IN THE SUPREME COURT OF OHIO

MON CHERI DAVENPORT, et al., Plaintiffs-Appellees,	*	Case No. 2025-1102
	*	
	*	On Appeal from the Court of Appeals
v.	*	Eighth Appellate District
	*	Cuyahoga County, Ohio
PROGRESSIVE DIRECT INSURANCE COMPANY, et al., Defendants-Appellants.	*	
	*	Court of Appeals
	*	Case No. CA-24-114306

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AND THE OHIO CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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IDENTITY AND INTEREST OF *AMICI CURIAE*[*]

The Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community, including cases involving class actions.

The American Property Casualty Insurance Association (APCIA) is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent 66% of the U.S. property-casualty insurance market, including more than 63% of Ohio's automobile-insurance market. On issues of importance to the insurance industry and marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts.

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[*] *Amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

The Ohio Chamber of Commerce (Ohio Chamber) is Ohio's largest and most diverse statewide business advocacy organization representing businesses ranging in size from small, sole proprietorships to some of the largest U.S. companies. The Ohio Chamber works to promote and protect the interests of its more than 8,000 business members while building a more favorable business climate in Ohio by advocating for the interests of Ohio's business community on matters of statewide importance. By promoting its pro-growth agenda with policymakers and in courts across Ohio, the Ohio Chamber seeks a stable and predictable legal system, which fosters a business climate where enterprise and Ohioans prosper. The Ohio Chamber regularly files *amicus curiae* briefs in cases important to its members' interests in courts across the state of Ohio.

The Eighth District's affirmance of the trial court's class-certification order contradicts hornbook class-action law. Progressive's insurance contracts require it to pay the "actual cash value" (ACV) of its insureds' totaled cars. Plaintiffs contend that one component of Progressive's ACV valuation—its application of a "projected sold adjustment" (PSA)—is inaccurate. The trial court certified a class of insureds under Rule 23, finding that the legitimacy of PSAs as one adjustment in an insurance valuation process to calculate ACV is a question common to the class and that the common issues predominate over the individualized ones. This reasoning is wrong. Addressing the legitimacy of PSAs as a factor in calculating ACV cannot generate any common answers that could drive the classwide resolution of this litigation because even if PSAs are inaccurate, a court would still have to determine, in every

individual insured's case, whether the use of a PSA produced a valuation lower than ACV. The legitimacy of PSAs thus does not qualify as the type of common question relevant to Rule 23. But even if it did, individualized, fact-specific valuation inquiries still overwhelmingly predominate over any common questions. *Amici* and their members have a strong interest in ensuring that courts comply with the relevant class-certification standards and have filed numerous *amicus curiae* briefs across the country addressing improper class certification in this ACV context.[1]

STATEMENT OF CASE AND FACTS

This case is part of a nationwide effort by plaintiffs' attorneys to bring putative class actions challenging automobile insurance companies' determinations of the "actual cash value" of totaled vehicles. Despite the fact that each breach-of-contract claim would involve an individualized, fact-specific assessment of whether each plaintiff was paid less than the actual cash value for the totaled vehicle, plaintiffs' attorneys across the country have attempted to certify class actions by manipulating what the commonality and predominance factors require.

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[1] *See, e.g.*, U.S. Chamber, APCIA, *et al. Amicus* Br., *State Farm Mutual Auto. Ins. Co. v. Gulick*, No 25–602 (10th Cir., filed May 21, 2025); U.S. Chamber, APCIA, *et al. Amicus* Br., *State Farm Mutual Auto. Ins. Co. v. Jama*, No 24–933 (S. Ct., filed Mar. 31, 2025); U.S. Chamber & APCIA *Amicus* Br., *Ambrosio v. Progressive Preferred Ins. Co.*, No 24–2708 (9th Cir., filed Sept. 30, 2024); U.S. Chamber & APCIA *Amicus* Br., *Clippinger v. State Farm Auto. Ins. Co.*, No 24–5421 (6th Cir., filed July 2, 2024); U.S. Chamber & APCIA *Amicus* Br., *Schroeder v. Progressive Paloverde Ins. Co.*, No 24–1559 (7th Cir., filed May 28, 2024); U.S. Chamber & APCIA *Amicus* Br., *Drummond v. Progressive Specialty Ins. Co.*, No 24–1267 (3d Cir., filed May 6, 2024).

