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IN THE
Supreme Court of the United States

COMCAST CORPORATION, COMCAST HOLDINGS CORPORATION, COMCAST CABLE COMMUNICATIONS, INC., COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., AND COMCAST CABLE HOLDINGS, LLC,

Petitioners,

v.

CAROLINE BEHREND, STANFORD GLABERSON, JOAN EVANCHUK-KIND AND ERIC BRISLAWN,

Respondents.

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

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—the Voice of the Defense Bar is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense lawyer, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. To promote these objectives, DRI participates as *amicus curiae* in cases raising issues of importance to its members, their clients, and the judicial system.

This is just such a case. DRI members regularly defend against proposed class actions in a variety of contexts and are confronted day-in and day-out with certification motions based on nothing more than junk science presented by so-called "experts." Unfortunately, as happened here, such motions are sometimes granted, even though the purported expert could not survive a challenge under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). What is worse, erroneous certification is almost always a complete litigation game changer.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* certifies that counsel of record for both petitioners and respondents have consented to this filing in letters on file with the Clerk's office.

Because of the enormous hydraulic pressure to settle class actions, meritless cases become found money for the plaintiffs' bar as soon as certification is granted. Accordingly, and for the reasons discussed below, this Court should reverse and confirm that admissible evidence is required to justify the pivotal certification decision.

INTRODUCTION

The district court certified a class that is larger and more diverse than the one this Court rejected in *Wal-Mart*. See Pet. App. 82a-83a, 163a. With over two million individuals served by 650 different franchises over the course of 13 years, the class was flawed from the start. *Id.* Yet plaintiffs were permitted to gloss over these differences by proffering a purported expert whose model suffered from fundamental and fatal methodological flaws. *Id.* at 40a; see also J.A. 189a-190a; Pet. Br. 16-35; Pet. App. 66a (plaintiffs' damages model is "incapable of identifying any damages caused by reduced overbuilding") (Jordan, J., dissenting). According to the Third Circuit, the absence of admissible evidence posed no barrier to certification because Rule 702 and *Daubert* simply do not apply. Instead, "[a]t the class certification stage," the Third Circuit only required "assur[ances]" that damages "are capable of measurement" at some later stage, Pet. App. 46a, and it sufficed that the model "could be refined . . . so as to comply with *Daubert*" in the future, *id.* at 44a n.13.

This was profound error. First, the decision below is irreconcilable with this Court's precedents. As the Court has explained, plaintiffs must "affirmatively demonstrate" that they satisfy the requirements of Rule 23. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011). Whether plaintiffs try to carry

that burden by offering expert opinions or through other means, district courts must "rigorous[ly] analy[ze]" plaintiffs' showing and make "find[ings]" as to whether plaintiffs can, "in fact," try their claims together with common evidence. *Id.*; Fed. R. Civ. P. 23(b)(3). This necessarily entails determining whether plaintiffs' expert evidence (if any) comports with Rule 702 and *Daubert*.

Second, allowing plaintiffs to obtain class certification with inadmissible expert opinions contravenes fundamental fairness. By piling numerous claims into one action, class certification "dramatically affects the stakes for defendants" and exerts "insurmountable pressure" to settle. *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). When a class is certified, the game is decided for all intents and purposes. As a result, a ruling that admissible evidence is not required would essentially allow courts to impose astronomical liability on a defendant without the basic building blocks of a civil case. This Court has recognized the importance of allowing only genuinely meritorious cases to proceed beyond the earliest stages of litigation because of the massive costs both to defendants and the judicial process. That approach requires reversal here.

Finally, affirming that inadmissible expert opinions cannot support class certification is essential to confine class actions to appropriate cases. Expert opinions are omnipresent in class certification proceedings in all types of cases, on all elements of plaintiffs' claims. The Third Circuit's indulgent approach towards these opinions would throw open the gate to class certification. The Court should reject that approach and require district courts to fulfill their vital gatekeeper duty to demand admissible evidence before certifying a class action.

ARGUMENT

I. THIS COURT'S PRECEDENTS REQUIRE PLAINTIFFS TO PRESENT ADMISSIBLE EVIDENCE BEFORE OBTAINING CLASS CERTIFICATION.

This Court's decisions make clear that plaintiffs cannot obtain class certification without introducing admissible evidence. As the Court recently held, "Rule 23 does not set forth a mere pleading standard." *Wal-Mart*, 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.* (first and second emphases added); see also *id.* at 2552 n.6 ("plaintiffs seeking 23(b)(3) certification must prove" the Rule 23 requirements even if "they will surely have to prove [certain issues] *again* at trial").

