No. 13-8007

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MIKE HARRIS AND JEFF DUNSTAN, INDIVIDUALLY AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED INDIVIDUALS,

Plaintiffs-Respondents,

v.

COMSCORE, INC.,

Defendant-Petitioner.

On Appeal from the United States District Court
for the Northern District of Illinois

BRIEF OF *AMICI CURIAE* DIRECT MARKETING ASSOCIATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, ASSOCIATION OF NATIONAL ADVERTISERS, ENTERTAINMENT SOFTWARE ASSOCIATION, INTERACTIVE ADVERTISING BUREAU, and CHAMBER OF COMMERCE of the UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR RULE 23(f) APPEAL OF CLASS CERTIFICATION ORDER

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INTERESTS OF THE AMICI CURIAE

Amici curiae, by leave of the Court, respectfully submit this brief in support of defendant comScore, Inc.'s ("comScore") Rule 23(f) Petition for review of the district court's class certification order (the "Order"). The *amici* represent a diverse and comprehensive population of merchants, advertisers, technology companies and other service providers who rely upon internet commerce. They have a strong interest in the issues presented in the Petition, and bring to the Court's attention important matters about comScore's standard setting function and the sparse law about internet privacy and how federal class action rules apply to them.[1]

Representing nearly half of all Fortune 100 companies and thousands of other consumer product and service firms, the Direct Marketing Association ("DMA") is an independent, non-profit association organized under New York law in 1917. It is dedicated to advancing and protecting responsible data-driven marketing.

The American Association of Advertising Agencies ("AAAA") is a national trade association of large, multinational agencies and hundreds of other advertising firms around the nation. Founded in 1917, AAAA is organized under the laws of the state of New York and headquartered in New York City.

The Association of National Advertisers ("ANA") is the advertising industry's oldest trade association, founded in 1910 in Detroit, Michigan and currently organized under New York law. ANA's membership includes 450 companies representing 10,000 brands whose collective annual advertising expenditures exceed $250 billion.

Entertainment Software Association ("ESA") is a not-for-profit trade association representing nearly all major U.S. publishers of computer and video games for video game

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[1] In compliance with Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief, in whole or in part, and no one other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. After conferring with the parties' counsel, comScore consented to submission of this brief but plaintiffs' counsel did not. *Amici's* authority for filing this brief is therefore the Court's grant of the accompanying motion for leave to file.

consoles, personal computers, handheld and mobile devices, and the internet. Founded in 1994, ESA is organized under the laws of the state of Delaware and headquartered in Washington, D.C.

Founded in 1996 as a Delaware non-profit entity headquartered in New York City, the Interactive Advertising Bureau ("IAB") represents over 500 leading companies participating in the sale of interactive advertising, including prominent search engines and online publishers. IAB members sell over 85% of all online advertising in the country.

The Chamber of Commerce of the United States of America ("Chamber") is a District of Columbia nonprofit corporation and the world's largest business federation. The Chamber represents 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. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases raising issues of vital concern to the nation's business community.

The issues raised in comScore's Rule 23(f) Petition are critically important to the development of class action jurisprudence generally, and to class actions affecting internet commerce and communications in particular. This matter's extraordinary procedural history and remarkable certification order gravely concerns *amici*. Moreover, this case and others like it implicate foundational internet communication and commerce technology (the so-called "cookie" software) and related disclosures developed as industry best practices. A growing number of *amici* members are being subjected to a steady pulse of putative class actions challenging the use of that technology and attendant disclosures to consumers in cases that attempt to shoehorn invasion of privacy claims into federal statutes aimed at other conduct.

Amici and their members are sensitive to the data privacy interests of customers, consumers, and all computer users. For this reason, *amici* regularly advocate for industry regulation and best business practices that enhance innovation, investment, and competition

while protecting privacy.[2] Yet, *amici* members face a groundswell of privacy class actions, such as this one, brought under ill-fitting statutes by uninjured named plaintiffs presenting uncorroborated (and often untestable) allegations that their privacy rights, and those of a massive class of allegedly "similarly situated" individuals, have been violated. Because of the foundational internet technology and industry best-practices disclosures challenged in this case, the remarkable nature of the certification order, and the potential that the Order will serve as a model for other courts and plaintiffs, *amici* respectfully submit this brief in support of comScore's Petition for interlocutory review.

