No. 26-0303

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE FIRSTENERGY CORP.; STEVEN E. STRAH; K. JON TAYLOR; JASON LISOWSKI; GEORGE M. SMART; PAUL T. ADDISON; MICHAEL J. ANDERSON; STEVEN J. DEMETRIOU; JULIA L. JOHNSON; DONALD T. MISHEFF; THOMAS N. MITCHELL; JAMES F. O'NEILL, III; CHIRSTOPHER D. PAPPAS; SANDRA PIANALTO; LUIS A. REYES; JERRY SUE THORNTON; LESLIE M. TURNER; LEILA L. VESPOLI; JAMES F. PEARSON; DENNIS CHACK; BARCLAYS CAPITAL INC.; BOFA SECURITIES, INC.; CITIGROUP GLOBAL MARKETS, INC.; JP MORGAN SECURITIES, LLC; MORGAN STANLEY & CO., LLC; MIZUHO SECURITIES USA LLC; PNC CAPITAL MARKETS LLC; RBC CAPITAL MARKETS, LLC; SANTANDER INVESTMENT SECURITIES INC.; SCOTIA CAPITAL (USA) INC.; SMBC NIKKO SECURITIES AMERICA, INC.; KEYBANC CAPITAL MARKETS INC.; TD SECURITIES (USA) LLC; U.S. BANCORP INVESTMENTS, INC.; MUFG SECURITIES AMERICAS INC.; ROBERT P. REFFNER; DONALD R. SCHNEIDER; JOHN JUDGE; CIBC WORLD MARKETS CORP., PETITIONERS

On Petition for Permission to Appeal from the
United States District Court for the Southern District of Ohio
Nos. 20-cv-3785, 20-cv-4287 (Hon. Algenon L. Marbley)

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AND THE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF FIRSTENERGY CORP.'S AND OTHER DEFENDANTS' PETITION FOR PERMISSION TO APPEAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 26-0303 Case Name: In re FirstEnergy Corp.

Name of counsel: Kwaku A. Akowuah

Pursuant to 6th Cir. R. 26.1, The Chamber of Commerce of the United States
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. The Chamber of Commerce of the United States of America is a non-profit, tax-exempt organization incorporated in the District of Columbia. It has no parent corporation, and no publicly held company has 10 percent or greater ownership in the Chamber.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

None known.

CERTIFICATE OF SERVICE

I certify that on May 21, 2026 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Kwaku A. Akowuah

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 26-0303 Case Name: In re FirstEnergy Corp.

Name of counsel: Kwaku A. Akowuah

Pursuant to 6th Cir. R. 26.1, The Securities Industry and Financial Markets Association
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. The Securities Industry and Financial Markets Association has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

None known.

CERTIFICATE OF SERVICE

I certify that on May 21, 2026 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 26-0303 Case Name: In re FirstEnergy Corp.

Name of counsel: Kwaku A. Akowuah

Pursuant to 6th Cir. R. 26.1, The American Property Casualty Insurance Association
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1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. The American Property Casualty Insurance Association has no parent companies, subsidiaries, or affiliates whose listing is required by Federal Rule of Appellate Procedure 26.1 or Sixth Circuit Rule 26.1.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

None known.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 26-0303 Case Name: In re FirstEnergy Corp.

Name of counsel: Kwaku A. Akowuah

Pursuant to 6th Cir. R. 26.1, The American Tort Reform Association
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. The American Tort Reform Association has no parent companies, subsidiaries, or affiliates whose listing is required by Federal Rule of Appellate Procedure 26.1 or Sixth Circuit Rule 26.1.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

None known.

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s/Kwaku A. Akowuah

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 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. An important function of the Chamber is representing the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Securities Industry and Financial Markets Association (SIFMA) represents the interests of securities firms, banks, and financial-asset managers across the United States. SIFMA's mission is to support a strong financial sector, while promoting investor opportunity, capital formation, job creation, economic growth, and the cultivation of public trust and confidence in the financial markets.

The American Property Casualty Insurance Association (APCIA) is the leading national trade association for home, auto, and business insurers, with a legacy dating back 150 years. On issues of importance to the insurance industry

[1] No party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than amici, their members, and their counsel contributed money that was intended to fund preparing or submitting this brief.

and marketplace, APCIA advocates sound public policies on behalf of its members and their policyholders in legislative and regulatory forums at the federal and state levels.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

This case raises a recurring question about the requirements for class certification. That question matters to amici's members—the public companies, investors, and financial-market participants who bear the costs when securities classes are certified on inadequate showings. Amici regularly participate as amici in similar cases and have a direct interest in ensuring that Rule 23's standards are faithfully applied in this Circuit and elsewhere.

