No. 11-864

IN THE

Supreme Court of the United States

COMCAST CORPORATION, ET AL.,
Petitioners,

v.

CAROLINE BEHREND, ET AL.,
Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

Page(s)

STATUTES:

RULES:

OTHER AUTHORITIES:

INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation (WLF) is a public-interest, law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. In particular, WLF devotes a substantial portion of its resources to advocating and litigating against excessive and improperly certified class action lawsuits. To that end, WLF has participated extensively in litigation in support of its view that federal courts should not certify cases as class actions unless the plaintiffs can demonstrate that they have satisfied each of the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See, e.g., Conn. Retirement Plans & Trust Funds v. Amgen, Inc.*, No. 11-1085 (dec. pending); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and letters of consent have been lodged with the Court.

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. Dedicated to the just and efficient administration of civil justice, the IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions, which are increasingly global in reach.

Amici are deeply concerned by the proliferation of class action lawsuits being filed throughout the federal court system and the inhibiting effect that such litigation can have on the development and expansion of business. *Amici* believe that the district court's certification decision, if allowed to stand, will only exacerbate that trend by encouraging efforts to certify inappropriate, unwieldy classes. Because the decision to certify a class is so often outcome determinative, classes should not be certified on the basis of untested expert testimony about damages, as was the case here.

STATEMENT OF THE CASE

Respondents, six non-basic cable television subscribers, allege that Petitioners (collectively, "Comcast") violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 by engaging in a practice called "clustering," whereby Comcast grew its share of the

Philadelphia market by trading cable systems it owned outside of Philadelphia for cable systems owned by Comcast competitors within Philadelphia. Although each of Comcast's acquisitions and "swaps" were approved by the Federal Communications Commission (FCC), Respondents brought suit in the Eastern District of Pennsylvania alleging that Comcast's antitrust violations caused them to purchase cable television at an artificially inflated price, resulting in measurable monetary losses. Pet. App. 5a-7a.

Seeking to represent a class comprised of more than two million current and former cable television subscribers in the Philadelphia metro area, Respondents advanced four theories of alleged antitrust impact by which common damages could ostensibly be measured. The district court rejected three of the four theories at the certification stage. *Id.* at 122a, 153a, 161a-162a.

Respondents asked the district court to certify the class on the remaining theory that Comcast's clustering unfairly deterred competition from "overbuilders"—those companies who offer a "competitive alternative where a telecommunications company already operates." *Id.* at 7a. Comcast objected that even if the alleged deterrence of such overbuilding resulted in an increase in the price of cable, it would not have resulted in the same increase in price throughout the 650 franchise areas of the Philadelphia market. In short, Comcast argued that the court could not assume that the "but-for" market conditions were common or uniform across the Philadelphia market. *Id.* at 82a-83a.

Consistent with black-letter law, the district court and all parties agreed that measureable damages are an essential element of Respondents' antitrust claims. *Id.* at 96a. As a result, Respondents could satisfy Rule 23(b)(3)'s predominance requirement only by establishing common proof of damages on a class-wide basis. Respondents presented the testimony of their damages expert, Dr. James McClave, who opined that damages could be determined on a class-wide basis by calculating the difference between existing cable prices and hypothetical cable prices that would have existed but for Comcast's allegedly anticompetitive conduct. *Id.* at 35a. Although his model purported to calculate damages for each of the sixteen counties comprising Comcast's Philadelphia market, Dr. McClave conceded that his methodology assumed that only five counties "would have been overbuilt." J.A. 1382a.

Comcast objected that Dr. McClave's damages model had been prepared in reliance on Respondents' four different theories of antitrust impact. Pet. App. 186a. Because three of those four theories had been roundly rejected by the court, Comcast argued that Dr. McClave's model could not be relied on to establish class-wide damages as it provided no methodological basis for segregating damages attributable solely to overbuilding. *Id.* at 40a. Comcast also raised objections to many of the assumptions and screens used by Dr. McClave in preparing his damages model. *Id.* 79a-86a.

Nevertheless, over Comcast's objections, the district court certified the class under Rule 23(b)(3). While conceding that Dr. McClave's damages model

had been prepared when Respondents were advancing four theories of antitrust, the court held that the model remained valid because "[a]ny anticompetitive conduct is reflected in the Philadelphia DMA price, not in the selection of the comparison counties." *Id.* at 186a-187a. The court then concluded that "there is a common methodology available to measure and quantify damages on a class-wide basis." *Id.*

On appeal, a divided panel of the U.S. Court of Appeals for the Third Circuit affirmed. The panel majority declined to address Comcast's objections to the model advanced by Dr. McClave and relied on by the district court. Concluding that Comcast's "attacks on the merits of the methodology" have "no place in the class certification inquiry," the panel announced "[w]e have not reached the stage of determining on the merits whether the methodology [advanced by Dr. McClave] is a just and reasonable inference or speculative." *Id.* at 47a-48a. Seemingly conceding that Dr. McClave's model would not satisfy the standards for admission of expert testimony under *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), it was satisfied that the model nevertheless "could *evolve to become* admissible evidence." *Id.* at 44a (emphasis added).