This case follows the typical strategy. To get around the individualized nature of these breach-of-contract claims, Plaintiffs claim that one part of Progressive's valuation process—the PSA—is categorically improper. Insurance companies like Progressive use the PSA to determine the market value of comparative vehicles that dealers have listed for sale yet have not sold. Plaintiffs sought to certify a state-wide class based on the claim that the use of PSAs is categorically improper because dealers always price vehicles to market and sell them for the listed price.

The trial court certified the class, and the Eighth District affirmed. *See Davenport v. Progressive Direct Ins.*, 2025-Ohio-2449 (8th Dist.) (App. Op.). Despite the individualized breach-of-contract inquiries in the class, the Eighth District accepted Plaintiffs' categorical approach that they "only contest[ed] the line-item PSA deductions" and "are proceeding on the same theory of liability." *Id.* ¶ 30. As such, the Eighth District held that the trial court did not abuse its discretion in finding predominance and certifying the class. *Id.* ¶¶ 57–59.

One irony of this approach, as Progressive observed in its memorandum in support of jurisdiction (at 7), is that two of the named plaintiffs—Davenport and Cassi—received *more* for their totaled vehicles than they would have under the National Automobile Dealers Association (NADA) "Clean Retail" valuation, NADA's estimate of the amount for which a dealer would sell a used vehicle in "clean" or excellent condition. Indeed, Progressive sampled claims of putative class members and found that around 30% of those sampled received payouts larger than the NADA

value. In other words, nearly one in three members of the putative class likely received over ACV and thus suffered no breach of contract or any harm at all.

This Court accepted Progressive's appeal.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

The Eighth District erred in holding that Plaintiffs satisfied Rule 23's commonality and predominance requirements. Plaintiffs claim that Progressive failed to pay the ACV of class members' totaled cars. Their theory is that Progressive's use of PSAs—which are one type of adjustment that Progressive folds into its valuation analysis—rests on outdated assumptions. But that showing, even if it could be made, would not establish Progressive's *liability* to any—much less every—class member. Plaintiffs would still have to prove, for each class member, that the use of the PSA actually produced a valuation below ACV and that each received less than ACV.

This Court should reverse the Eighth District and declare two propositions of law that the Eighth District erred in not following. First, an appropriately rigorous analysis of commonality and predominance under Rule 23 requires identifying the essential elements of the class claims and assessing whether proving those elements involves individualized or common questions. Second, a putative class cannot satisfy either Rule 23 requirement by alleging that only a single adjustment in an insurance valuation process was flawed when liability for class members' claims turns on the undervaluation of insured property. Each proposition of law will be addressed in turn.

PROPOSITION OF LAW NO. 1:

Undertaking a rigorous analysis of Rule 23 predominance requires an analysis of the essential elements of the class claims and whether they involve individualized or common questions.

The Eighth District found that the trial court did not abuse its discretion in concluding that there was a question "common to the class," Civ.R. 23(A), which "predominate[d] over any questions affecting only individual members." Civ.R. 23(B)(3). That conclusion was wrong. No common question exists in the relevant sense. And even if one did, individual questions still overwhelmingly predominate because ACV must be assessed on a vehicle-by-vehicle basis. The Eighth District's reasoning fundamentally misunderstands Rule 23 and, if adopted by this Court, would profoundly distort class-action practice in Ohio.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013) (citation omitted); *see also Cullen v. State Farm Mut. Auto. Ins. Co.*, 2013-Ohio-4733, ¶ 14 ("Because Civ.R. 23 is virtually identical to Fed.R.Civ.P. 23, we have recognized that 'federal authority is an appropriate aid to interpretation of the Ohio rule.'" (quoting *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 201 (1987)). "[P]laintiffs wishing to proceed through a[n opt-out] class action must actually prove—not simply plead—that their proposed class satisfies each requirement" of Rule 23(b)(3)—commonality, predominance, and superiority. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014). "[C]ertification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of [Rule 23] have been satisfied.'" *Comcast*, 569 U.S. at 33 (quoting *Wal-*

Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–52 (2011)); *accord Stammco, L.L.C. v. United Tel. Co.*, 2013-Ohio-3019, ¶¶ 29–33 (adopting guidance from the U.S. Supreme Court on the rigorous analysis required).

Plaintiffs have not proven that any common question exists, much less that it predominates over individualized questions. Plaintiffs seek to certify a class of Progressive's insureds who purchased an insurance policy that promises to pay the ACV of totaled vehicles. When calculating the Mitchell value, Progressive applies an adjustment known as the PSA to account for the fact that many used cars sell for less than list price. Plaintiffs claim that PSAs are "contrary to the used car industry's market pricing and inventory management practices." App. Op. ¶ 3. According to Plaintiffs, Progressive's purportedly flawed methodology for calculating ACV has "'thumbed the scale' in issuing payments for their and other similarly situated claimants in Ohio for loss of a totaled used vehicle." *Id.* ¶ 2.

But no common question exists in the relevant sense. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes*, 564 U.S. at 350–51 (citation omitted). Commonality also requires not just "the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Plaintiffs contend that PSAs rest on outdated assumptions and should not be used. In other words, they contend that the common question is: should Progressive have used PSAs? But no common answer

to that question could drive the resolution of the litigation, either classwide or even individually. Suppose Plaintiffs prove that PSAs are systematically inaccurate and should never be applied. That finding would not drive the resolution of the litigation with respect to *any* putative class member, because that finding would not answer the ultimate question that matters: did Progressive breach its insurance contract by paying less than ACV? For every class member, the determination of whether Progressive breached that contract would still require an individualized analysis of whether the amount the class member received is lower than ACV. Plaintiffs therefore cannot show any common questions in the sense relevant to Rule 23.

Even if Plaintiffs could prove commonality, they could not prove predominance—the issue expressly before this Court. "The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (cleaned up). If each plaintiff would "need to provide particularized evidence" to prove their claim, "common issues do not predominate over individual ones." *Ferreras v. Am. Airlines, Inc.*, 946 F.3d 178, 186 (3d Cir. 2019). In other words, the court must rigorously analyze the essential elements of the class claims and also assess whether proving those elements involves individualized or common questions.

In this breach-of-contract litigation, individualized questions predominate for a straightforward reason: adjudicating breach will inevitably require individual liability trials for every single class member to determine the ACV of each totaled

vehicle. As already explained, even if Plaintiffs were to prove, following class certification, that PSAs rest on outdated assumptions about the market for used cars, that fact would reveal precisely nothing about whether Progressive breached its insurance contract with any particular class member. For every single class member, the court would still have to ask the question: was the payment in fact lower than ACV? That question would depend on individualized evidence regarding the characteristics of each class member's particular vehicle.

The asserted flaw in PSAs, if proven, might be one piece of relevant evidence supporting the insured's case, but a court would still have to weigh that evidence alongside all the other insured-specific evidence before making a determination regarding the ACV of that particular insured's vehicle. Because the court would need to review particularized evidence with respect to every putative class member before determining whether any class member received less than ACV and thus suffered a breach, individualized questions predominate. As the U.S. Court of Appeals for the Seventh Circuit concluded in reversing class certification in a materially similar lawsuit against Progressive, "[i]ndividual issues would thus overwhelm the litigation." *Schroeder v. Progressive Paloverde Ins. Co.*, 146 F.4th 567, 577 (7th Cir. 2025). That is because "the putative class members' cars differ by model, age, mileage, and other features. To value a totaled car, Progressive (through its use of Mitchell's system) selects comparable cars that match the totaled car's features, so the comparable cars in Progressive's valuation reports also differ." *Id.* (citation omitted).