INTRODUCTION AND SUMMARY OF ARGUMENT

For class certification under Rule 23(b)(3), plaintiffs must present "evidentiary proof" that "damages are capable of measurement on a classwide basis" consistent with their liability theory. *Comcast Corp. v. Behrend*, 569 U.S. 27, 34-35 (2013). Promises do not count. A court that takes one on faith, rather than examining the methodology presented, has not done the "rigorous analysis" that *Comcast* requires. *Id.* at 33.

Last year, this Court vacated the district court's first class-certification order because it had "failed to conduct any analysis at all, let alone a rigorous one," of whether Plaintiffs' damages theory satisfied Rule 23(b)(3). *In re FirstEnergy Corp. Sec. Litig.*, 149 F.4th 587, 621 (6th Cir. 2025) (*FirstEnergy I*). The district court again certified the class on remand. But it did so by accepting what *Comcast* forbids: an expert's promise to figure out, sometime later, how to measure artificial stock-price inflation across a multi-year, multi-statement, multi-phase alleged fraud. The error this Court reversed once has returned, and again warrants Rule 23(f) review.

I. *Comcast*'s limits on class certification provide essential protections for American businesses and investors. The rigorous-analysis requirement matters because certification is often the practical end of securities litigation. Once a class is certified, defendants settle even low-probability cases rather than risk trial. The costs are not limited to the parties; they fall on shareholders, consumers, workers, and capital markets.

II. District courts need guidance on applying *Comcast*. This Court recently reiterated that, under Rule 23, courts may not "leave the hard questions for later." *Speerly v. Gen. Motors, LLC*, 143 F.4th 306, 324 (6th Cir. 2025) (en banc). District courts within this Circuit are divided, with some continuing to accept generic event-study references and lists of valuation tools. The Fourth

and Seventh Circuits recently granted Rule 23(f) review of the same question. Without review, this recurring issue will continue to evade appellate resolution because certified securities cases almost always settle.

III. The district court's ruling defangs *Comcast*. Plaintiffs' expert did not present a case-specific methodology for measuring stock-price inflation throughout the class period. He cut-and-pasted the same generic approach that he had used in multiple prior cases: he invoked the out-of-pocket measure, listed general valuation techniques, and assured the court he would select tools when the time came to calculate damages. That is not evidentiary proof that damages are measurable classwide. It is a promise to develop a model later. Accepting that promise repeats the error that *FirstEnergy I* directed the district court to correct. The Court should grant the petition and vacate the order again.

ARGUMENT

I. *Comcast*'s Limits On Class Certification Provide Essential Protections For American Businesses And Investors.

Plaintiffs "seeking to maintain a class action 'must affirmatively demonstrate [their] compliance' with Rule 23." *Comcast*, 569 U.S. at 33. For a Rule 23(b)(3) class, that requires "evidentiary proof"—not pleadings or assurances—that common issues predominate and that damages can be measured classwide through a methodology consistent with plaintiffs' liability theories. *See id.* At the certification stage, a court may not accept an expert's

promise that a workable model will eventually emerge. It must instead "take a close look" and "conduct a rigorous analysis" to determine whether the methodology plaintiffs have presented can measure damages on a classwide basis. *Id.* at 35. Without that showing, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.* at 34.

That rigorous review is critical because, "[f]or many damages class actions, certification is the whole ballgame." *Speerly*, 143 F.4th at 351 (Nalbandian, J., concurring). "Certification of a large class may so increase the defendant's potential damages liability and litigation costs that [it] may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (recognizing that "even a small chance of a devastating loss" can cause settlement of "questionable claims"). And "[e]ven in the mine-run case, a class action can result in 'potentially ruinous liability'" and corresponding "pressure to settle." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting).

These concerns are hardly theoretical. From 1997 through 2025, fewer than half of one percent of federal securities class actions went to trial. Cornerstone Rsch., *Securities Class Action Filings—2025 Year in Review* 16 (2026).

This is because the exposure is astronomical: maximum potential damages in securities class actions filed in 2025 was *$2.9 trillion*. *Id.* at 10. As a result, if plaintiffs "survive motions to dismiss and obtain class certification," securities cases "almost always settle." Geoffrey Rapp, *Rewiring the DNA of Securities Fraud Litigation:* Amgen*'s Missed Opportunity*, 44 Loy. U. Chi. L.J. 1475, 1478 (2013); *accord* Cornerstone Rsch., *supra*, at 16 (from 2015 to 2022, 54% of such cases were dismissed, 39% settled, and 5% are ongoing). Such settlements are typically for a single-digit-percentage of alleged damages, suggesting a low likelihood of success for plaintiffs. Cornerstone Rsch., *Securities Class Action Settlements—2025 Review & Analysis* 7 (2026). Certification, in other words, is where *Comcast* does its work. If courts do not test plaintiffs' damages models there, they will never be tested.

