No. 09-1205

# In The Supreme Court of the United States

KEITH SMITH AND SHIRLEY SPERLAZZA,

*Petitioners,*

v.

BAYER CORPORATION,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT


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## INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent 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 that raise issues of vital concern to the Nation's business community. The Chamber is well situated to brief the Court on the importance of issues presented in the petition to companies collectively responsible for a substantial portion of the total U.S. economic activity.

This case addresses the circumstances under which a federal court's judgment denying class action status should be given preclusive effect to petitioners' attempt to relitigate the same issue of class certification in state court. The Chamber's members are frequent targets of class action

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, the *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

lawsuits and are interested in ensuring that the rules in class action cases are applied fairly and equally. The Chamber's members are also interested in decreasing the overall costs of litigation and in preventing serial litigation concerning substantially the same issues.

## SUMMARY OF ARGUMENT

The underlying question in this case is whether members of a putative national class action whose certification has been denied by a federal court should be allowed to circumvent that denial by relitigating the same certification issues in a state court. Permitting such relitigation would mean giving preclusive effect to class certification decisions only when they favor plaintiffs, thereby enshrining a pro-plaintiff asymmetry and distorting the proper functioning of the class action mechanism. It would also threaten the enormous societal interest in preventing serial litigation, an interest that is heightened in the context of class certification decisions. Class certifications alter parties' bargaining positions and enable extortionate settlements, and data indicate that class actions impose an enormous cost on business and society. If the benefits and burdens of class action law were to be skewed to favor one side in litigation, these costs would be needlessly magnified. Fortunately, neither principles of res judicata nor this Court's prior precedents support such a result.

Petitioners sought to certify an economic class of similarly "affected" West Virginians under a West Virginia consumer protection statute,

notwithstanding the fact that a federal district court in Minnesota had previously denied class action status to another representative of the same putative class. *McCollins v. Bayer Corp.*, 265 F.R.D. 453 (D. Minn. 2008). The court in *McCollins* concluded that petitioners had not established their own injury under the statute and that class certification was inappropriate because individual issues of actual injury would predominate. *In re Baycol Prods. Litig.*, No. 1431, 2008 WL 7425712, at *1-2 (D. Minn. Dec. 9, 2008). Petitioners were adequately represented in *McCollins*, and the class certification issues decided there are the same issues petitioners wish to relitigate here.

Petitioners contend that principles of collateral estoppel and due process prevent the district court from treating them as parties to the prior decision and therefore enjoining them from relitigating the same issues in West Virginia's state courts. But this Court has long recognized that the term "parties" has a flexible, contextual meaning for purposes of res judicata, and has accepted the proposition that unnamed and uninformed parties can have their rights affected by purported class actions that are not ultimately certified. In *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) the Court held that the filing of an uncertified class action tolled the statute of limitations for absent putative class members, thus effectively expanding their rights, regardless of their knowledge of the class action proceedings and despite the fact that class certification was ultimately denied. The Court cited principles of efficiency and preventing a

multiplicity of actions in support of what has become known as the *American Pipe* doctrine.

The result in *American Pipe* favored putative class members, but the reasoning and principles underlying the decision support respondent here. Recognizing the preclusive effect of the district court's decision on class certification issues in this case will prevent a multiplicity of suits and preserve judicial resources. It will also eliminate the unseemliness of plaintiffs forum shopping for a particularly friendly jurisdiction. It will reduce the availability of socially wasteful serial litigation and is consistent with Congressional enactments such as the Class Action Fairness Act ("CAFA") and the fairness concerns that underlie the basis for diversity jurisdiction itself.

The class action mechanism undoubtedly plays an important and sometimes beneficial role in our legal system. But the asymmetric rule proposed by petitioners, which would accord preclusive effect to class certification decisions only when they favor plaintiffs, would throw off the fundamental balance of the mechanism and make it an instrument of distortion rather than dispute resolution. As the Eighth Circuit recognized below, and as the Seventh Circuit has recognized in similar cases such as *In re Bridgestone/Firestone, Inc. Tire Products Liability Litig.,* 333 F3d 763 (7th Cir. 2003) and *Thorogood v. Sears, Roebuck & Co.,* 624 F.3d 842 (7th Cir. 2010), *reh'g denied*, 2010 WL 4890698 (Dec. 2, 2010), the petitioners' alternative would invite a multiplicity of suits and the likelihood that a distinctly minority judicial view—perhaps influenced by local concerns

or connections—will prevail over a better considered understanding of the law. Such serial litigation, often in pursuit of objectively weak claims, is unfair to defendants, imposes enormous societal costs and diminishes respect for the law itself.