Judge Jordan dissented on the question of common damages, concluding that "Dr. McClave's testimony is incapable of identifying any damages caused by reduced overbuilding" in Philadelphia." *Id.* at 65a-66a. He criticized the majority's "willingness to overlook the debilitating flaws in Dr. McClave's model in an effort to avoid an 'attack on the merits'" as "precisely the kind [of] talismanic

invocation of 'concern for merits-avoidance'" that Third Circuit precedent forbids. *Id.* at 81a n.8 (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 317 n.17 (3d Cir. 2008)). "[W]hether we frame the issue as a question of fit under *Daubert*," Judge Jordan observed, "or simply ask whether the District Court abused its discretion by relying on irrelevant evidence, we are effectively asking the same question." *Id.* at 67a. Because Dr. McClave's model was not limited to the only surviving theory of antitrust impact, Judge Jordan would have vacated the class certification order.

SUMMARY OF ARGUMENT

In affirming class certification, the Third Circuit adopted an alarmingly narrow view of what evidence suffices to satisfy Fed. R. Civ. P. 23(b)(3)'s commonality requirement in a class action. Specifically, the district court relied on the opinion of plaintiffs' damages expert in concluding that commonality was established, but failed at the class certification stage to analyze the reliability and admissibility of that opinion using the standards for doing so established by this Court in *Daubert*.

By electing to defer a true *Daubert* analysis to a subsequent phase of the litigation, the district court, as affirmed by the Third Circuit, effectively breathed new life into the defunct notion of conditional certification. As this Court recognized only last term, because class certification exponentially raises the stakes in litigation, it should not be granted in the absence of reliable evidence that all Rule 23 requirements have been satisfied. This means digging below the surface of a

plaintiffs' expert's testimony on damages and putting his methodology to the test. That such an inquiry overlaps with the merits is no justification for avoiding it.

Likewise, there is no justification for applying a lesser reliability standard at class certification than at any other point in the litigation. Here, the district court's failure to conduct a *Daubert* analysis of plaintiffs' expert's opinion on damages, and the Third Circuit's failure to require one, was a legal error that jeopardizes the rights of Petitioners and absent class members.

The Third Circuit's approach also fails to appreciate the crucial role that certification decisions play in the outcome of high-stakes class-action litigation. Empirical research demonstrates that litigation costs make it very difficult for the party who loses the class certification decision to continue with the litigation—with the result that erroneous certification decisions are effectively unreviewable. In light of that concern, this Court should adopt a clear rule that will encourage district judges to grant certification motions only after first determining the admissibility of evidence relied on by plaintiffs to prove that the requirements of Rule 23 have been satisfied.

ARGUMENT

I. NO JUSTIFICATION EXISTS FOR REQUIRING A LOWER EVIDENTIARY STANDARD AT THE CLASS CERTIFICATION STAGE

Respondents claim the right to sue Comcast

not only on their own behalf but also as representatives of thousands of other Comcast cable subscribers in the Philadelphia metropolitan area. Federal Rule of Civil Procedure 23 imposes numerous requirements on those seeking to maintain such a representative action, including (under the circumstances of this case) a judicial finding "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Certification of a class is appropriate only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *General Tel. Co. S.W. v. Falcon*, 457 U.S. 147, 161 (1982)).

In upholding class certification, the Third Circuit panel concluded that "[w]e have not reached the stage of determining on the merits whether the methodology [relied on by the plaintiffs' damages expert] is a just and reasonable inference or speculative," Pet. App. 47a. But neither inference nor speculation is a proper basis for class certification, even in the Third Circuit. Indeed, "the question at class certification is whether, *if* [damages are] plausible in theory, [they are] *also* susceptible to proof at trial through available evidence common to the class." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 325 (3d Cir. 2008) (emphasis added). Thus, even where a theory is plausible, the relevant question at the certification stage is whether that theory is susceptible to common proof. If the only proof offered is inadmissible expert testimony, then plaintiffs will have failed to meet their burden of showing that the theory of damages, however

plausible, is capable of common proof.