ARGUMENT

Under Fed. R. Civ. P. 23(f), "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Advisory Committee Notes to 1998 Amendments. Defendant's Petition presents vitally important issues, on which law is scarce, about the appropriateness of certifying privacy claims challenging on-line data collection under federal statutes that were designed to serve other purposes. The Order creates what appears to be the largest class ever certified in a contested internet privacy case, and there is good cause to conclude that it does so erroneously by avoiding Supreme Court precedents and deferring mandatory Rule 23 determinations until trial. Representing the digital business community, *amici* urge the Court to review this significant case. *See Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (immediate appeal appropriate where class certification order provides unfair leverage to "wring settlements from defendants whose legal positions are justified but unpopular" and where interlocutory appeal may facilitate development of the law.)

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[2] Many of the *amici* participated in the 2010 founding of an industry regulation program that provides internet users with the ability to opt out of online behavioral advertising systems. *See* "Ad Group Unveils Plan to Improve Web Privacy," New York Times (October 4, 2010) (Exhibit "A"). DMA and the Better Business Bureau monitor and enforce compliance with this program.

I. THE PETITION PRESENTS AN IMPORTANT QUESTION ABOUT THE VALIDITY OF CLASS CHALLENGES TO THE STANDARD-SETTING ON WHICH INTERNET COMMERCE DEPENDS.

A. comScore's Standard-Setting Role in Internet Commerce.

Nearly all major companies engaged in internet commerce use website audience ratings to establish online advertising rates. By providing these ratings, comScore provides a vital service to the internet industry on which nearly all *amici* members – and other major companies engaged in internet commerce – rely. comScore provides website audience ratings similar to the Nielsen Company's ("Nielsen") well-known ratings system for television programs. Under that system, "Nielsen Families" from every feasible demographic and geographic area agree to connect their televisions to a small device ("set meter") that gathers all information on the home's viewing habits and transmits that information nightly to Nielsen. Nielsen compensates these "families" in a variety of forms for participating. The resulting data are often reported by Nielsen as rating points or "share" for a particular television program. Broadcasters and advertisers then use this share data to establish advertising rates for various programs. Nielsen also tailors analytics for individual marketers and broadcasters, assessing their reach and effectiveness within particular audiences.

comScore serves the same important function in the online advertising industry. Instead of "Nielsen Families," comScore enlists "panelists" – computer users who agree to download and use comScore's software under disclosed terms.[3] Like Nielsen, comScore compensates participating panelists in a variety of ways. *See* Petition at 2-3. In the same way Nielsen's set meters collect and report all television information from a Nielsen Family, comScore's software gathers certain computer information from a panelist and transmits that data to comScore. In the

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[3] The Order acknowledged that comScore's terms advise prospective panelists that its system will "allow their online browsing and purchasing behavior to be monitored, collected, aggregated, and once anonymized, used to generate market reports . . .," and that the data "includes internet usage information, basic demographic information, certain hardware, software, computer configuration and application usage information about the computer on which you install" comScore's system. Order at 3. To become a comScore panelist, consumers must affirmatively accept the proffered download by clicking "ACCEPT" to proceed. *Id.*

same way Nielsen's work generates "share" for television programs, comScore's work generates equivalent ratings for websites. Nielsen ratings are used to establish advertising rates for different television shows, while comScore data is used to establish online advertising rates. Indeed, Nielsen *also* provides website ratings and, together with comScore, these two companies are the principal providers of industry data used to establish advertising rates on the internet.

Given this standard setting function in the market and comScore's use of the industry's best-practice disclosures, which are independently developed and monitored by TRUSTe (Petition at 5), *amici* are justifiably alarmed by the ease with which these plaintiffs were allowed to suspend disbelief and obtain certification of a class challenging disclosures that plainly advise panelists that comScore's system will comprehensively monitor *all* activity and configurations on the computer to which it is downloaded. Petition at 3-5.