## ARGUMENT

### I. BASIC PRINCIPLES OF RES JUDICATA AND JUDICIAL EFFICIENCY SUPPORT THE FINDING OF PRECLUSION IN THIS CASE.

Allowing plaintiffs to relitigate a federal court's denial of class certification would give plaintiffs a systematic and unnecessary advantage, reduce judicial efficiency, and encourage duplicative litigation. The Court need not and should not endorse such a rule, which would fundamentally distort the class action system.

Petitioners are unnamed members of the defined class in *McCollins*, and argue that their asserted right to pursue class status in West Virginia state courts should not be affected by denial of class certification in *McCollins*. Petitioners thus maintain that they should not be treated as parties or privies to the *McCollins* action because the *McCollins* class was never certified. This argument runs counter to basic principles of collateral estoppel.

In *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002), this Court recognized that the "label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various

procedural rules that may differ based on context." Petitioners, however, seek to vary the meaning of party based not on "context," but on whether the *result* of a class certification decision is plaintiff-friendly. Such a rule would give preclusive effect to grants of class certification, while denying it to rejections of class certification. The inherent unfairness of this position is neither mandated by principles of res judicata nor supported by prior decisions of this Court.

Petitioners' position is what the Seventh Circuit described as "heads I win, tails you lose," where the decision of any court denying certification is never given preclusive effect, but a decision granting class certification is. *Bridgestone/Firestone*, 333 F.3d at 767. Having secured a single favorable certification decision, plaintiffs could then invoke res judicata or collateral estoppel no matter how many times their certification arguments had been rejected elsewhere. Judge Posner aptly demonstrated the perversities of such a system, where a single outlier court can effectively overrule the majority:

> If for example class counsel have a 10 percent chance of winning a given statewide class action against a given defendant, and they sue that defendant 50 times (one suit per state), they are pretty certain to win quite a number of their cases . . . . Even if class counsel filed only 12 cases, the probability that defendant would win them all would be only 28 percent ($.9^{12} = .28$). And that probability (the probability of the defendant's winning all the cases) would fall to one-half of one percent

> ($.9^{50}$ = .005) if class counsel sued in all 50 states. And this despite the fact that the defendant in our example has a 90 percent chance of winning any one of the 50 cases.

*Sears*, 624 F.3d at 849.

The law of res judicata is a useful tool for avoiding these perverse results because it effectively balances individual and societal interests: "Res judicata law's task is to specify which nonparties to consider privies. It demands some substantial reasons in policy . . . to bind a nonparty . . . outweigh[ing] the social costs." Kevin M. Clermont, *Class Certification's Preclusive Effects*, PENNumbra Vol. 159 (forthcoming March 2011).

This Court's holdings in *American Pipe* and *Crown, Cork & Seal* were based upon a weighing of these social costs. *See Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987) ("*American Pipe* and *Crown, Cork* represent a careful balancing of the interests of plaintiffs, defendants, and the court system."); *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987) (same). In *American Pipe*, the Court referred to the policy considerations underlying the adoption of Federal Rule of Civil Procedure 23 as supporting its holding that unnamed class members could have their statute of limitations period tolled by a putative, ultimately uncertified class action. The Court cited "the efficiency and economy of litigation which is a principal purpose of the procedure." 414 U.S. at 553. In *Crown, Cork & Seal*, the Court again referenced the "promotion of efficiency and economy of litigation," 462 U.S. at 349, in support of

extending the rule in *American Pipe* to all putative members of a proposed class, not just interveners. In neither case did the Court suggest that the benefit of tolling depended upon whether the absent plaintiff received actual notice of the pending class action, or even that notice was relevant.[2]

Here, petitioners have been denied use of a particular procedural device—the class action—for the simple reason that they were adequately represented before the federal district court that denied certification of the class of which they claim to be members. Petitioners' substantive rights are unaffected, and they remain free to bring their own individual claims on the merits. All they have lost is the opportunity to relitigate the issue of class certification, a procedural matter to which they have no due process right, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 764 (2005), and against which must be weighed society's substantial interest in not giving any party to litigation virtually "unlimited bites of the apple." *Van–S–Aviation Corp. v. Piper Aircraft Corp.* (In re *Piper Aircraft Dist. Sys. Antitrust Litig.*), 551 F.2d 213, 219 (8th Cir. 1977).

