IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 18-55850

KEITH ANDREWS, *ET AL.*,
Plaintiffs/Appellees,

v.

PLAINS ALL AMERICAN PIPELINE, L.P., *ET AL.*,
Defendants/Appellants.

Appeal from the United States District Court for the Central District of California
Case No. 2:15-cv-04113-PSG-JEM
The Hon. Philip S. Gutierrez, United States District Judge

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae certifies that it has no outstanding shares or debt securities in the hands of the public, and it does not have a parent company. No publicly held company has a 10% or greater ownership interest in *amicus curiae*.

/s/ Adam G. Unikowsky

The Chamber of Commerce of the United States of America (the "Chamber") respectfully files this motion for leave to file a brief as *amicus curiae*. Defendants consent to this filing. Plaintiffs do not consent to this filing.

Under the Federal Rules, motions for leave to file *amicus curiae* briefs must state "the movant's interest"; and "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." *See* Fed. R. App. P. 29(a)(3) (*amicus curiae* brief during consideration of case on merits).

Movant's interest. The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 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, from every 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 concern to the Nation's business community.

The Chamber has a strong interest in this case. The district court certified a class of plaintiffs even though the class members share little (if anything) in common, some suffered no injury, and individual questions predominate in the adjudication of their fact-intensive negligence claims. *Amicus curiae*'s members depend on courts to apply "a rigorous analysis" to putative class actions to ensure

that both "'the prerequisites of Rule 23(a)'" and "Rule 23(b)(3)'s predominance criterion" have been satisfied before any class is certified. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013) (citations omitted). The district court did not conduct that rigorous analysis here. The Chamber has an interest in ensuring that district courts in this Circuit adhere to the rigorous requirements of Rule 23.

Why an amicus curiae brief is desirable and relevant. "Even when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Associates, P.A. v. Commissioner*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.). "Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group." *Id.* (quotation marks and citation omitted).

In this case, the Chamber's proposed *amicus curiae* brief fulfills all three of these functions. First, the Chamber has "particular expertise." *Id.* (quotation marks omitted). In view of its broad and diverse membership, the Chamber has an unparalleled ability to assess whether a particular judicial decision will have a significant effect on cases not before the Court. The Chamber's brief elucidates how the district court's reasoning, if followed by other district courts, would have substantial implications in future cases.

Second, the Chamber argues "points deemed too far-reaching for emphasis by a party intent on winning a particular case." *Id.* (quotation marks omitted). Although the parties rightly focus on the facts of this case, the Chamber makes more general arguments about the broader significance of the district court's ruling to class action law which may be helpful in deciding this case.

Third, the Chamber "explain[s] the impact a potential holding might have on an industry or other group." *Id.* (quotation marks omitted). As previously described, the Chamber has a unique capability to describe how the district court's opinion, if followed by other courts, will affect other parties beyond the parties currently before the Court.

Therefore, the Chamber's motion for leave to file an *amicus curiae* brief should be granted.

CONCLUSION

The motion for leave to file an *amicus curiae* brief in support of Appellants should be granted.

November 9, 2018

Respectfully submitted,

/s/ Adam G. Unikowsky

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d)(2)(A), I certify that this brief complies with the type-volume limitation because this brief contains 635 words.

Pursuant to Fed. R. App. P. 27(d)(1)(E), this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Adam G. Unikowsky

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/s/ Adam G. Unikowsky

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT REGARDING CONSENT

Defendants consent to the filing of this *amicus curiae* brief. Plaintiffs do not consent to the filing of this brief. *Amicus curiae* has contemporaneously filed a motion for leave to file this brief.[1]

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 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, from every 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 concern to the Nation's business community.

The Chamber has a strong interest in this case. The district court certified a class of plaintiffs even though the class members share little (if anything) in common, some suffered no injury, and individual questions predominate in the adjudication of their fact-intensive negligence claims. *Amicus curiae*'s members

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

depend on courts to apply "a rigorous analysis" to putative class actions to ensure that both "'the prerequisites of Rule 23(a)'" and "Rule 23(b)(3)'s predominance criterion" have been satisfied before any class is certified. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013) (citations omitted). The district court did not conduct that rigorous analysis here. The Chamber has an interest in ensuring that district courts in this Circuit adhere to the rigorous requirements of Rule 23.

