ORAL ARGUMENT NOT YET SCHEDULED

No. 18-7010

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION - MDL NO. 1869

On Appeal from the United States District Court for the District of Columbia, No. 1:07-mc-00489-PLF, Honorable Paul L. Friedman, U.S. Senior District Judge

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Circuit's Rule 28(a)(1), amicus curiae certifies:

(A) Parties and *Amici*: Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Opening Brief of Plaintiffs-Appellants: *Amicus curiae* Chamber of Commerce of the United States of America.

(B) Rulings Under Review: References to the rulings at issue appear in the Opening Brief of Plaintiffs-Appellants.

(C) Related Cases: This case was previously before this Court. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013). *Amicus curiae* is aware of no related cases pending in this Court or any other Court.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber 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, and from every region of the country.

The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing the requirements for class certification. The Chamber takes no position on the underlying merits of the antitrust action in this case. But many of the Chamber's members are defendants in class actions, and the Chamber thus has a keen interest in ensuring that courts rigorously analyze whether the requirements for class certification have been satisfied before a class is certified. In particular, the Chamber and its members have a critical interest in the question presented here, i.e., whether the question whether expert testimony suffices to prove that the class certification requirements of Rule 23 have been satisfied is separate from the antecedent question whether

[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or their counsel made a monetary contribution to its preparation or submission. Pursuant to this Court's Rule 29(b), all parties have consented to the filing of this brief.

that testimony is admissible. For the reasons explained below, the Court should affirm the district court's conclusion that these two questions are distinct, and that regardless whether an expert opinion is admissible, the district court at class certification must rigorously analyze the substance of the opinion to determine whether it satisfies the plaintiffs' burden of proving that the preconditions to class certification have been met.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs filed a complaint seeking to represent a class of more than 16,000 entities claiming that they were harmed by an alleged rate-fixing conspiracy among the defendant railroads. In their motion for class certification, plaintiffs sought to demonstrate that their suit could appropriately be adjudicated on a classwide basis under Rule 23 by offering expert testimony that purported to demonstrate a common methodology showing that each class member was harmed by the alleged conspiracy. The district court determined that the expert's testimony was sufficiently reliable and based on accepted scientific principles to be admissible under Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). But the district court declined to certify the class based in part on its conclusion that this expert testimony failed to satisfy plaintiffs' burden under Rule 23 of demonstrating that common questions predominated over individual ones. The court instead determined—based largely on the fact that,

while plaintiffs claimed that all class members were injured, the report itself indicated that over 2,000 class members were *not* injured—that class certification was inappropriate.

On appeal, plaintiffs' primary argument is that the district court committed legal error by treating the question of the expert testimony's admissibility as distinct from whether the testimony satisfies plaintiffs' burden of showing that Rule 23's predominance requirement has been met. In plaintiffs' view, the fact that the expert opinion satisfies *Daubert* automatically means that it also suffices to demonstrate that class certification is warranted. Plaintiffs' contention rests on a profound misunderstanding of basic evidentiary and class-action principles, and should be rejected.

The Supreme Court has repeatedly made clear that putative class plaintiffs must "affirmatively demonstrate" their compliance with Rule 23 at the certification stage, and that district courts must "conduct a 'rigorous analysis' to determine whether" a putative class plaintiff has met that burden. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 35 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011)). That rigorous analysis ensures that a class will be certified only if each class member's claim (and the defendant's defenses) rise or fall together based on common proof. And this rigorous analysis further makes certain that classwide litigation will *not* be allowed if individualized inquiries are required to

protect the defendants' due process rights to present all evidence and defenses to liability.

As the Supreme Court has made clear, it is crucial that the rigorous analysis Rule 23 requires take place at the class certification stage. This requirement reflects not only a doctrinal but a practical concern. Because certification of a large class often exposes defendants to massive potential liability, a certification order itself imposes massive pressure on defendants to settle even weak or unmeritorious claims. Requiring plaintiffs to prove that classwide adjudication is warranted at the outset is thus likely to be a defendant's only meaningful opportunity to test the plaintiff's assertion that the claims at issue may appropriately be litigated on a classwide basis. And by ensuring that a class is not certified when the Rule 23 preconditions are not proven at the outset, this approach avoids creating an incentive for plaintiffs' attorneys to bring non-meritorious class actions in the first place.