These social interests are significant because serial class action litigation imposes enormous costs

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[2] The Court has never required actual notice in class certification cases, only the "best notice practicable." *See, e.g., Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997); *cf. Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974) (individual notice is required only when names and addresses of all class members are "easily ascertainable" through "reasonable effort."). And the Court has never required notice of the pendency of the class certification decision itself.

on defendants and on society. Moneys paid to settle claims of little merit are a deadweight loss for society as a whole, effectively transferring money from shareholders to plaintiffs' attorneys. *See, e.g.*, S. Rep. No. 109-14, at 14 (2005) [hereinafter "Senate Report"] ("In too many cases, state court judges are readily approving class action settlements that offer little—if any—meaningful recovery to the class members and simply transfer money from corporations to class counsel."). Those sums will not be spent on capital improvements, hiring workers, or paying dividends to shareholders—in other words, the productive lifeblood of the economy.

As a matter of principle and doctrine, this Court's precedent makes it clear that the rights of unnamed class members can be affected by proceedings of which they have no notice. In *American Pipe*, that principle worked to the advantage of plaintiffs, since it permitted an unnamed putative class member to deliberately sleep on his or her right to sue and still have that right extended by virtue of a putative class action of which he or she had no knowledge. The question presented in this case is whether the societal interests that justify such a result can only ever benefit plaintiffs, and not defendants.

The answer must surely be no. Societal, judicial, and equitable interests would not materially be advanced by a system where preclusive effects only help plaintiffs. The costs of such a system, however, would be clear and significant. Accordingly, the "efficiency and economy of litigation," *Am. Pipe*, 414 U.S. at 553, and the values of equitable judicial administration demonstrate the importance and

correctness of giving preclusive effect to the district court's class certification decision.

## II. DENYING PRECLUSIVE EFFECT TO A DENIAL OF CLASS CERTIFICATION WOULD EXACERBATE THE PERSISTENT ABUSE OF THE CLASS ACTION MECHANISM.

The modern class action mechanism has substantial benefits, but it also has undeniable costs and can be subject to serious abuse. Nowhere is this truer than at the certification stage, where "a single positive trumps all negatives." *Bridgestone/Firestone*, 333 F.3d at 766-67. Allowing plaintiffs to avoid a federal court's denial of certification would substantially and asymmetrically increase the costs and opportunities for abuse, harming business interests and economic growth.

The abuses of the class action mechanism are well documented. The Senate Judiciary Committee Report issued in connection with the passage of CAFA noted four of the most common forms of abuse:

> First, lawyers, not plaintiffs, may benefit most from settlements. Second, corporate defendants are forced to settle frivolous claims to avoid expensive litigation, thus driving up consumer prices. Third, constitutional due process rights are often ignored in class actions. Fourth, expensive and predatory copy-cat cases force defendants to litigate the

> same case in multiple jurisdictions, driving up consumer costs.

Senate Report at 14. Permitting plaintiffs to relitigate issues of class certification in state court despite an adverse federal judgment would only make matters worse on all counts.

First, the class action mechanism provides a powerful incentive for plaintiffs' lawyers to engage in collusive settlements with defendants to enrich themselves at the expense of the class. *See, e.g.*, *Sears*, 2010 WL 4890698, at *4 ("[T]he structure of class actions under Rule 23 of the federal rules gives class action lawyers an *incentive* to negotiate settlements that enrich themselves but give scant reward to class members.") (emphasis in original).[3]

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[3] *Accord Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 (1999) (noting great incentive for class counsel to settle for any amount that will survive a fairness hearing); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 7 (1st Cir. 1999) ("[C]ircumstances unique to the complex litigation context sometimes tempt class counsel and/or named class plaintiffs to conclude settlements that are not in the best interests of absent class members."); *Vollmer v. Selden*, 350 F.3d 656, 6560 (7th Cir. 2003) (class counsel may settle claims "for significantly less than they are worth, not because they think it is in the class's best interest, but instead because they are satisfied with the fees they will take away"); Bruce Hay and David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 Notre Dame L. Rev. 1377, 1390 (2000) (raising concern that class action settlements "will give class members too little, because class counsel will be tempted to enter into a 'sweetheart' or collusive deal with the defendant."); Andrew Rosenfield, *An Empirical Test of Class-Action Settlement*, 5 J. Legal Stud. 113, 117 (1976) (empirical study suggesting that attorneys who settled class actions rather than

This "inherent motivation" for class action attorneys "to enrich themselves at the expense of the class," *Sears*, 2010 WL 4890698, at *4, has often resulted in class action settlements that provide little, if any, relief to class members while handsomely rewarding class counsel. *See* Senate Report at 14-20 (describing various settlements). The effect has been a transfer of wealth from businesses to plaintiffs' lawyers, not to the class members. *Id.* at 4