The Eighth District's reasoning regarding predominance is misguided. In finding that common issues would predominate, the Eighth District reasoned as follows: "The plaintiffs are not contesting the individualized valuations; rather, they are only contesting the line-item PSA deductions. At this stage, the plaintiffs have shown that their contracts are materially similar and they are proceeding on the same theory of liability." App. Op. ¶ 30. But applying a PSA deduction is not a breach if its inclusion in the valuation formula does not produce a valuation below ACV, which is all the class members' insurance contracts require. The Eighth District's predominance reasoning thus improperly distorts the predominance inquiry by ignoring the ultimate liability question. Analyzing predominance requires focusing on the broader, ultimate elements of the claim—not merely some narrow, subsidiary legal or factual question that might be relevant—and assessing whether proving those elements involves common questions that will predominate over individualized questions. Put differently, analyzing predominance requires assessing whether adjudicating each class member's *entire* claim and its elements *as a whole* will overwhelmingly involve individualized questions and proof despite some relevant, but subsidiary, factual questions that might be resolved with common proof.

The Eighth District failed to consider the ultimate elements of Plaintiffs' claims, much less whether adjudicating those elements involves common or individualized inquiries. For a breach-of-contract claim, those elements include, well, a breach of contract (and resulting injury). As the Tenth District has observed, when it comes to "breach of contract claims, the predominance inquiry must ask whether

the essential breach element of the breach-of-contract claim is an individualized fact question that justifies class certification." *Cross v. Univ. of Toledo*, 2022-Ohio-3825, ¶ 34 (10th Dist.) (cleaned up). Progressive's use of PSAs could never, in and of itself, violate its contractual obligation to pay the proposed class members the ACV of their totaled vehicles. The only thing Progressive could do that would violate that contractual obligation is *pay a putative class member less than the ACV of their vehicle*.

If Progressive applies a PSA, but nonetheless pays a class member the ACV of a totaled vehicle, there is no breach—or injury. Thus, no common question exists, much less predominates. Even if Progressive applies PSAs for every single putative class member, there will be, at most, *some* instances where it breaches the contract (because it pays less than ACV) and *other* instances where it does not (because it pays ACV or more). In reversing class certification in a materially similar lawsuit against Progressive, the U.S. Court of Appeals for the Fourth Circuit crisply summarized this problem with Plaintiffs' class-certification theory:

> This is, at bottom, a straightforward breach of contract case where Freeman contends that Progressive failed to pay her the actual cash value of her totaled vehicle. . . . To prove the breach, Freeman *and every purported class member* would have to show that the market value of his or her vehicle—with all its unique characteristics—was greater than the amount Progressive paid. This totally individualized process precludes class certification.

Freeman v. Progressive Direct Ins. Co., 149 F.4th 461, 471 (4th Cir. 2025). Accordingly, in reversing class certification here, this Court should hold that Rule 23's commonality and predominance inquiries require a rigorous analysis of the

essential elements of the class claims and whether adjudicating them involves common questions that will predominate over individualized ones.

PROPOSITION OF LAW NO. 2:

> **A putative class cannot satisfy Rule 23's predominance requirement by alleging that only a single adjustment in an insurance valuation process was flawed when liability for class members' claims turns on the undervaluation of insured property.**

The trial court and the Eighth District accepted Plaintiffs' attempt to circumvent the individualized breach and injury inquiries by embracing Plaintiffs' theory that Progressive breached its insurance contract simply by applying PSAs in reaching its valuation. No individualized vehicle valuations are necessary for class certification, Plaintiffs argue, because Plaintiffs "maintain that 'the Mitchell reports have already done those individualized valuations" and there is "some evidence" that "the PSA deduction, which Progressive applied to all the class members, always results in a downward deduction and, thus, Progressive's valuation of the plaintiffs' claims resulted in an underpayment of the ACV of their vehicles, in breach of their policies." App. Op. ¶ 30.