Plaintiffs' assertion that class certification is warranted so long as their expert's testimony satisfies *Daubert* cannot be reconciled with these principles. *Daubert* ensures that expert testimony is sufficiently reliable to be admissible, and requires district courts to screen out testimony based on junk science. But *Daubert* is entirely agnostic as to the *weight* of an expert's report, or as to the relevance of the expert's report to establishing the predicates for class certification. Yet that is

what matters under Rule 23: the Supreme Court has held that a plaintiff must "actually *prove* … that [her] proposed class satisfies each requirement of Rule 23." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014). Just as with any evidence offered on any issue in any case, an expert opinion proffered at the class certification stage might be admissible for some purposes and yet not actually carry the proffering party's relevant burden. There was therefore no legal error in the district court's conclusion that plaintiffs' expert failed to prove that Rule 23's predominance precondition was satisfied even though the expert's opinion itself was admissible. Plaintiffs' contrary position would simply jettison the "rigorous analysis" the Supreme Court has mandated prior to certifying a class.

Moreover, accepting plaintiffs' position would result in adverse practical consequences, including subjecting defendants to the very sorts of extortionate settlement pressures—and accompanying incentives for plaintiffs to file ever more meritless class actions—that Rule 23's "rigorous analysis" is designed to prevent.

The district court, in short, correctly held that presenting an admissible expert report does not suffice to support class certification. Rather, that expert opinion must also actually prove that classwide adjudication is warranted. Here, the district court concluded that plaintiffs' expert proved the opposite—i.e., that more than 2,000 putative class members were not injured at all. There was no

legal error in that determination, and thus no basis to disturb the denial of class certification. The decision below should be affirmed.

ARGUMENT

I. THE PREDOMINANCE REQUIREMENT OF RULE 23 IS INDEPENDENT OF THE *DAUBERT* TEST FOR ADMISSIBILITY OF EXPERT EVIDENCE

Plaintiffs contend that expert testimony satisfies the Rule 23(b) predominance requirement so long as it is admissible. But as the district court correctly held, the question whether expert testimony is admissible is independent of the separate question whether such evidence actually demonstrates that common issues predominate over individualized ones. That second question turns not on whether the expert's opinion is admissible, but rather on whether the (by hypothesis admissible) opinion actually proves that Rule 23's predominance precondition has been satisfied.

A. Rule 23 Requires District Courts To Conduct A Rigorous Analysis Of Whether Common Questions In Fact Predominate Before Certifying A Class

1. "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 564 U.S. at 348-49 (quotations omitted). To justify a departure from that ordinary rule, the class plaintiff bears the burden of showing that classwide adjudication of claims is appropriate. And class treatment is appropriate only where the key questions can be resolved "in the same manner [as] to each member of the class,"

Califano v. Yamasaki, 442 U.S. 682, 701 (1979)—"in such cases, 'the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.'" *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quoting *Yamasaki*, 442 U.S. at 701).

Rule 23 reflects two fundamental principles of class action law. First, Rule 23's requirements ensure that claims that exhibit those efficiencies can proceed through the class vehicle, but that claims that do not are litigated individually. When class members' claims cannot be adjudicated on a classwide basis but instead turn on individualized inquiries, in other words, a putative class action cannot satisfy the requirements of Rule 23, and may not be certified. *E.g.*, *Comcast*, 569 U.S. at 33-34.

Second, Rule 23 ensures that the class action mechanism cannot be used to override defendants' due process rights. It is well established that defendants have a fundamental due process right "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quotations omitted). Accordingly, Rule 23's "procedural protections"—which are grounded in "due process," *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008)—were carefully crafted to preclude aggregation of claims when defenses can only be adjudicated on an individualized rather than classwide basis.

2. Because of the fundamental importance of the Rule 23 requirements, the Supreme Court has made clear that the plaintiff must demonstrate, and the district court must find, that those requirements are satisfied *at the class certification stage*. The Court has mandated that "a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23" at the certification stage, and that district courts must "conduct a 'rigorous analysis' to determine whether" the putative class plaintiff has met that burden. *Comcast*, 569 U.S. at 33, 35 (quoting *Dukes*, 564 U.S. at 350-51)); *see also Halliburton Co.*, 134 S. Ct. at 2412 (*Wal-Mart* and *Comcast* "made clear that plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23" (emphasis in original)). Rule 23, in other words, requires the plaintiff to demonstrate "through evidentiary proof" that the class's claims "*in fact*" can be litigated on a classwide basis while still allowing defendants their rights to challenge liability and damages. *Comcast*, 569 U.S. at 33 (quotations omitted). The inquiry into whether the plaintiff has affirmatively demonstrated that the Rule 23 requirements are satisfied "will frequently entail 'overlap with the merits of the plaintiff's underlying claim.'" *Id.* at 33-34 (quoting *Dukes*, 564 U.S. at 351).