Accordingly, district courts must conduct a "'rigorous analysis'" of Rule 23's criteria before "find[ing]" that the case qualifies for class treatment. *Id.* at 2551 (quoting *Gen. Tel. Co.* v. *Falcon*, 457 U.S. 147, 161 (1982)); Fed. R. Civ. P. 23(b)(3). This entails giving the case a "close look," *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 615 (1997), in which the court "probe[s] behind the pleadings before coming to rest on the certification question." *Falcon*, 457 U.S. at 160. These precedents reflect this Court's proper misgivings about allowing cases to proceed beyond the earliest stages of litigation without meaningful judicial scrutiny because it will cause even unmeritorious claims to recover some settlement value from defendants who cannot risk the chance of a huge damages award.

If the term "rigorous analysis" is to mean anything, it must require findings "based on adequate admissible evidence." *Unger* v. *Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005); see also *In re IPO Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (court must "receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met"). Indeed, an analysis conducted without valid evidence is the antithesis of "rigorous"—it is indefensible *ipse dixit*. As Judge Jordan explained in dissent, "[a] court should be hard pressed to conclude that the elements of a claim are capable of proof through evidence common to a class if the only evidence proffered would not be admissible as proof of anything." See Pet. App. 66a n.18.

Thus, if plaintiffs try to carry their burden by offering an expert opinion, the district court must decide whether the opinion satisfies Rule 702 and *Daubert*'s standards for helpful and reliable expert evidence. There is no reason why evidence falling short of these standards should ever be allowed to support class certification. *Wal-Mart*, 131 S. Ct. at 2553-54; see, *e.g.*, *Am. Honda Motor Co.* v. *Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010) (per curiam). If plaintiffs cannot introduce admissible common evidence in support of class certification, the court has no basis to "find" that plaintiffs can try their case on a class-wide basis. *E.g.*, *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 970, 982-83 (9th Cir. 2011); *IPO Sec. Litig.*, 471 F.3d at 41; *West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002).

As petitioners detail, plaintiffs' proffered expert testimony did not remotely satisfy Rule 702 and *Daubert*'s threshold requirements of helpfulness and reliability. Pet. Br. 44-49. Nor *could* admissible expert testimony ultimately be proffered: The pro-

posed class of over two million individuals scattered across 650 different pricing franchises presents individualized damages issues that cannot be resolved in a single proceeding. But, instead of requiring the district court to confront the flaws in the expert's model, the Third Circuit held that the district court's task was only "to evaluate whether an expert is presenting a model which could evolve to become admissible evidence." Pet. App. 44a n.13. Under this amorphous standard, it sufficed that "the District Court likely determined that [plaintiffs' expert's] model could be refined between the time when class certification was granted and trial so as to comply with *Daubert*." *Id.* That is no meaningful gate to keep, and certainly is not the "rigorous analysis" that Rule 23 requires.

II. FUNDAMENTAL PRINCIPLES OF FAIRNESS REQUIRE PLAINTIFFS TO INTRODUCE ADMISSIBLE EVIDENCE.

Certifying a class without admissible evidence also contravenes basic principles of fairness by effectively imposing exponential liability on a defendant without the basic building blocks of a civil case. *E.g.*, *Superintendent* v. *Hill*, 472 U.S. 445, 455 (1985) (due process is violated "if the decision is not supported by any evidence"); *Jackson* v. *Virginia*, 443 U.S. 307, 314 (1979) (decision based upon "a record wholly devoid of any relevant evidence . . . is constitutionally infirm").

It is well-established that "[a] district court's ruling on the certification issue is often the most significant decision rendered in . . . class-action proceedings." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980). Class certification "dramatically affects the stakes for defendants" because the aggregation of claims into a single action "creates insurmountable pressure on defendants to settle, whereas individual

trials would not." *Castano*, 84 F.3d at 746; see also, *e.g.*, 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."); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1875 (2006) ("[T]he *overwhelming majority* of actions certified to proceed on a class-wide basis . . . result in settlements.") (emphasis added); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1276 (2002) (explaining class certification's "serious impact on settlement dynamics").

Empirical studies have consistently confirmed what courts and commentators know to be true. For example, a 2005 Federal Judicial Center study found that approximately 90% of the suits under review that were filed as class actions settled after certification. Barbara J. Rothstein & Thomas E. Willging, Fed. Judicial Ctr., *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (2005). And a subsequent Federal Judicial Center study found that *every* certified class action in its (smaller) sample terminated in a settlement. Emery G. Lee III & Thomas G. Willging, *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* 11-15 (2008).[2]

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[2] Available at http://www.fjc.gov/public/pdf.nsf/lookup/cafa1108.pdf/$file/cafa1108.pdf.