SUMMARY OF ARGUMENT

I. Certifying Plaintiffs' claims for class treatment conflicts with bedrock principles of class action procedure. Class actions serve as a procedural mechanism to adjudicate claims by similarly-situated plaintiffs efficiently. They are not vehicles for skirting substantive principles that would apply in individualized litigation—like the requirement that a plaintiff establish an injury-in-fact. Here, however, the district court openly acknowledged that uninjured plaintiffs would be class members, based on the fact that they were supposedly "exposed" to risk of harm when an oil pipeline was shut down—even if that harm never materialized. Thus, the district court allowed plaintiffs to pursue claims on a class basis that they could never have asserted in individualized litigation. That result cannot stand.

II. The district court erred in holding that common questions of law or fact "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Class certification "is proper only if the trial court is satisfied, after a

rigorous analysis," that Rule 23(b)(3)'s predominance requirement has been satisfied. *Comcast*, 569 U.S. at 33-34 (internal quotation marks and citations omitted). The district court did not seriously conduct that analysis, and it is obvious that there are a litany of individualized issues. For example, the court will need to undertake individualized inquiries into the duty (if any) owed to each class member, whether and to what extent each class member suffered a cognizable injury, whether and to what extent that alleged injury is attributable to the after-effects of the pipeline shutdown as opposed to myriad alternative explanations, and whether and how each class member attempted (if at all) to mitigate whatever harm they allegedly suffered as a result of the shutdown. Because those questions cannot be answered by multiple plaintiffs using the same evidence, common questions do not predominate. Merely reciting that all class members had been exposed to the *risk* of harm does not establish that class-wide litigation is appropriate.

III. The Chamber takes no position on whether any individual plaintiff in the class would have a meritorious claim. But if such plaintiffs existed, they would be the real victims of the class certification order. By including countless numbers of uninjured plaintiffs in the class, any recovery by class members that actually suffered injury will be diluted by payments owed to uninjured members. At the same time, by joining whatever few meritorious claims there might be with countless patently meritless claims by plaintiffs who admittedly suffered no injury, chances

increase that the claims will be dismissed in their entirety. That in turn reduces the expected value of the class's claims, harms class counsel's negotiating position, and creates the risk of a settlement that is high in absolute terms because of the large class, but low per capita. In the end, this will cause any injured plaintiff to receive far less than he would have received had he pursued the suit in individual litigation.

ARGUMENT

The Chamber agrees with Defendants that this class should not have been certified. It writes separately to highlight certain conceptual flaws and practical consequences arising from the district court's ruling.

I. The Class Certification Order Misunderstands Rule 23.

The district court certified a class that included not only an array of companies with relationships to oil drilling, but also all employees who worked on the offshore oil drilling platforms, and all employees of companies with a contract to support those platforms—regardless of whether those employees lost their job as a result of the alleged negligence. The district court openly recognized that Plaintiffs' proposed class included individuals who were "not injured as a result of the Pipeline shutdown." ER15; Order 14. The district court nevertheless certified the class on the theory that each of the plaintiffs was "at the very least exposed to the shutdown" of the pipeline. *Id.* Therefore, the court reasoned, each plaintiff was at risk of being harmed by the alleged negligence, even if they did not actually suffer any economic

harm. ER 12, 15; Order 11, 14. The district court's reasoning is wrong. Certifying a class of employees who were not injured, merely because they were exposed to a risk of injury that never materialized, is incompatible with foundational principles of class action procedure.

"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*, 569 U.S. at 33-34 (citation omitted). "A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). "And like traditional joinder," a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id.* In other words, class actions do not provide litigants with any more substantive rights than they otherwise would have had if their claims had proceeded individually. Class actions are simply a procedural vehicle that provides "'the manner and the means' by which the litigants' rights are 'enforced'" without "alter[ing] 'the rules of decision by which [the] court will adjudicate [those] rights.'" *Id.* at 407 (citations omitted).

The district court's order conflicts with those principles. By certifying a class that admittedly includes plaintiffs who "were not injured as a result of the Pipeline shutdown" (ER15; Order 14), the district court allowed the class members to

maintain claims that they could not have maintained if brought individually. It should go without saying that an individual plaintiff could not file a suit alleging that as a result of the defendant's negligence, he *might have* lost his job—even though he actually did not. Because Rule 23 is merely a species of joinder, it follows that such an individual plaintiff cannot be a class member.

In interpreting Rule 23 to permit such plaintiffs to be class members, the district court violated the Rules Enabling Act, which prohibits courts from applying procedural rules to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The district court's interpretation also violated the Constitution. "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not. The Judiciary's role is limited to provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (internal quotation marks omitted); *see also Lewis v. Casey*, 518 U.S. 343, 360 n.7 (1996) ("Courts have no power to presume and remediate harm that has not been established."). The Constitution did not permit the district court to certify a class encompassing uninjured plaintiffs.