These efforts to skirt Rule 23 fail. For starters, the theory fails as a matter of law because it rests on a plainly incorrect interpretation of the putative class members' insurance contract. Nothing in that contract suggests that the mere use of PSAs—untethered from any resulting valuation error—is a breach. Indeed, the contract is silent on PSAs. Nor would any insured have any reason to care whether Progressive uses PSAs, so long as the insured ultimately receives at least ACV. A

breach-of-contract theory hinging on Progressive's mere use of PSAs would require rewriting the contract.

The Court must analyze commonality and predominance based on the *correct* interpretation of the contract—which determines how each class member's claims must ultimately be tried—not based on Plaintiffs' asserted, but incorrect, reading. Plaintiffs argue that the putative class members' claims present a common question: whether using the PSA method "always results in a downward deduction" that, in turn, results in a valuation less than ACV. App. Op. ¶ 30. But to decide whether that is genuinely a common question—in the relevant sense of producing common answers that will drive classwide resolution of the litigation and predominate over individualized issues at trial—the Court must decide whether such a finding would *in fact* be a sufficient basis to find a breach of contract with respect to each class member, not merely whether Plaintiffs *claim* that it would.

And it would not. The insurance contract's plain language makes clear that each case turns on whether the individual projected sale price of each totaled vehicle satisfied the requirement that Progressive pay ACV, not on whether PSAs are inaccurate because they misrepresent current market behavior. Again, the Fourth Circuit similarly concluded that "[t]his totally individualized process precludes class certification" because, "[t]o prove the breach, [the plaintiff] *and every purported class member* would have to show that the market value of his or her vehicle—with all its unique characteristics—was greater than the amount Progressive paid." *Freeman*, 149 F.4th at 471.

Under *Comcast*, the Eighth District erred in affirming class certification when the trial court did not scrutinize the legal theory underpinning—and ultimately, defeating—Plaintiffs' theory of classwide liability. *See Cullen*, 2013-Ohio-4733, ¶ 2 ("When determining whether to certify a class, a trial court must conduct a rigorous analysis, and it may grant certification only after resolving all relevant factual disputes and finding that sufficient evidence proves that all requirements of Civ.R. 23 have been satisfied."); *Ferreras*, 946 F.3d at 184 ("Prior to certifying a class, a district court must resolve every dispute that is relevant to class certification."). This requirement may result in a partial analysis of the merits of the plaintiff's claim at the class-certification stage. But that is an inevitable and common feature of class-action litigation. The U.S. Supreme Court has repeatedly "emphasized that it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and "[s]uch an analysis will frequently entail overlap with the merits of the plaintiff's underlying claim." *Comcast*, 569 U.S. at 33–34 (quotation marks omitted). "That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 34 (quotation marks omitted).

That is precisely the case here. The relevant inquiry for commonality under Rule 23 is: "would proof that PSAs are generally inaccurate establish Progressive's liability with respect to each class member?" That question overlaps with the relevant inquiry for liability: "did Progressive breach the contract by paying out below ACV by

using PSAs?" But notwithstanding this overlap, the court must resolve the commonality question prior to class certification.

This is not to say, of course, that a court should *always* resolve all common legal issues prior to class certification. Suppose a contract is ambiguous on a particular issue, and the class members' claims entirely rise or fall based on resolution of that ambiguity. However the court resolves the ambiguity will determine the defendant's liability to the class in one fell swoop, no matter the court's answer. In such a scenario, this contract-interpretation question might be a "common question" under Rule 23 that should be answered after, rather than before, class certification. *Cf. Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 467–74 (2013) (holding that securities class-action plaintiffs need not prove materiality at the class-certification stage because the lack of materiality would simultaneously doom all class members' claims). But the court must ascertain as a matter of law whether such an all-or-nothing legal question actually exists; it cannot simply accept the plaintiff's assertion that it does. *See, e.g.*, *Sampson v. USAA*, 83 F.4th 414, 423 (5th Cir. 2023) (reversing class certification because "plaintiffs have not demonstrated that NADA equates to ACV *in fact*, nor put forward a coherent theory on which NADA, but not KBB or Edmunds, etc., can serve as a determinant of injury and liability *as a matter of law*" (internal citation omitted)).