Studies of class actions in state courts find similarly high settlement rates. See, *e.g.*, Hilary Hehman, *Class Certification in California: Second Interim Report from the Study of California Class Action Litigation* 23 (2010) ("Eighty-nine percent of certified cases ended in settlement, as compared to only 15% in cases with no certification.")[3]; Steven S. Gensler, *The Other Side of the CAFA Effect: An Empirical Analysis of Class Action Activity in the Oklahoma State Courts* 840 (2010) ("Out of the eighty cases that were class certified, a total of fifty-nine (74%) resulted in a settlement, with twelve still pending.").

This intuitively obvious settlement pressure exists even when plaintiffs' claims lack merit. Indeed, in enacting the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, Congress observed that "[b]ecause class actions are such a powerful tool, they can give a class attorney unbounded leverage," which "can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous law-suits." S. Rep. No. 109-14, at 20 (2005); see also *id.* at 21 ("[T]he ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions."). This Court too has recognized that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978); see also *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740

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[3] Available at http://www.courtinfo.ca.gov/reference/documents/classaction-certification.pdf.

(1975) ("even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial").

Judge Posner illustrated why this is so. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). In that case, plaintiffs' claims were far from strong: Indeed, the defendant had lost only one of the first 13 individual trials. *Id.* The defendant therefore could reasonably predict that, if class certification were denied, it would be forced to pay damages in approximately 25 of the 300 cases. *Id.* Assuming that each prevailing suit would result in $5 million in damages, the defendant could estimate its total potential exposure to be $125 million. *Id.* But, if class certification were granted, the defendant would suddenly face claims, not just by the individual plaintiffs who filed suit, but by all class members—5,000 strong. The defendant would thus have a one-in-thirteen chance of owing $25 billion—"and with it bankruptcy." *Id.*; see also Nagareda, *supra*, 106 Colum. L. Rev. at 1881-82 (providing similar example). As Judge Posner concluded, the defendant "may not wish to roll these dice" and "will be under intense pressure to settle." *Rhone-Poulenc Rorer*, 51 F.3d at 1298.

These realities refute the Third Circuit's unfounded assumption that there will be plenty of time after class certification for expert evidence to "evolve" and "be refined." Pet. App. 44a n.13; see also, *e.g.*, *In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18, 26-29 & n.6 (N.D. Ga. 1997) ("postpon[ing]" analysis of whether the expert's opinion satisfies *Daubert* and requiring plaintiffs to describe only "the *type* of evidence with which they will attempt to prove their case"). Nor may defendants take comfort in the

technical truth that a certification order may be "modified" later. See Fed. R. Civ. P. 23(c)(1); see, *e.g.*, *Barnes* v. *Am. Tobacco Co.*, 176 F.R.D. 479, 492-93 (E.D. Pa. 1997) (granting certification "even though this case may present a close question . . . because the Court may amend the certification order before a decision on the merits"), *aff'd*, 161 F.3d 127 (3d Cir. 1998).[4] Almost always, the certification decision leads rapidly to settlement and the defendant pays off the plaintiffs to avoid intolerable risk.

In effect, certification determines "liability." For this reason as well, the Court should demand admissible evidence at the certification stage. Otherwise, courts are effectively imposing enormous liability on defendants without the slightest showing that a class claim has any legal merit. Fundamental fairness requires more.

III. EXPERT OPINIONS PERVADE CLASS CERTIFICATION PROCEEDINGS.

Finally, if expert opinions are not subject to the basic requirements of admissibility, winning class certification will become as simple as hiring an expert witness. Plaintiffs' strategy in this case is not unique: In all types of cases and on all aspects of their claims, plaintiffs offer expert opinions that seek to smooth over individualized differences among putative class members.

This case is paradigmatic of antitrust suits in which plaintiffs try to compensate for overbroad classes with an expert's promise to make differences

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[4] Indeed, it is not even clear whether or when modification orders are appealable under Federal Rule of Civil Procedure 23(f). *See, e.g.*, *Carpenter* v. *Boeing Co.*, 456 F.3d 1183, 1191 (10th Cir. 2006).

among damages claims magically disappear. See, *e.g.*, *Bell Atl. Corp.* v. *AT&T Corp.,* 339 F.3d 294, 306 (5th Cir. 2003) (affirming denial of class certification because expert's formula "in no way account[ed] for the vast differences among those class members," and "[a]ny reasonable approximation of the damages actually suffered by the various class members" would require "individualized damages inquiries"); *Windham* v. *Am. Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977) (en banc) (affirming denial of class certification because damages did not lend themselves to "mechanical calculation, but required 'separate "mini-trial[s]"' of an overwhelming large number of individual claims").