In reaching a contrary view, the district court relied on the plaintiffs' "exposure" theory. It reasoned that even though only a subset of plaintiffs *actually* lost their jobs, all plaintiff class members were *exposed* to the risk of harm, thus

entitling all plaintiffs be class members. Exposure to varying degrees of speculative risk provides no basis for class certification. Although this Court has affirmed class-certification decisions on an "exposure" theory, those cases have involved the very different scenario where such "exposure" was *itself* an injury that support an individual plaintiff's claim. The "exposure" theory has been applied in false advertising class actions where the plaintiffs' alleged harm was the exposure to the allegedly harmful message. In those cases, under the applicable substantive law, plaintiffs are not required to prove falsity, reliance, or harm—only that "members of the public are *likely* to be deceived." *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1068 (9th Cir. 2014) (emphasis added; quotation marks omitted); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012) (allowing recovery on unfair competition claims "without individualized proof of deception, reliance, or injury"). Thus, because an individual plaintiff can pursue a claim based on exposure to false advertising without a showing of particularized injury, this Court has held that plaintiffs can pursue such a claim as a certified class.

By contrast, here, Plaintiffs are bringing negligence claims. The law of negligence does not permit a plaintiff to sue merely because the plaintiff was exposed to the risk of harm that never occurred. Thus, an uninjured plaintiff could not maintain an individual lawsuit asserting negligence by merely asserting that she was "exposed" to the pipeline's shutdown and thus *might* have been injured by the

pipeline's shutdown. Rather, a plaintiff must prove that they were owed a duty and that any breach of that duty proximately caused them actual injury. *See, e.g.*, *Ileto v. Glock Inc.*, 349 F.3d 1191, 1203-04 (9th Cir. 2003); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (standing "requires that the party seeking review be himself among the injured," not among the injured potentially "some day" in the future). Because the district court expressly acknowledged that there were plaintiffs within the class who could not make this showing, the class should not have been certified.

Even if there were no ironclad rule that uninjured plaintiffs cannot be class members, the class certification order here would still be improper. This Court has stated that "even a well-defined class may inevitably contain some individuals who have suffered no harm as a result of a defendant's unlawful conduct," because "an injurious course of conduct may sometimes fail to cause injury to certain class members." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016). The Chamber disagrees with that view, but even if it were correct, it cannot justify the class certification order here. In *Torres*, the Court stated that a class definition could contain uninjured class members if the "non-injury to a subset of class members" was "fortuitous." *Id.* at 1137. In other words, if a "class definition" was "reasonably co-extensive with Plaintiffs' chosen theory of liability," *id.*, the

presence of individual class members who would not ultimately be entitled to damages would not taint the entire class.

That is emphatically not the situation here. *Most* of the class is uninjured. Plaintiffs' key piece of evidence at the class certification stage was an expert report estimating that oil-industry employment declined 34 percent after the spill. ERR344-46. This means that *two-thirds* of the class members were uninjured. Declaring those class members to be plaintiffs is irreconcilable with the text and purpose of Rule 23.

The district court's class certification order appeared to be based on the intuition that class litigation can be used to achieve a kind of aggregate rough justice. From the district court's perspective, *some* class members were injured—even though it was unclear which ones—so including *all* employees in the class would allow the injured class members, whoever they are, to be compensated. The district court apparently concluded that by calculating the aggregate loss of jobs as a result of the spill, it could calculate the aggregate harm that Defendants allegedly caused, and therefore require Defendants to compensate the oil industry *in general*.

But that is simply not how class litigation works. Rule 23 is a Federal Rule of Civil *Procedure*—a procedure for adjudicating multiple claims efficiently—rather than a mechanism of vindicating aggregate, collective injuries that could not

be remedied via individualized litigation. Viewed in that light, Rule 23 plainly does not authorize the district court's order.

The district court's reasoning, if adopted by other courts, could cause significant mischief. Until now, the "exposure" theory of class certification has been properly confined to cases where the exposure *itself* is an injury. The district court's reasoning would expand that theory significantly. Enormous classes could be certified on the theory that all the class members were exposed to some risk. Anyone who ever walked to a pharmacy could bring a products liability claim based on a drug they never brought—on the theory that by seeing it on the drug store shelf, they were exposed to the risk of injury if they had bought it. All employees at a company could challenge the company's overtime policy, on the theory that they were exposed of the risk of being subject to the policy if they ever worked after hours—regardless of whether they ever actually did so. Although these examples may seem absurd, they are no less absurd than the district court's decision to certify a class of employees who might have, but did not, lose their jobs as a result of the defendant's negligence. The Court should reverse the district court and clarify that such a class cannot lawfully be certified.