Requiring the district court to find the Rule 23 requirements satisfied at the class-certification stage also has immense practical significance, because of the

enormous settlement pressure that certification itself imposes. As the Supreme Court has explained, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation cost[]" 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 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). As a result, class certification is likely to be a defendant's only meaningful opportunity to test the plaintiff's assertion that claims and defenses—including the question principally at issue in this case, i.e., whether each plaintiff that seeks a recovery against the defendant has actually suffered an injury and thus has a claim against the defendant—are subject to classwide adjudication.

3. The key requirement at issue in this case is Rule 23(b)(3)'s predominance requirement, which requires a court, before certifying a class, to find that "the questions of law or fact common to class members predominate over any questions affecting only individual members." *Comcast*, 569 U.S. at 33 (quoting Fed. R.

Civ. P. 23). The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997), and ensures that class adjudication "achieve[s] economies of time, effort, and expense," Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment.

Particularly relevant here is the question whether plaintiffs can demonstrate by common proof whether they have suffered an injury. As this Court has already explained, predominance is not satisfied, and a class cannot be certified, where many plaintiffs' claims will require "individual trials" to determine whether that plaintiff was injured. *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 252 (D.C. Cir. 2013). The predominance inquiry thus ensures that the most basic question in class litigation—have the class members suffered an injury?—is capable of a "common *answer[]*." *Dukes*, 564 U.S. at 350 (quotations omitted).

B. The Fact That Expert Testimony Is Admissible Does Not Mean That It Suffices To Actually Prove That The Rule 23 Preconditions Have Been Satisfied, Which Is What Supreme Court Precedent Requires

Plaintiffs sought to demonstrate that they could show injury on a classwide rather than individual basis through expert testimony. The district court concluded that the proffered expert testimony was sufficiently reliable to be admissible under Rule of Evidence 702. *See Daubert*, 509 U.S. 579. But the court further

concluded that this testimony did not actually prove that the question whether plaintiffs were injured could be answered on a classwide basis. That determination was correct and should be affirmed.

1. Plaintiffs' main objection to this aspect of the district court's ruling is that, once the court concluded that the expert's opinion met the admissibility requirements of *Daubert*, it was required further to conclude that this opinion *also* proved that Rule 23's predominance requirement was satisfied. Plaintiffs, in other words, believe that it is impermissible to impose "a higher reliability bar than that imposed by *Daubert*" at the certification stage. Plaintiffs' Opening Brief ("Br.") 26; *see* Br. 29 n.3 ("a bar higher than *Daubert* is impermissible").

Plaintiffs' argument ignores basic evidentiary and class-action principles. *Daubert* ensures that expert testimony is sufficiently reliable to be admissible—it implements Rule of Evidence 702, and requires that expert testimony be "not only relevant, but reliable." *Daubert*, 509 U.S. at 589. "Relevance" in that inquiry simply means the evidence has a "valid scientific connection" to any inquiry in the case. *Id.* at 592. And the reliability inquiry asks "whether the reasoning or methodology underlying the testimony is scientifically valid," focusing on the "principles and methodology" of the expert's opinions, "not on the conclusions that they generate." *Id.* at 594-95. *Daubert*, in short, is an evidentiary test that

probes the basis for an expert's testimony—not the expert's conclusions—and is designed to prevent junk science from infecting the work of federal courts.

But while *Daubert* answers whether expert opinion is *admissible*, it is agnostic as to the opinion's particular relevance and weight. Obviously, the fact that evidence is admissible for *some* purpose does not mean that it actually proves the necessary predicates for class certification. Yet that is what matters at the class certification stage—plaintiffs "wishing to proceed through a class action must actually *prove* … that their proposed class satisfies each requirement of Rule 23." *Halliburton Co.*, 134 S. Ct. at 2412. The fact that evidence may be admissible simply does not answer one way or another whether the evidence also satisfies the plaintiff's burden of demonstrating that Rule 23 has been satisfied.

Thus, for example, an expert's opinion might be scientifically reliable and relevant to some issue in the case, but be entirely *irrelevant* to the specific question whether common questions predominate for purposes of class certification. The expert's perfectly reliable opinion could even be relevant to the question of class-certification but still be insufficient to satisfy the plaintiff's burden of proving that the Rule 23 elements have been satisfied. Indeed, the expert's admissible opinion could actually *disprove* some element of the plaintiff's argument for class certification, as the district court properly found here. *See* Appellees' Br. at 44-49. The details will depend on the facts of the case, but the generalizable principle is

that, just as with any evidence at any stage of any case, an expert opinion proffered at the class certification stage might be *admissible* and yet not actually *carry the proffering party's burden* on the point for which it is offered.