The Court must also rigorously analyze Plaintiffs' factual representations necessary to the novel legal theory. It is beyond implausible that the use of PSA "always" results in a value less than ACV or that the Mitchell value without the PSA

methodology apparently "always" gets ACV correct, such that no individualized inquiry is required. *See* App. Op. ¶ 30. Plaintiffs have not even come close to proving either proposition. Plaintiffs have purportedly produced "some evidence" that the PSA application "always results in a downward deduction" from the Mitchell value. Even if true, however, that does not mean that "Progressive's valuation of the plaintiffs' claims [always] resulted in an underpayment of the ACV . . . ." *Id.* It is a huge, farcical factual leap to conclude that a downward deduction *always* "resulted in an underpayment of the ACV on [all of Plaintiffs'] vehicles." As the U.S. Court of Appeals for the Third Circuit held in reversing class certification in a materially similar lawsuit against Progressive, "just because Progressive's final settlement value could have been higher but for the use of the PSA does not mean that a given insured was actually underpaid. And if an insured was not underpaid, then Progressive did not breach its contract with that insured." *Drummond v. Progressive Specialty Ins. Co.*, 142 F.4th 149, 160 (3d Cir. 2025).

To accept the Plaintiffs' factual representation that applying a PSA in the valuation formula *always* produces a valuation below ACV, one would have to find that there is one methodology—apparently the Mitchell value without the PSA application—that always arrives at the accurate ACV. But not even Plaintiffs suggest that their experts' proposed valuation methodology is the only way to value a vehicle. And an individualized inquiry will surely reveal that at least some Plaintiffs received more than ACV under the Mitchell value when the PSA methodology was not applied.

The Third Circuit accordingly rejected the plaintiffs' similarly unfounded factual assertion:

> That is, if we accept plaintiffs' allegation that Progressive manipulated the Mitchell value by applying improper downward adjustments to it, the final settlement value would always be lower than *what it otherwise would have been*. But that is not what matters for purposes of breach of contract. Rather, what matters is whether the decrease in the Mitchell value led to the final settlement value dropping below the *true ACV* of the totaled vehicle—because that is what Progressive is contractually obliged to pay insureds. . . . Just because the Mitchell value decreased does not mean the resulting final settlement value was less than the *true ACV* of the vehicle.

Drummond, 142 F.4th at 158; *accord Lara v. First Nat'l Ins. Co. of Am.*, 25 F.4th 1134, 1139 (9th Cir. 2022) ("[T]his class could include a plaintiff whose car was valued using the CCC report with the disputed condition adjustment, and for whom Liberty used CCC's estimate without making any further adjustments. Even for that plaintiff, the district court would have to look into the actual value of the car, to see if there was an injury.").

Indeed, as Progressive observed in its memorandum in support of jurisdiction (at 7), Progressive sampled claims of putative class members and found that nearly one in three of those sampled received payouts *larger* than the NADA "Clean Retail" value. *See also Ambrosio v. Progressive Preferred Ins. Co.*, 154 F.4th 1107, 1112 (9th Cir. 2025) ("Progressive has provided evidence that at least two members of the proposed class received a higher 'market value' valuation from the Mitchell Report than they would have from other sources."). Here, it is likely nearly a third of the certified class suffered no breach or injury. As the U.S. Court of Appeals for the Ninth Circuit concluded in rejecting class certification in a similar ACV lawsuit against

Progressive, "[a]llowing Progressive to mount this defense [that there was no breach because the plaintiffs received ACV] towards the remaining proposed class members would render class certification inappropriate." *Id.*

If the Eighth District's reasoning is upheld, an enterprising plaintiff in Ohio could extend this Court's precedent to manufacture class certification in every single case. The plaintiff could simply assert that a legal theory exists that would allow the defendant's liability to be adjudicated on a classwide basis—and if the defendant disputes that legal theory, the plaintiff could insist that such a legal dispute remains an issue to be resolved after class certification. This outcome would violate both the letter and spirit of Rule 23 and would seriously harm class-action defendants. What's more, it would make the state of Ohio an extremely attractive jurisdiction for these types of class actions—and even more so as even more jurisdictions reject the certification of such classes.

