "on behalf of many class members, not individual class members." Order at 12 n.9. That concedes the inquiry is developer-specific. Grouping users by developer may reduce millions of individual consent questions to thousands, but those separate consent determinations will still "overwhelm common ones." *Olean*, 31 F.4th at 669.

C. The Evidence Does Not Show That Common Questions Predominate Over 5,600 Covered Entity Determinations.

Every claim at issue begins with a threshold, entity-specific question: whether the website or app that sent the data is a healthcare provider covered by HIPAA or the CMIA. The certification order itself recognized that plaintiffs would need to prove that the entities on their lists are covered entities, while Meta would be entitled to contest that showing. Order at 5–6. The record also contains examples suggesting that plaintiffs' lists include entities that are not covered healthcare providers. Order at 29–30. Plaintiffs lists clearly are not a reliable proxy

for covered-entity status, which must therefore be established entity by entity.

That inquiry cannot be resolved with common evidence. HIPAA and the CMIA reach only defined providers, plans, and contractors, *see* Cal. Civ. Code § 56.10. Even the district court acknowledged that resolving covered-entity status may be time-consuming and contemplated addressing the issue through later merits proceedings. Order at 5–6. The difficulty is apparent even in litigation involving only one developer. *See* Meta Pet. at 7; Trial Tr. at 1095:18–23, *Frasco v. Flo Health, Inc.*, No. 3:21-cv-00757-JD (N.D. Cal. July 30, 2025). Multiplied across more than 5,600 websites and apps, that is the paradigm of an individualized issue that will "weigh heavy in the predominance balancing." *Van*, 61 F.4th at 1067 n.11.

The district court did not identify common evidence resolving that issue, because none exists. A class that presumes covered-entity status across more than 5,600 websites and apps writes HIPAA's and the CMIA's gating definitions out of the case. The classes should not have been certified.

III. THE ORDER'S COERCIVE EFFECT MAKES INTERLOCUTORY REVIEW THE ONLY REALISTIC OPPORTUNITY TO CORRECT CERTIFICATION ERROR.

A. Aggregation Can Divorce Statutory Liability from Any Rational Relationship to Harm.

Per-violation statutory damages may encourage individual enforcement but become punitive when aggregated. As this Court has explained, "[c]ompensation and deterrence aims can be overshadowed when damages are aggregated, leading to damages awards that are largely punitive and untethered to the statute's purpose." *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1122 (9th Cir. 2022). For that reason, *Wakefield* held that aggregated statutory damages are subject to due-process limits even where the per-violation amount is constitutional. *Id.* at 1121–22. The concern is acute where "modern technology . . . triggers minimum statutory damages with the push of a button," *id.* at 1124–25—a description that fits the automated tracking code at issue here, which fires across thousands of websites.

B. Due-Process Review Comes Too Late Once Certification Compels Settlement.

In a class action of this scale, whatever limits due process may place on an aggregate award come too late to matter, because the certification order itself forces settlement before any award is entered. Due process

checks an award only after judgment, and only for a defendant willing to try the case to verdict. A defendant facing exposure in the trillions of dollars cannot rationally take that risk. *See Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 524 (2018) (class actions can "place pressure on the defendant to settle even unmeritorious claims").

Rigorous Rule 23 analysis at certification is the only realistic point of review. If the order stands, the questions identified above will be resolved not by any court but by a settlement driven by the certification order itself. Rule 23(f) exists to prevent that outcome. *See Chamberlan*, 402 F.3d at 957.

CONCLUSION

For the foregoing reasons, the Atlantic Legal Foundation respectfully urges the Court to grant the Rule 23(f) petition for permission to appeal.

Dated: November 20, 2026 Respectfully submitted,

BY: /S/ SHANNON N. PROCTOR
GRANT W. HOLLINGSWORTH
HOLLINGSWORTH LLP
1350 I Street, NW
Washington, DC 20005
(202) 898-5800
ghollingsworth@hollingsworthllp.com
sproctor@hollingsworthllp.com

LAWRENCE S. EBNER
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

Counsel for Amicus Curiae
Atlantic Legal Foundation

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