Due to the enormous costs of litigation, defendants face enormous pressure to settle even frivolous cases, leading to what the Senate Report referred to as "judicial blackmail." *Id.* at 20. Numerous courts, including this Court, have recognized the potential for extortionate settlements created by abuse of the class action mechanism. *See, e.g.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163-64 (2008) (plaintiffs with meritless claims may "extort settlements from innocent companies").[4] The risk of a potentially

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taking them to judgment received an average fee premium of $104,000); Jeffery W. Stempel, *Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes*, 83 Wash. Univ. L. Quarterly 1127, 1214 (2005) (settlement of frivolous class claims "may be unduly generous to counsel, relative to class members, and may create problems of conflict of interest that would not arise for individual cases"); s*ee also Sears*, 2010 WL 4890698, at *5 (collecting authorities).

[4] *See also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975) ("The very pendency of a [class action] lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit"); *Jones Motor Co., Inc. v. Holtkamp, Liese, Beckemeier & Childress, P.C.*, 197 F.3d 1190, 1193 (7th Cir. 1999) ("[I]t is well known

devastating damages award is often more than a company can bear.[5]

Denying preclusive effect to federal court decisions rejecting class certification would significantly increase the opportunities for extortionate settlements and perverse settlement incentives, because certification is the point at which such opportunities arise. As Judge Posner has noted, certification of a class action, even one lacking in merit, "forces defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995); *see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 n.8 (3d Cir. 2001)

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that frivolous class actions can sometimes extort sizeable settlements from the defendants"); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 7 (1st Cir. 1999) (recognizing that "little-to-lose" situations in the class action context "sometimes cause concern because they raise the specter of extortive legal proceedings pressed not to redress real wrongs, but to realize upon their nuisance value") (internal citations omitted).

[5] *See, e.g.*, *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (recognizing the potential for a "devastatingly large damage award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class"); *Castano v. Am. Tobacco Co.*, 884 F.3d 734, 746 (5th Cir. 1996) ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low"); *Blair v. Equifax Check Servs. Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) ("[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight.").

(recognizing that class certification may present "acute and unwarranted pressure on defendants to settle" because of the size of the class and number of claims). The certification decision is therefore the heart of the class action mechanism. Petitioners' proposed rule would make it a stage that defendants cannot really win and plaintiffs cannot really lose.

If plaintiffs are not subject to preclusion with regard to adverse certification decisions, they will simply relitigate their certification claims before another judge. And in doing so, plaintiffs' attorneys can and will take advantage of certain state courts that have become known as "magnet" jurisdictions for the plaintiffs' bar. Senate Report at 22-23. For example, in one rural county in Illinois covering less than 750 square miles, class action filings jumped from two in 1998 to more than 100 by 2003, nearly all having nothing to do with the venue itself. *Id.* at 13 (citing John H. Beisner and Jessica Davidson Miller, *They're Making A Federal Case Out Of It . . . In State Court*, 25 Harv. J. L. & Pub. Pol'y 143, 161 (2001)).

Such jurisdictions engage in "so-called 'drive-by class certification' . . . in which a class is certified before the defendant has a chance to respond to the complaint, or in some cases, has even received the complaint." Senate Report at 23. One "state court judge certified a nationwide class on the day [the] complaint was filed, without awaiting a response from defendants and without giving reasons." *Bridgestone/Firestone*, 333 F.3d at 765. The plaintiffs' bar often seeks out such judges, filing "copy cat" class actions, engaging in "blatant forum

shopping," and selecting venues with "a receptive judge who will rapidly certify a class." Senate Report at 23. The courts that are selected are typically plaintiff-friendly jurisdictions that are hostile to outsiders or accord insiders preferential treatment. *Id.* at 6 ("[F]requently in such cases, there appears to be state court provincialism against out-of-state defendants or a judicial failure to recognize the interests of other states"). This unseemly forum shopping erodes respect for the legal system and the rule of law, fostering a perception that justice is an insiders' game. *Id.* at 20-23 (discussing class action suits that encourage unfair substantive outcomes and lack of uniform results).

Petitioners' approach would effectively encourage such forum shopping by giving outlier "magnet" jurisdictions the power to certify class actions that had been rejected in federal court.[6] Having secured one such win in an outlier jurisdiction, no matter how many times they had been denied elsewhere, plaintiffs would then be in a position to force a settlement. *See Sears*, 2010 WL 4890698, at *5 (class counsel's strategy "is to bring identical or similar suits in different jurisdictions until he wins one, then use the judgment in that suit as res judicata or collateral estoppel in the next suit, and the next, and the next, until [defendant] gives up").