This case is also an example of how plaintiffs employ experts in an attempt to satisfy the other elements of an antitrust claim. Rule 23 analysis "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011). To obtain class certification, plaintiffs must show commonality, typicality, and predominance as to all elements of their claims, and they often hire an expert to opine for them. See 1 Joseph P. McLaughlin, *McLaughlin on Class Actions* § 3:14, at 445 (8th ed. 2011) ("The use of expert testimony, including expert reports and affidavits, is common in support of and in opposition to the class certification motion."); see also Heather P. Scribner, *Rigorous Analysis of the Class Certification Expert: The Roles of* Daubert *and the Defendant's Proof*, 28 Rev. Litig. 71, 72 (2008) (plaintiffs "often" attempt to meet their burden with an expert, and defendants "invariably" respond with an expert of their own).

In antitrust cases like this one, plaintiffs frequently call upon an expert economist to say the defendant's

conduct had a common antitrust impact on all class members. See, *e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 312 (3d Cir. 2009); *Blades* v. *Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005); Pet. App. 15a-34a. As commentators have observed, "[t]he low bar for acceptance of economic expert evidence applied in many class certification proceedings has created a 'niche' for evidence based on methodologies created solely for the purpose of such proceedings, which therefore have not been subjected to peer review." John H. Johnson & Gregory K. Leonard, *In the Eye of the Beholder: Price Structure as Junk Science in Antitrust Class Certification Proceedings*, 22 Antitrust 108, 108 (2008). Courts should not base the crucial certification decision on such unreliable opinions.

The need to guard against flimsy expert opinions is equally present in securities cases. Plaintiff investors claiming securities fraud must prove, among other things, that they relied on the defendants' misrepresentation, which generally presents a highly individualized inquiry that cannot be decided on a class-wide basis. See *Basic Inc.* v. *Levinson*, 485 U.S. 224, 242 (1988). But a class of investors may proceed together under the fraud-on-the-market-theory if they can show they traded shares in an "'efficient market'" that incorporated the misrepresented information into the share price. *Id.* at 248; *Wal-Mart*, 131 S. Ct. at 2552 n.6; see, *e.g.*, *In re Polymedica Corp. Sec. Litig.*, 432 F.3d 1, 7-8 (1st Cir. 2005). Proving "market efficiency" typically entails complex "statistical, economic, and mathematical analysis." *Unger,* 401 F.3d at 323 n.6. Consequently, market efficiency often triggers a battle at the class certification stage waged through expert witnesses. See, *e.g.*, *id.* ("many courts have considered [expert

testimony] when addressing" market efficiency); *Polymedica*, 432 F.3d at 5 (the district court considered "both parties' expert reports and literally hundreds of pages of exhibits focused on market efficiency"). If plaintiffs' expert opinions need not even satisfy Rule 702 and *Daubert*—let alone overcome a competing expert's opinion—far more meritless strike suits will be filed and certified and payments by defendants will be forthcoming.

The district court's gatekeeper role is also critical in employment discrimination cases. Just as in *Wal-Mart*, plaintiff employees seeking class certification often enlist experts to opine that the employer has a "culture" of gender stereotyping that influenced employment decisions. *E.g.*, *Ellis*, 657 F.3d at 982-83; see *Wal-Mart*, 131 S. Ct. at 2553-54. The Court suggested in *Wal-Mart* that such opinions can easily stray beyond what Rule 702 and *Daubert* admit. See 131 S. Ct. at 2553 n.8; see also John Monahan et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715, 1748 (2008) (concluding that admissible expert opinion cannot offer "linkage of general research to specific facts"); cf. Allan G. King & Syeeda S. Amin, *Social Framework Analysis as Inadmissible "Character" Evidence*, 32 Law & Psychol. Rev. 1, 3 (2008) (arguing that "social framework evidence" can constitute "mere character evidence that should be excluded under Rule 404(a)"). District courts must therefore closely scrutinize such opinions before subjecting employers to potential financial ruin.

The above examples are just a few of the many contexts in which the class certification decision hinges on disputed expert analysis. Proposed class actions in products liability, toxic torts, and numerous other areas of law also frequently feature

expert opinions. See, *e.g.*, *Am. Honda*, 600 F.3d at 815-16 (reversing class certification order for which the "expert's report or testimony [was] critical" because the district court failed to "perform a full *Daubert* analysis"); *Sher* v. *Raytheon*, 419 F. App'x. 887, 890 (11th Cir. 2011) ("the district court erred . . . by not sufficiently evaluating and weighing conflicting expert testimony"), *rev'g*, 261 F.R.D. 651, 670 (M.D. Fla. 2009). In all of these instances, Rule 23 and basic fairness require that plaintiffs present admissible evidence before obtaining the all-important class certification order.

CONCLUSION

For these reasons, and those stated by petitioners, the decision of the Third Circuit should be reversed.

Respectfully submitted,

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