B. The Petition Presents Critical Privacy Class Action Questions For Which Scant Authority Exists.

The Order openly questions whether recent Supreme Court class certification precedents apply to privacy class actions. Order at 19, fn. 9. While that observation is impermissible in the abstract, its effects are particularly problematic in the arena of online advertising where, for the past ten years, the leading decisions have been two conflicting district court cases. *Compare In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497 (S.D.N.Y. 2001) (finding DoubleClick not liable because challenged internet advertising program fell within the consent exceptions of the statutes asserted); *In re Toys 'R' Us, Inc., Privacy Litig.*, 2001 U.S. Dist. LEXIS 16947 (N.D. Cal. 2001) (granting in part and denying in part motion to dismiss privacy claims under federal statutes). This Court has recognized a critical need for Rule 23(f) interlocutory review when the cases on class treatment of particular claims are "sparse and divided." *See Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910 (7th Cir. 2003) ("We grant permission in order to determine the appropriateness of class action treatment in pollution cases, a matter on which the case law is sparse and divided."). Privacy class actions fit that bill perfectly, and when the justification for interlocutory review is contributing to development of the law, "it is less important to show that

the district judge's decision is shaky," – *Blair*, 181 F.3d at 835 – though the Order here is demonstrably "shaky."

Amici are not aware of *any* federal circuit court decision that addresses – directly or indirectly – class certification of claims raising internet privacy issues. A growing number of federal class action suits challenge internet advertising systems under the Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.* ("ECPA"), The Stored Communications Act, 18 U.S.C. § 2701 *et seq.* ("SCA") and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 *et seq.* ("CFAA"). Many of these suits settle regardless of their merits, or are dismissed before certification for lack of standing[4] or because defendants are able to establish user consent.[5]

This Court should therefore grant the Petition based on the importance and novelty of the

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[4] *See, e.g., Bose v. Interclick, Inc.*, No. 10 Civ. 9183, 2011 WL 4343517, *5 (S.D.N.Y. Aug. 17, 2011) (dismissing with prejudice CFAA claims in suit alleging use of flash cookies and browser "history sniffing" because complaint failed to assert personal economic loss under CFAA); *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705 (N.D. Cal. 2011) (dismissing ECPA claim arising out of alleged transmission of personal information from a social network to advertisers); *Del Vecchio v. Amazon.com, Inc.*, No. C11-366-RSL, 2011 WL 6325910 (W.D. Wash. Dec. 1, 2011) (dismissing with leave to amend a class action under the CFAA and other claims based on the alleged use of browser and flash cookies); *Chance v. Avenue A, Inc.*, 165 F. Supp. 2d 1153 (W.D. Wash. 2001) (granting summary judgment and denying as moot plaintiffs' motion for class certification in class action challenging defendants' alleged placement of cookies on user computers and tracking their activity); *Low v. LinkedIn Corp.*, No. 11–cv–01468–LHK, 2011 WL 5509848, at *3–4 (N.D. Cal. Nov. 11, 2011) (dismissing for lack of standing privacy claims stemming from alleged disclosure browsing history to third party marketing companies).

[5] *See, e.g., Deering v. CenturyTel, Inc.*, No. CV-10-63-BLG-RFC, 2011 WL 1842859 (D. Mont. May 16, 2011) (dismissing ECPA claim based on terms of defendant's privacy policy and subsequent email disclosures); *Mortensen v. Bresnan Communication, L.L.C.*, No. CV 10-13-BLG-RFC, 2010 WL 5140454 (D. Mont. Dec. 13, 2010) (dismissing ECPA claim where defendant-internet provider gave notice that electronic transmissions might be monitored and transferred to third parties). *See also In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1066 (N.D. Cal. 2012) (dismissing with prejudice plaintiffs' CFAA and ECPA claims because, among other things, plaintiffs voluntarily downloaded software at issue and therefore Apple could not have accessed the devices without authorization, but denying motion to dismiss plaintiffs' state consumer and unfair competition claims where court found ambiguity in defendant's terms and conditions).

issues presented alone. If the Court does not grant interlocutory review, the questions presented will continue to evade appellate review. As the Court noted in *In re Rhone-Poulenc Rorer, Inc.*, there is "intense pressure" to accept "blackmail settlements" in certified cases, regardless of the underlying merits. 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973).[6] Even if the parties resolve the certified class disputes for a relatively modest *cy pres* sum that is proportional to the overall weakness of plaintiff's claims,[7] *amici* members face significant harm because this flawed certification decision will continue to influence privacy determinations throughout the country as one of the very few (or only) decisions certifying a class in this area of the law. *See* "Massive Class Certified in ComScore User Privacy Suit," Privacy Law360 (April 4, 2013) (quoting plaintiff's counsel for claim that this matter is "the largest privacy case ever certified on an adversarial basis.") (Petition at 19).