II. Plaintiffs' Claims Are Inappropriate For Class Treatment Because Individualized Issues Predominate And Innumerable Mini-Trials Will Be Needed To Decide Their Claims.

The district court further erred in holding that Plaintiffs had satisfied the predominance requirement for class certification. *See* Fed. R. Civ. P. 23(b)(3). The predominance inquiry requires a practical analysis of whether resolving the plaintiffs' claims on a class-wide basis is feasible. The district court did not conduct that analysis, and it is obvious on the facts of this case that full-scale trials will be required for each class member.

To certify a damages class, a plaintiff must demonstrate that common questions "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Class certification "is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a)" and "Rule 23(b)(3)'s predominance criterion," which "is even more demanding than Rule 23(a)," have been satisfied. *Comcast*, 569 U.S. at 33-34 (internal quotation marks omitted). Plaintiffs must demonstrate "through evidentiary proof" that their claims "in fact" can be litigated on a class-wide basis without the need for individualized mini-trials. *Id.* at 33.

The district court concluded that class treatment was appropriate because each class member had a "contractual relationship tying them to the oil industry." ER 13; Order 12. But to characterize this as a "common issue" is wordplay, because each

contractual relationship is different. Some contracts may create a duty; others may not. As such, each class member will need to present its particular contract—"evidence that varies from member to member"—to prove up its claims. 2 William B. Rubenstein, *Newberg on Class Actions* § 4:50, at 196-97 (5th ed. 2012) (internal quotation marks omitted). That the "the same evidence will [not] suffice for each member" to prove its claim, *id.*, is strong evidence that "non-common, aggregation-defeating, individual issues" predominate over common issues, *id.* § 4:49, at 195-96.

Even setting aside the differences between each class member's contracts, individual issues abound. The district court committed a cardinal error of class-certification decisions: "gerrymander[ing] predominance by suggesting that only a single issue be certified for class treatment (in which, by definition, it will 'predominate') when other individualized issues will dominate the resolution of the class members' claims." 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:43, at 1007-08 (15th ed. 2018) (citation omitted). For any class member, proving causation and damages will require a trial-within-a-trial that will be far more complex than whatever issues the district court intends to resolve on a class-wide basis.

Suppose Plaintiffs succeed in proving, on a class-wide basis, that Defendants were negligent. For each individual plaintiff, that will be not the end of the case, but

the beginning. Each plaintiff will need to offer evidence of: (1) a duty of care owed by Defendants, in light of the specific relationship between that plaintiff, Defendants, and any intermediaries; (2) injury, such as the loss of a job or loss in earnings; (3) a causal link between the alleged negligence and the injury, as opposed to the injury being caused by a general market downturn, the plaintiff's job performance, or some other event unrelated to the pipeline. And even if the plaintiff can prove all of those elements via individualized evidence, the plaintiff will need to prove damages, which will be highly individualized. It may turn on questions such as whether the plaintiff's wage rate would have changed had the alleged negligence not occurred; whether the plaintiff took another job or performed other duties that should offset the alleged damages; and whether the plaintiff unreasonably failed to pursue other employment and therefore failed to mitigate damages.

A similar set of individualized inquiries surround claims by businesses alleging economic harm from the pipeline shutdown. To prove those claims, those businesses will need to offer individualized evidence regarding their work, business, and relationship to the pipeline. This evidence would have to show that any reduced revenue or profit is attributable to the pipeline, and not, for instance, to macro- or micro-economic trends, product offerings, marketing, or management-related issues. That will present a challenge, to say the least; even the district court recognized that the class it certified included "myriad businesses" whose performance was "subject

to varying factors other than the oil spill." ER14-15; Order 13-14. Whether those "varying factors" undermine Plaintiffs' claims will need to be addressed in particularized proceedings for each business that is a class member. *See* ER15; Order 14; *accord Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997) (determining the impact from exposure "will depend on singular circumstances and individual … histories" because plaintiffs "share little in common, either with each other or with the presently injured class members" (internal quotation marks omitted)).

Indeed, the key evidence that Plaintiffs rely on at the class-certification stage confirms beyond doubt that common issues do not predominate. Plaintiffs pointed to an expert report estimating that oil-industry employment declined 34 percent after the spill. ER344-46. So what? Even if the Court deems this expert report to be probative, it would not advance the litigation ball for *any* class members. An individual plaintiff could not recover damages merely by showing that employment decreased in general. And the Court could not enter judgment for any individual class member unless it calculated the damages owed to *that class member*—which will involve a protracted proceeding unsuitable for class litigation.