Even if a legal theory undermining a class claim appears meritless, class certification is still a game-changing event. "[T]he certification decision is typically a game-changer, often the whole ballgame." *Marcus v. BMW of N. Am. LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012). "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." Nagareda, *supra*, at 99. In the typical case, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Sci.–Atlanta, Inc.*, 552 U.S. 148, 163 (2008).

"Certification of a large class may so increase the defendant's potential damages liability and litigation costs" that even the most surefooted defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023) ("[T]he possibility of colossal liability can lead to what Judge Friendly called 'blackmail settlements.'" (quoting Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973)); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."). This is why "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010).

Given that reality, this Court should reaffirm that classes may not be certified based on manifestly faulty legal theories, such as Plaintiffs' theory here. Plaintiffs' class-certification theory fails because commonality and predominance cannot be satisfied by merely alleging that only a single adjustment in an insurance valuation process was flawed when liability for class members' claims turns on the ultimate undervaluation of insured property.

In reversing class certification, this Court would join the U.S. Courts of Appeals for the Third, Fourth, Seventh, and Ninth Circuits in recently rejecting class certification in materially identical lawsuits against Progressive. *See Drummond* 142 F.4th at 160–61 (holding that "individual issues predominate as to whether the

putative class members actually received less than ACV" and that the district court's class certification "rested upon an errant conclusion of law" (cleaned up)); *Schroeder*, 146 F.4th at 579 (holding that "[t]he district court premised its analysis of commonality and predominance on an erroneous legal conclusion that the putative class members could succeed on their claims under this theory of breach"); *Freeman*, 149 F.4th at 471 (rejecting class certification "[b]ecause Freeman's claim and the claims of all the purported class members are essentially individualized claims requiring mini trials as to each"); *Ambrosio*, 154 F.4th at 1112 (holding that common issues cannot predominate because "the PSA cannot serve as common evidence of liability, [as] each individual Appellant would need to compare their flawed 'market value' with a correct one to win on the merits"); *see also Sampson*, 83 F.4th at 423 (U.S. Court of Appeals for the Fifth Circuit reversing class certification in materially similar lawsuit against USAA).

In October of last year, just down the street from the Thomas J. Moyer Ohio Judicial Center, Judge Eric Murphy of the U.S Court of Appeals for the Sixth Circuit bemoaned his panel colleagues' decision to "disagree with these circuits by certifying a class that should result in some 90,000 trials about the fair market value of each class member's car." *Clippinger v. State Farm Auto. Ins. Co.*, 156 F.4th 724, 746 (6th Cir. 2025) (Murphy, J., dissenting). "And to the extent that my colleagues can avoid that result," Judge Murphy continued, "they may do so only by violating the insurer's 'substantive right' to prove that it paid each class member an amount equal to the fair market value of that class member's car." *Id.* (citation omitted). That Sixth

Circuit panel's decision was not long for this world. Last week, the Sixth Circuit decided to rehear the case en banc, an extraordinary step for that court. *Clippinger v. State Farm Auto. Ins. Co.*, No. 24–5421, 2026 WL 234844 (6th Cir. Jan. 29, 2026) (vacating the panel decision and granting rehearing en banc). This Court should reverse class certification because, as Judge Murphy put it, "the resulting class action will either generate a never-ending valuation trial or deprive [the insurer] of its rights." *Clippinger*, 156 F.4th at 757 (Murphy, J., dissenting).

CONCLUSION

For these reasons, the Court should reverse class certification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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