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6 *See also* Richard A. Nagareda, Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA, 106 Colum. L. Rev. 1872, 1875 (2006) ("overwhelming majority of actions certified to proceed on a class-wide basis and not otherwise resolved by dispositive motion result in settlements."); Michael E. Solimine & Christine Oliver Hines, Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f), 41 Wm. & Mary L. Rev. 1531, 1546 n.74 (2000) (observing that even remote chance of severe outcome puts "untenable" pressure on defendants faced with certified class.").

7 A common characteristic of internet privacy class settlements is the *cy pres* award in lieu of awards to individual class members who typically suffered no economic losses and are simply aggregating statutory penalties. The scope of these cases – with their millions of class members and sweeping public policy implications – also renders class benefit distributions infeasible. *See Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012) (affirming approval of $9.5 million *cy pres* settlement of behavioral advertising class action suit despite the settlement providing class members with no compensation); *Valentine v. NebuAd, Inc.*, No. 3:08-cv-05113 (N.D.Cal. December 19, 2011) (approving $2.4 class settlement distributed as $800,000 in class counsel fee, a modest incentive award to named plaintiffs, and remainder to *cy pres* recipients); *In re Quantcast Advertising Cookie Litigation*, No. 2:10-cv-05484 consolidated with *In re Clearspring Flash Cookie Litig.*, No. 2:10-cv-05948 (C.D.Cal. June 13, 2011) (approving $2.4 million class settlement with no monetary benefits to class members).

II. THERE ARE SUBSTANTIAL REASONS TO CONCLUDE THAT THE CERTIFICATION ORDER IS ERRONEOUS ON THE MERITS

Rule 23(f) review is further warranted because the trial court's Certification Order violates a number of modern class certification precepts while closely reflecting the now-abandoned certification standards that pre-date 2003 amendments to Rule 23. The Order also reflects two recurring abuses of discretion by (1) resolving doubts in favor of the plaintiff while shifting the burden to defendant to disprove Rule 23 elements; and (2) conditionally certifying a class subject to revision at trial if "litigation on the merits" reveals individual issues.[8]

Amici are particularly concerned with the trial court's ruling that the Supreme Court's recent decision in *Comcast Corp. v. Behrend*, No. 11-864, 2013 WL 1222646, -- S.Ct. -- (U.S. March 27, 2013), is not "applicable to privacy class actions." Order at 19 n.9. In *Behrend*, the Supreme Court reaffirmed what that Court had recently emphasized in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011)—also conspicuously absent from the trial court's Order – that courts must conduct a "rigorous analysis" of the commonality requirement for Rule 23 class actions. Nothing in *Behrend*, which was an antitrust case, suggests that the precedent's reasoning is inapplicable to other categories of cases. To the contrary, almost immediately after *Behrend* was issued, the Supreme Court granted, vacated and remanded class certification orders in two disparate cases – one involving common law products liability claims and the other raising state-law employment compensation claims – instructing the courts of appeals (including this Court) to reconsider their prior decisions in light of *Behrend*. *See Whirlpool Corp. v. Glazer*, 2013 WL 1285305, -- S.Ct. -- (April 1, 2013) (raising Ohio common law negligence, failure to warn and breach of warranty claims) and *RBS Citizens, N.A., v. Ross*, 2013 WL 1285303, -- S. Ct. -- (April 1, 2013) (raising Illinois minimum wage law claims). And just as in the Order in the case at bar, the class in *RBS Citizens* was also "conditionally" certified.

The decision below amply demonstrates why conditional certification is so pernicious.

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[8] *See* Rule 23(c)(1)(C) Advisory Committee Note ("The provision that a class certification 'may be conditional' is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.").