Thus, this case is very different from the typical wage-and-hour claim that is litigated on a collective basis. In a classic wage-and-hour case, the plaintiff alleges that the employer did not pay all class members for compensable activity. If the

plaintiff prevails, determining damages is, in some cases, a matter of mechanically multiplying the amount of compensable time for each employee by the minimum wage—a calculation that can often be conducted using time records in the employer's possession. In that scenario, one can say that common issues "predominate" because the common issue on which liability turns is whether the activity at issue was compensable, whereas the individualized issues can be determined via simple proceedings without undue complexity. *See Berger*, 741 F.3d at 1068 ("[T]he common questions must be 'a significant aspect of the case ... [that] can be resolved for all members of the class in a single adjudication.'" (quoting *Mazza*, 666 F.3d at 589)). This case is the polar opposite. The supposedly common issues do not come close to resolving any plaintiff's liability, and each employee will have to prove up almost his entire case to recover damages.

The Court in *Amchem* presciently summarized the predominance-related defects in Plaintiffs' class claims. "Given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute" about the impact of the "exposure cannot satisfy the Rule 23(b)(3) predominance standard." 521 U.S. at 623-24. For the same reasons, this Court should reverse the district court's order certifying the class of Plaintiffs "exposed" to the pipeline's shutdown.

III. Plaintiffs' Class Is So Defective That It Actually Undermines The Interests of Class Members With Meritorious Claims.

This case also illustrates how class-certification orders harm not only the defendant, but also plaintiffs with valid claims. The Chamber takes no position on the merit (if any) of any claim by any class member. But even if some class member had a legitimate claim against Defendants, it would be lost in the deluge of clearly meritless and defective claims—to that plaintiff's detriment.

The reasons that improper class-certification orders harm defendants are well-known. "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). 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).

But such orders harm plaintiffs with meritorious claims as well. The bigger the class, the bigger the payout for class counsel. But the bigger the class, the more

likely it is that any individual plaintiff with a meritorious claim would be undercompensated. This case, in which the district court aggregated the claims of people who lost their jobs with people who suffered no harm but were merely "exposed to it," is an illustration of this point.

Any plaintiff class member with a meritorious claim is harmed by the class certification order in two respects. First, a plaintiff who could actually prove he suffered injury will be forced to share any recovery with the legions of uninjured plaintiffs in the class. Plaintiffs may claim that uninjured class members will be winnowed out. But given the complexity of determining whether any class member's alleged injury can be traced to the alleged negligence, and the lack of any incentive by class counsel to litigate on a defendant-by-defendant basis, this is unrealistic; realistically, any settlement will be divvied up among class members in a way that compensates people whose injuries, if any, were not caused by any alleged negligence. That effectively forces an injured plaintiff to fund an uninjured plaintiff's windfall.

Second, including so many obviously invalid claims in the class increases the risk that the class will later be decertified, or the class claims will fail on their merits. This in turn makes class counsel anxious to negotiate a quick and low-value settlement for pennies on the dollar, rather than try the case and risk losing everything. In this scenario, not only do injured plaintiffs have to share their

damages with uninjured plaintiffs, but the amount of money to be shared per capita will be lower because of the weakness in the underlying "exposure" claims.

Concretely, any plaintiff who lost his job and filed a lawsuit would want their lawyer to argue to the jury that the plaintiff lost his job, rather than be conflated with a co-worker who *kept* his job but was merely exposed to the *risk* of losing it. Yet conflating those types of claims is precisely the effect of the district court's order, which is premised on the theory that mere exposure to the risk of harm is the common issue that can be litigated class-wide.

Nor does the typical justification for class litigation—that individual class members will lack the incentive to litigate—apply to this case. Plaintiffs claim that class members were injured because they lost their jobs. Plenty of individual plaintiffs file employment discrimination and wrongful termination claims, and plenty of lawyers exist to represent them. Such claims are unlike the types of low-value claims, for a few dollars per plaintiff, which have traditionally been used to justify the class action mechanism. The overbroad class certification order will doubtless enrich class *counsel*, who can make up for the weakness of individual claims in volume. And it may slightly enrich *uninjured* class members, who might get a small settlement check. But the people who actually lost their jobs will be left worse off. The Court should allow those claims to proceed as individualized cases rather than pushing such square pegs into the round hole of the certified class.

CONCLUSION

The district court's class certification order should be reversed.

November 9, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation because this brief contains 4,365 words.

Pursuant to Fed. R. App. P. 32(a)(5) and (6), this brief complies with the typeface and type style requirements because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Adam G. Unikowsky