The consequences of these certification-driven settlements extend well beyond the parties to any particular suit. The average securities class action reduces the equity value of the defendant company by 3.5 percent, with losses absorbed by current shareholders who, in effect, insure former shareholders against their investment losses. Anjan V. Thakor, *The Unintended Consequences of Securities Litigation*, U.S. Chamber Inst. for Legal Reform 14 (Oct. 26, 2005). "[T]he prevalence of meritless securities lawsuits and settlements" also "drive[s] up the apparent and actual cost of business" in the U.S. and discourages foreign

issuers from accessing U.S. capital markets "for fear that the potential costs of litigation will more than outweigh any incremental benefits of cheaper capital." Michael Bloomberg & Charles Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* ii, 101 (2007). Ultimately, "consumers, investors, and workers" are worse off. *Speerly*, 143 F.4th at 324.

This Circuit has seen its share of these cases, with plaintiffs filing securities class actions each year alleging many billions of dollars in aggregate damages. *See* Cornerstone Rsch., *supra*, at 33. Event-driven suits like this one—filed after non-financial scandals, and built around long class periods and vague, fluffy "misstatements"—have become increasingly common. *See* U.S. Chamber Inst. for Legal Reform, *Containing the Contagion* 9-11 (Feb. 2019). When *Comcast*'s limits are diluted, public issuers face "incorrectly certified classes" and may "reluctantly swallow" settlements "rather than be[t] the company on the uncertainties of trial." *Speerly*, 143 F.4th at 324. That concern is particularly acute where, as here, dozens of generic, aspirational statements are challenged in order to inflate damages, despite each statement having little-to-no individual impact on the stock price. *See FirstEnergy I*, 149 F.4th at 602, 614 (calling out the "generic corporate statements" at issue). The resulting costs fall not on alleged wrongdoers (individuals are inevitably indemnified) but on current

shareholders, consumers, and the public at large. That is precisely the result that Rule 23 and *Comcast* guard against.

II. District Courts Need Guidance On Applying *Comcast*.

The Supreme Court has "repeatedly explained"—before *Comcast* and since—that district courts have "an obligation before certifying a class to 'determin[e] that Rule 23 is satisfied, even when that requires inquiry into the merits.'" *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 594 U.S. 113, 122 (2021) (quoting *Comcast*, 569 U.S. at 35); *see, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 & n.6 (2011). Yet district courts routinely treat *Comcast* as satisfied when plaintiffs' experts identify a "generic methodology," such as "an 'event study methodology' or an 'out-of-pocket methodology,'" and list "valuation techniques" that might be applied later. R.1020 at 26097-98 (citing, e.g., *In re The Boeing Co. Aircraft Sec. Litig.*, 2026 WL 734721 at *12-15 (N.D. Ill. Mar. 16, 2026); *In re Upstart Holdings, Inc. Sec. Litig.*, 348 F.R.D. 612, 629 (S.D. Ohio 2025)). The promised model then is rarely even articulated—let alone scrutinized or tested—because the case settles. This Court's guidance is therefore necessary.

Two other courts of appeals—the Fourth and Seventh Circuits—have recently granted Rule 23(f) review of the same question raised in this petition:

whether plaintiffs in a securities class action can satisfy *Comcast* by promising that their expert will eventually develop a methodology sufficient to measure classwide damages. *See In re The Boeing Co. Sec. Litig.*, No. 25-135 (4th Cir. May 2, 2025); *In re The Boeing Co. Aircraft Sec. Litig.*, No. 26-8007 (7th Cir. May 7, 2026). Those grants of interlocutory review are powerful evidence that the issue is important, recurring, and unsettled.

The divide among district courts in this Circuit underscores the need for review. In *OPERS v. Federal Home Loan Mortgage Corp.*, the court correctly denied certification where the plaintiffs' expert "simply assert[ed]" the availability of "unspecified 'tools' ... to measure damages," including an event study, holding that "the model amounts to 'no damages model at all,' and the class cannot be certified." 2018 WL 3861840, at *19 (N.D. Ohio Aug. 14, 2018), *rev'd on other grounds*, 64 F.4th 731 (6th Cir. 2023). Other district courts in this Circuit, including the court below, have taken the opposite approach, accepting generic representations as sufficient. *See, e.g.*, *In re Upstart*, 348 F.R.D. at 629-30; *Dougherty v. Esperion Therapeutics, Inc.*, 2020 WL 6793326, at *6-7 (E.D. Mich. Nov. 19, 2020); *Willis v. Big Lots, Inc.*, 242 F. Supp. 3d 634, 652 (S.D. Ohio 2017). This Court previously granted Rule 23(f) review in *Big Lots* to address this issue, but the case settled before the appeal could be heard—an outcome that illustrates

why review is needed here. *See In re Big Lots, Inc.*, 2017 WL 4404634 (6th Cir. Aug. 23, 2017); *Willis v. Big Lots, Inc.*, 2018 WL 7361404 (6th Cir. Dec. 4, 2018).