Of course, this court has already established a standard for evaluating the reliability of expert testimony in federal courts. *See Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993). *Daubert* established a non-exhaustive list of criteria to evaluate the reliability, and thus admissibility, of an expert's opinions, including whether the theory has been tested and subjected to peer review and publication, and whether it is generally accepted in the relevant scientific or technical community. 509 U.S. at 593-94.

Likewise, the Advisory Committee's Notes to Federal Evidence Rule 702 recommend additional benchmarks, including whether the expert has accounted for alternative explanations, whether the expert's opinions resulted from independent research or are a product of litigation, and whether the expert was as careful in forming his opinions for litigation as he would be in his non-testifying professional work. *See* Fed. R. Evid. 702. There is no justification for requiring a lower standard at the class certification stage, and every reason to apply the same standard for testing the reliability of expert testimony at *every* stage of the litigation.

The district court below did not conduct a full *Daubert* analysis of the expert testimony supplied by plaintiffs in support of the Rule 23 requirements. Instead of analyzing Dr. McClave's opinions against the criteria established by *Daubert* and Rule 702, the district court improperly relied on the Plaintiffs' expert's "theory" of common damages to certify the class without testing the reliability of his

methodology. Under such circumstances, it was undoubtedly an abuse of discretion for the district court to consider Dr. McClave's opinion as a basis for concluding that damages could be proven using evidence common to the class. As Judge Jordan observed in dissent, "whether we frame the issue as a question of fit under *Daubert* or simply ask whether the District Court abused its discretion by relying on irrelevant evidence, we are effectively asking the same question." Pet. App 67a.

According to the Third Circuit, Comcast's "attacks on the merits of the methodology . . . have no place in the class certification inquiry." *Id.* at 48a. But this Court has never embraced that position. Indeed, only last term, this Court made clear that expert testimony is no different than any other form of evidence relevant to a Rule 23 inquiry, and even went on to question a district court's refusal to conduct a *Daubert* analysis before evaluating whether an expert's testimony supported a finding that Rule 23's requirements were met. *See Dukes*, 131 S. Ct. at 2553-54 ("The District Court concluded that *Daubert* did not apply to expert testimony at the class certification stage of class-action proceedings. *We doubt that this is so* . . . .") (internal citations omitted and emphasis added).

As Rule 702 makes clear, expert opinion is not admissible simply because it is based on reliable principles and methodology. The application or "fit" of that methodology to the facts of the case must also be reliable. *See* Fed. R. Evid. 702(2)-(3). But here, Dr. McClave premised his damages model on four different theories of antitrust impact. Once the district court rejected three of those four theories,

leaving only the "reduced-overbuilding" theory, Dr. McClave's damages model no longer fit Respondents sole theory of antitrust impact. Nevertheless, the district court accepted Dr. McClave's opinion on damages at face value and relied upon them in finding Rule 23's requirements satisfied—without evaluating those opinions against the *Daubert* criteria. The Third Circuit compounded that problem by holding that a district court must only "evaluate expert models to determine whether the theory of proof is plausible." Pet. App. 44a n.13. But if such expert models are inadmissible under *Daubert*, they should not be considered as evidence for any purpose.

In failing to sufficiently scrutinize the reliability, admissibility, and fit of Dr. McClave's opinions, the district court failed to rigorously analyze Rule 23's class certification requirements. If Dr. McClave's opinions ultimately could not withstand *Daubert* scrutiny, those opinions necessarily fail and thus cannot supply evidence of commonality or typicality, as required by Rule 23(a).

The Third Circuit's decision to affirm the district court's acceptance of Dr. McClave's testimony in support of class certification is not supported by reason or the jurisprudence of this Court. If left undisturbed, the opinion below will have far-reaching and adverse consequences on defendants and effectively return class action jurisprudence to the days of conditional class certification.

II. THE DECISION BELOW IGNORES THIS COURT'S ADMONITION IN *DUKES* THAT COURTS SHOULD NOT AVOID ADDRESSING ISSUES RELEVANT TO CLASS CERTIFICATION SIMPLY BECAUSE THEY ARE ALSO MERITS-BASED ISSUES

The appeals court held that, for purposes of class certification, any arguments that might be said to address the "merits" of Plaintiff's claims were not "properly before" the court. Pet. App. 19a. But this Court has already rejected that view in *Wal-Mart v. Dukes*, holding that "Rule 23 does not set forth a mere pleading standard." 131 S. Ct. at 2551. Rather, a "party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* (emphasis in original). As a result, courts are required to resolve any "merits question[s]" bearing on class certification, even if the plaintiffs "will surely have to prove [those issues] *again* at trial in order to make out their case on the merits." *Id.* at 2552 n.6.