The assumption that defects in class proof will be addressed later in the litigation is illusory. Most class actions settle after certification because the risks of trying thousands of claims in a single lawsuit often are too great for rational corporate decision-makers to bear. Even where, as here, the merits of the underlying case are weak, a single error in determining liability could have catastrophic consequences, for the company. Plaintiffs who succeed in certifying a class are almost always able to extract what Judge Friendly aptly termed a "blackmail settlement." *See* Advisory Committee's Notes to 1998 Amendments ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

The Order in this case charts a path plagued by one-way intervention error. The Order proposes cutting comScore panelists out of the class as difficulties of individual class membership and proof of injury arise at trial. This plan to excuse class members who are "losing" claims against comScore yields two impermissible results. First, the "merits litigation" anticipated by the Order winnows the class down to the presumptive "winners," while releasing the "losers" from being bound by the class judgment. Avoiding the due process catastrophe of "one-way intervention" is why class certification must be determined *before* merits litigation, why notice is given to a defined class *before* merits litigation, and why opt-out rights are exercised *before* merits litigation. *See generally Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 353-54 (7th Cir. 1975).

Second, even the most frivolous putative class actions impose substantial reputational risks which, combined with the economic risks associated with defending a class action, often compel settlement regardless of the underlying merits. That risk is aggravated in situations where, as here, the defendant relies on the voluntary participation of a large market research population, and other companies rely on the data collected for rate-setting activity. The reputational harm inflicted by a proposed class action can linger even after a class certification motion is rejected or the matter settles with no admission of wrongdoing.

Rule 23(f) interlocutory review of certification orders plays a vital role in mitigating the

economic and reputational harms that flow from the improper certification of putative class actions. In this particular case, an improper certification order has the probable impact of not only harming defendant comScore by chilling voluntary participation in its market research, but also adversely impacting many of the *amici*'s members who rely on web rating services of the defendant and companies like it. These concerns further confirm why this Court should exercise its jurisdiction to grant interlocutory review of the Order in this case.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the Rule 23(f) Petition for interlocutory review of the Certification Order in this matter.

Respectfully submitted,

DATED: April 23, 2013

/s/ John F. Cooney

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EXHIBIT A

October 4, 2010

Ad Group Unveils Plan to Improve Web Privacy

By TANZINA VEGA

As the debate around online privacy and advertiser access to users' data continues, a group of the advertising industry's largest trade organizations was to announce on Monday the details of a self-regulatory program that would allow users to opt out of being tracked by its member organizations.

The program provides details on how companies can adopt some of the principles for conducting online behavioral advertising outlined in a report released last July.

The program includes the use of an icon called the "Advertising Option Icon" that marketers can place near their ads or on the Web pages that collect data that is used for behavioral targeting. Users who click on the icon, a lower case letter "I" inside a triangle that is pointing right, will see an explanation of why they are seeing a particular ad and will be able to opt out of being tracked.

Some companies may still serve less focused ads after a user opts out, while others may stop showing ads to that user altogether. But representatives for the trade organizations said the steps were not an indication that the privacy debate had ended.

"This is a big step forward in what's going to be on ongoing dialogue for many years," said Stuart P. Ingis, a partner at the Venable law firm and a lawyer for the trade groups.

The program would affect the 5,000 companies that are represented by the trade organizations, which include the American Association of Advertising Agencies, the American Advertising Federation, the Association of National Advertisers, the Direct Marketing Association and the Interactive Advertising Bureau, with additional support from the Council of Better Business Bureaus.

The Better Business Bureaus group and the Direct Marketing Association will be charged with monitoring and enforcing compliance with the program and will also manage consumer complaints.

The organizations will provide Web seminars with information on the newly created program for advertisers, and will also use donated advertising space online to advertise the program to consumers.

Marketers that collect data for behavioral advertising will also be able to visit AboutAds.info to start to use the icon or register for the opt-out mechanism.

The trade groups have teamed up with Better Advertising, a New York start-up, which will provide the technology to monitor the ads online and report findings so the industry groups can take action. They will also monitor changes to the privacy policies for participating companies and report updates or changes.

But privacy advocates say self-regulation is not enough.

"This is just the latest version in a long series of failed self-regulatory efforts. We need the government to step in and set rules for industry," said Pam Dixon, the executive director of the World Privacy Forum, a nonprofit group based in California.