The district court's decision suggests that this Court's recent en banc decision in *Speerly* did not solve the problem. *Speerly* held that "if the predominance inquiry is to serve its critical function," courts may not "leave the hard questions for later," and directed district courts to confront even "slight variations" among putative class members to ensure that the proposed damages model "accounts" for them. 143 F.4th at 322-24, 335. Yet the district court distinguished *Speerly* on the ground that this Court had not cited it in *FirstEnergy I*. R.1020 at 26092. That reasoning has no doctrinal foundation. *Speerly* is binding precedent whether or not it was cited in a separate panel decision, and its instruction applies with special force in a securities case where variation is built into Plaintiffs' own theory of a 3.5-year, 46-statement, multi-phase fraud. Worse still, the district court repeatedly relied instead on the Northern District of Illinois's *Boeing* decision—now under Rule 23(f) review in the Seventh Circuit. R.1020 at 26085, 26093, 26096-97, 26103. Unless this Court intervenes, that mistaken approach will continue to spread. Rule 23(f) exists to prevent that kind of recurring certification error from evading review.

III. The District Court's Acceptance Of Plaintiffs' Damages Model Improperly Defangs *Comcast*.

Comcast's rigorous-analysis requirement was treated as a formality below. Plaintiffs' expert, Dalrymple, did not present a damages methodology capable of measuring artificial inflation in FirstEnergy's stock price across all 860 trading days of the class period. He promised to develop one later.

Dalrymple's report devoted less than two pages to "[m]easuring [d]amages," R.293-7 at 6303-04, and was drawn nearly verbatim from reports he had submitted in prior cases, *see* R.948-5 at 24603-05; R.948-6 at 24665-67; R.948-7 at 24712-13. He identified the out-of-pocket measure of damages, invoked an event study, and said he could use "standard economic, financial, and valuation techniques" to estimate inflation. R.293-7 at 6303-04. But he did not explain how those techniques would be applied to FirstEnergy's stock; how the methodology would account for the changing conduct alleged across multiple phases of the alleged fraud; or how it would isolate inflation attributable to any of the 46 alleged misstatements. Instead, he claimed "it would be premature to present a specific technique or model" at the certification stage. R.346-3 at 7752. And when pressed at the remand hearing four years later, Dalrymple testified that he had "not settled on a specific technique" to measure inflation, R.936 at 24252, had "not measured inflation on any day in the class

period," *id.* at 24256, and had "not made a determination as to ... the most reliable tool to estimate inflation or make an adjustment," *id.* at 24266.

That is the antithesis of what *Comcast* demands. A damages model that "does not even attempt" to measure damages under the plaintiffs' liability theory "cannot possibly establish that damages are susceptible of measurement across the entire class." *Comcast*, 569 U.S. at 35. This Court has been equally clear: Rule 23 is not a "mere pleading standard"; it requires "significant evidentiary proof." *In re Ford Motor Co.*, 86 F.4th 723, 726 (6th Cir. 2023) (cleaned up). Other courts have applied that principle to reject precisely this kind of placeholder damages showing. *See OPERS*, 2018 WL 3861840, at *19.

Left undisturbed, the decision below will become another data point in the growing body of district-court certifications that subsequent courts cite to shortcut *Comcast*. The Court should grant the petition.

CONCLUSION

This Court should grant Defendants' Rule 23(f) petition.

Dated: May 21, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,599 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b), as determined by the word-counting feature of Microsoft Word.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface, including serifs, using Microsoft Word in Calisto MT 14-point font.

/s/ Kwaku A. Akowuah
Kwaku A. Akowuah

CERTIFICATE OF SERVICE

I hereby certify that, on May 21, 2026, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system, which will serve counsel for all parties to this proceeding. In addition, I certify that I caused true and correct copies of the foregoing to be served via U.S. mail on counsel for Defendants Charles E. Jones and Michael Dowling, who are petitioners, respectively, in Case Numbers 26-0304 and 26-0305.

/s/ Kwaku A. Akowuah
Kwaku A. Akowuah