The Third Circuit attempted to support its decision not to address Comcast's objections to Plaintiffs' expert's theory of common damages in support of class certification by insisting that it was foreclosed from addressing those concerns "at this stage of the litigation." Pet. App. at 32a. Under this view,

> If the class proves at trial that Comcast engaged in anticompetitive behavior, it can

> use the constructed "but-for" market to measure the anticompetitive impact on the class members. At the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations . . . . We have not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculation.

Id. at 46a-47a. In the court's view, because the Plaintiff's theory of damages was a question of fact that *might* be determined later on a class-wide basis, its resolution must await a full-blown trial on the merits.

But the Third Circuit's analysis is based on a serious misunderstanding of this Court's holding in *Dukes*, which repeatedly emphasized that federal trial courts should *not* shy away from delving into issues that touch on the merits of the lawsuit if doing so is necessary to determine whether class certification is appropriate under Rule 23. In *Dukes*, this Court called on district courts to engage in a "rigorous analysis" to determine whether the prerequisites of Rule 23 have been satisfied, and added:

> Frequently the "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be

> helped. "[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." . . . Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation.

Dukes, 131 S. Ct. at 2551-52 (quoting *Falco*n, 459 U.S. at 160).

As *Dukes* makes clear, such scrutiny is especially warranted in those cases where, as here, money damages are sought: "[W]hen a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident." *Dukes*, 131 S. Ct. at 2558-59. But when it comes to each class member's individualized claim for money damages, "that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority *before* allowing the class." *Id*. (emphasis added).

Notwithstanding this Court's prior holdings, the Third Circuit's position that any issue capable of being resolved on a class-wide basis should not be decided until trial, even when the issue is relevant to class certification, has little to recommend it. Of course, it may sometimes be true that a defendant who disproves a plaintiff's theory of damages also

defeats the plaintiffs' claims on the merits. But even the Third Circuit would surely concede that such a showing also defeats a claim for class certification by demonstrating the absence of the commonality required by Rule 23(b)(3). Under such circumstances, what possible justification remains for allowing class certification to proceed? A court should not make it easier for a plaintiff to win certification and advance to trial in those cases where the defendant has evidence demonstrating that an essential element of the lawsuit cannot be proven. For that reason alone, this Court should reverse the decision of the Third Circuit.

III. FAILURE TO TEST THE RELIABILITY OF EXPERT TESTIMONY AT THE CLASS CERTIFICATION STAGE IS INEFFICIENT AND PREJUDICES ABSENT CLASS MEMBERS

Permitting courts to consider expert testimony in support of class certification without testing its reliability under *Daubert* is inefficient at best and at worst prejudices the parties. Because class certification dramatically raises the stakes of litigation for defendants, often creating insurmountable pressure to settle even weak claims, *see* § IV *infra*, those defendants who bow under this pressure may never get the opportunity to compel the required scrutiny of plaintiffs' experts' testimony.

In class-action litigation, "an order certifying the class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises (and if the case is settled, there

could not be such an examination)." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (1st Cir. 2004). Moreover, forcing defendants to conduct class-wide discovery and to expend the resources necessary to reach the merits phase of a class action—only to have it determined that the expert testimony on which the class certification decision is based is unreliable—is fundamentally unfair and inefficient.

Even more importantly, the rights of absent class members may be substantially impaired or lost altogether when a class is certified based on unreliable expert testimony that is ultimately excluded following a full *Daubert* review. This is precisely why Rule 23 requires courts to probe beyond the pleadings and scrutinize the evidence to ensure that absent class members' interests are adequately represented and their rights are preserved.

As this Court held in *Dukes*, district courts must resolve any "merits question[s]" that bear on the "propriety of certification under Rules 23(a) and (b)." 131 S. Ct. at 2552 n.6. That is, plaintiffs must bridge the gap between their individual claims of harm caused by an antitrust violation and "the existence of a class of persons who have suffered the *same* injury . . . such that the individual's claim and the class claims will share questions of law and fact and that the individual's claim will be typical of the class claims." *Falcon*, 457 U.S. at 157 (emphasis added). Here, plaintiffs attempted to bridge that gap by offering Dr. James McClave, a damages expert who formulated a model purporting to establish class-wide proof of damages. Pet. App. 165a-187a.

The district court relied on this evidence, without even considering whether the testimony was reliable under *Daubert*, to determine that plaintiffs satisfied the requirements of Rule 23.