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[6] The instant case is something of an outlier in that it was filed before CAFA's effective date, and would have been removed to federal court had it been filed after. But that is all the more reason for this Court to embrace a preclusion principle that is in keeping with CAFA's aims.

CAFA was enacted to address these very problems. *See* CAFA, Pub. L. No. 109-2, 119 Stat. 4 (2005). CAFA's purpose is to cut down on the abuses that had "adversely affected interstate commerce," discouraged innovation, and raised consumer prices. *See* CAFA § 2(a)(2) & (b)(3).

Despite the best efforts of CAFA, class action litigation remains a serious problem for the business community today. That problem has been exacerbated by the recent national economic crisis, as companies struggling to regain their footing are buffeted by ever-increasing pressure to settle class action lawsuits. *See, e.g.*, Ellen M. Ryan and Laura E. Simmons, *Securities Class Action Settlements: 2009 Review and Analysis*, Cornerstone Research 1 (2010) (noting 39 percent increase in dollar value of securities class action settlements from 2008 to 2009).

These class actions impose significant costs on companies and shareholders. Between 2000 and 2004, American companies spent an average of $3.2 billion per year on securities class action settlements alone. *See* Ryan & Simmons at 1. Tort liability has continued to rise, reaching $254 billion by 2008—equivalent to 1.8% of the nation's GDP. Towers Perrin, *2009 Update on U.S. Tort Cost Trends* 3, 13 (2009). These costs do not merely affect large corporations and their insurers. In 2008, small businesses carried $105.4 billion of the national tort liability—roughly forty percent of all tort liability that year and more than eighty percent of all business tort liability. U.S. Chamber Institute for Legal Reform, *Tort Liability Costs for Small*

*Business* 1 (July 2010). One third of those tort costs were paid by small businesses directly out of pocket. *Id*.

Permitting relitigation of certification questions would increase these costs even further. Businesses incur prohibitive costs throughout the life of a class action suit, but particularly at the early stages. *See* Elizabeth M. Williamson, *When Talk Isn't Cheap: The Hidden Costs of Communication with Putative Class Members for Class Action Defense Counsel in a Post-Financial Recession World*, 5 Entrepreneurial Bus. L. J. 453, 454 (2010). One of the fundamental asymmetries of class action litigation is that the defendants bear almost all the cost of discovery. Individual plaintiffs will rarely have more than a handful of readily accessible documents, whereas discovery costs to businesses, particularly costs stemming from modern e-discovery, can be enormous. *See, e.g.*, *Sears*, 624 F.3d at 849-850 ("[T]here is far more evidence that plaintiffs may be able to discover in defendants' records . . . than vice versa."); *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376, 1381 (N.D. Ga. 2009) ("The enormous burden and expense of electronic discovery are well-known. Taxation of these costs will encourage litigants to exercise restraint in burdening the opposing party with the huge cost of unlimited demands for electronic discovery."). Requiring businesses to repeatedly litigate the same certification issues will further increase these burdens, in some cases forcing settlement of even the flimsiest case on the basis of the discovery costs alone.

In addition to legal fees and other discovery costs, there are real opportunity costs associated with time spent defending wasteful litigation. Management and employees spend their time attending depositions, meeting with defense counsel and complying with document requests, leading to lower productivity. Industry sectors avoid innovation efforts that bear a risk of failure because the resultant hit to the company's stock price yields a nearly automatic securities class action complaint.

These are not merely costs to business executives or insurance providers. All stakeholders in a business suffer from the exorbitant costs of meritless complaints. Shareholders lose value as the publicity of a class action takes its toll; employees face cutbacks as cash reserves are depleted and new business ventures postponed; consumers are met with higher prices to offset the price of e-discovery and opposing counsel fees; and society as a whole loses out on the opportunities that would have been pursued by businesses that must instead spend their time in the courtroom.[7]

Obviously, many class action complaints have merit. But the potential for the plaintiffs bar to shop onerous claims from venue to venue in an effort to obtain class certification, and threaten corporate

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[7] *See, e.g.*, Council of Economic Advisors, *Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System* 1 (2002) ("[T]he cost of excessive tort may be quite substantial, with intermediate estimates equivalent to a 2 percent tax on consumption, a 3 percent tax on wages, or a 5 percent tax on capital income.").

defendants with millions in litigation expenses, is an unnecessary hindrance to both legitimate business operations and proper judicial administration in America. The Court should embrace the opportunity this case presents to draw a line against such practices by recognizing the fairness of collaterally estopping petitioners from attempting to have another court overrule the district court's class certification decision.

## CONCLUSION

For the reasons stated above, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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