Of course, the same evidence would be critical to carrying plaintiffs' burden of proof at trial. If, after conducting the reliability and admissibility analysis required by *Daubert* immediately prior to trial, the district court determines that Dr. McClave's testimony should be excluded, it could have "catastrophic consequences" to absent class members where "the plaintiff loses and carries the class down with him." *Johnson v. Ga. Highway Express, Inc.*, 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., concurring specially). While the loss of such evidence could lead to a decertification of the class, it may also simply be deemed a failure of proof on the merits, resulting in a defense judgment whose *res judicata* effect binds all class members who did not affirmatively opt out. Such unnamed members of a class action will be bound, "even though they are not parties to the suit." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011). *See also, Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (explaining that "suits with preclusive effect on nonparties include properly conducted class actions"); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("[U]nder elementary principles of prior adjudication, a judgment in a properly entertained class action is binding on class members in any subsequent litigation.").

A similar harm would occur to class members in this case even if the plaintiffs were to *prevail* at trial and go on distribute damages according to Dr.

McClave's model. That model relies on Philadelphia-wide averages to select benchmark counties, and even then calculates damages only on a county-by-county basis. Because sufficient variations exist among franchise areas to prevent any determination of but-for conditions across the entire Philadelphia market, Dr. McClave's model would inevitably undercompensate some class members (and unfairly overcompensate others).[2] So whether the plaintiffs win or lose at trial, the Third Circuit's approach to class certification has harmful consequences.

Daubert affords another level of protection to absent class members in the Rule 23 inquiry by exposing, at a preliminary stage, expert testimony that is unreliable and would not likely be admissible at a trial on the merits. For, unlike adjudication on the merits, the denial of class certification cannot bind proposed class members. *See Bayer Corp.*, 131 S. Ct. at 2381 n.11 ("The great weight of scholarly authority—from the Restatement of Judgments to the American Law Institute to Wright and Miller—agrees that an uncertified class action cannot bind proposed class members."). It is therefore essential that this Court affirmatively rule that *Daubert*, and not some lesser standard of review, applies at class certification.

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[2] Such a result also raises serious questions under the Rules Enabling Act, 28 U.S.C. § 2072, which was enacted to prevent this very type of expansion or reduction of the substantive rights of class members under the guise of a procedural rule.

IV. BECAUSE CLASS CERTIFICATION DECISIONS ARE SO OFTEN OUTCOME DETERMINATIVE, TRIAL COURTS SHOULD TEST THE RELIABILITY OF EXPERT EVIDENCE AT THE CLASS CERTIFICATION STAGE

Empirical research demonstrates the crucial role that class certification decisions play in the outcome of high-stakes class action lawsuits. Litigation costs make it very difficult for the party who loses the class certification battle to continue with the litigation—with the result that erroneous certification decisions are often effectively unreviewable. In light of that concern, *amici* respectfully urge the Court to adopt clear rules that will encourage district judges to certify plaintiff classes only after they have tested the reliability of any evidence proffered to show that Rule 23 has been satisfied.

As numerous courts have recognized, companies that face a large certified class (and the accompanying enormous potential damages) are "under intense pressure to settle." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, C.J.), *cert. denied*, 516 U.S. 867 (1995). Unless defendants want to "roll the dice," they must settle—often without regard to the merits of the plaintiffs' underlying claims. *Id.* In many instances, such settlements can legitimately be characterized as "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). *See also* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class

certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial.").

Simply put, "the high costs of class litigation after the certification stage create considerable pressure to settle early." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1302 (2002). Once settlement occurs, "the trial judge never gets a chance to revisit the initial certification decision." *Id.* As a result, "initial certification is, as a practical matter, tantamount to final certification for most cases." *Id.* In any event, if a trial judge believes that settlement will likely follow after class certification, "she has little incentive to decertify the class. Accordingly, defendants have little incentive to file motions to decertify." *Id.* By requiring admissible proof of commonality *prior* to class certification, this Court can help guard against a flood of frivolous and vexatious lawsuits.

Careful gatekeeping at the Rule 23 stage helps to ensure judicial efficiency and fundamental fairness. In light of these goals, this Court should adopt a clear rule that will encourage district judges to grant certification motions only after first determining the admissibility of evidence relied on by the plaintiffs to prove that the requirements of Rule 23 have been satisfied. That such an inquiry often overlaps with difficult merits questions is no justification for avoiding it. Because the decision to certify a class is so often outcome determinative, classes should not be certified on the basis of untested expert testimony about damages.

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation, Allied Educational Foundation, and International Association of Defense Counsel respectfully request that the Court reverse the Third Circuit's holding below.

Respectfully submitted,

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