Indeed, plaintiffs' argument makes nonsense of the "rigorous analysis" the Supreme Court has mandated prior to certifying a class. That analysis requires plaintiffs to "affirmatively demonstrate" that the Rule 23 requirements are satisfied. *Comcast*, 569 U.S. at 33 (quoting *Dukes*, 564 U.S. at 350). Yet the fact that opinion testimony is admissible does not "affirmatively demonstrate" anything other than that it satisfies Rule 702. And it certainly does not "actually *prove* … that [plaintiffs'] proposed class satisfies each requirement of Rule 23." *Halliburton Co.*, 134 S. Ct. at 2412.

2. It is no surprise, then, that plaintiffs' position has been expressly or implicitly rejected by every court to have considered it.

Most important, the Supreme Court rejected plaintiffs' argument in *Comcast*. The *Comcast* Court explicitly concluded that defendants had forfeited the argument that the expert report in that case was not "admissible evidence." 569 U.S. at 32 n.4. If plaintiffs were right that a finding of admissibility automatically resulted in a conclusion that the Rule 23 preconditions—in that case, predominance—had been satisfied, then there would have been nothing further for the Court to consider. Yet the Court went on to address the separate and distinct

question whether this expert opinion showed that "the case is susceptible to awarding damages on a class-wide basis." *Id.* The Court, in other words, took as given that the report at issue was admissible, but nevertheless probed what that report *actually said* to determine whether it sufficed to demonstrate predominance, and concluded that it did not. *See id.* at 38.

Before and after *Comcast*, numerous courts have properly recognized that the question of admissibility under *Daubert* is distinct from the question whether the evidence satisfies a plaintiff's Rule 23 burden. The Third Circuit, for example, has explained that because "[e]xpert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis," no such testimony should be "uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2008). Thus, "a district court's conclusion that an expert's opinion is admissible does not necessarily dispose of the ultimate question—whether the district court is satisfied, by all the evidence and arguments including all relevant expert opinion, that the requirements of Rule 23 have been met." *Id.* at 315 n.13. Put simply: "Like any evidence, admissible expert opinion may persuade its audience, or it may not," and district courts can find that they are not "persuaded by the testimony" of an expert "with respect to whether a certification

requirement is met." *Id.* at 323; *see also In re Blood Reagents Antitrust Litig*, 783 F.3d 183, 188 (3d Cir. 2015) (courts must "conduct a *Daubert* inquiry *before* assessing whether the requirements of Rule 23 have been met" (emphasis added)).

The Ninth Circuit has similarly admonished district courts not to "confuse[] the *Daubert* standard … with the 'rigorous analysis' standard to be applied when analyzing" whether expert testimony satisfies the Rule 23 requirements. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). "*Daubert* does not require a court to admit or to exclude evidence based on its persuasiveness; rather it requires a court to admit or exclude evidence based on its scientific reliability and relevance." *Id.* The Eighth Circuit has likewise affirmed a district court's denial of class certification on the ground that an expert's opinion, even though admissible under *Daubert*, failed to demonstrate "that class members could use common evidence" to show "classwide injury." *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005); *see id.* at 569-70 (excerpt of district court opinion explaining that although judge considered expert's report, his "testimony does *not* show that impact can be demonstrated on a class-wide basis"). And the Seventh Circuit has concisely captured the implications of plaintiffs' argument in the course of rejecting it: refusing to probe whether admissible expert testimony satisfies Rule 23's requirements would "amount[] to a delegation of judicial power to the

plaintiffs, who [could] obtain class certification just by hiring a competent expert." *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002).

3. Plaintiffs' contrary cases do not support their argument that the *Daubert* inquiry subsumes the Rule 23 inquiry.

Plaintiffs rely primarily upon *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). Plaintiffs point in particular to that case's holding that "where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class," because the Rules Enabling Act instructs that rules of procedure "shall not abridge, enlarge, or modify any substantive right." *Id.* at 1046. This is not a case, however, where a defendant argues that a type of evidence that could be used to prove the merits of an individual claim cannot be used to prove compliance with the Rule 23 requirements or the merits of claims litigated under Rule 23. The district court did not deem plaintiffs' expert evidence unusable simply because this is a class suit; the district court considered whether plaintiffs' expert evidence satisfied the predominance requirement, and found that it did not. In this context, plaintiffs' argument (Br. 18) that *Tyson Foods* "prohibits the creation of a higher bar for a class (rather than a single plaintiff) to prove an antitrust violation" proves far too much. The necessary implication of plaintiffs' argument is that it violates the Rules Enabling Act to require a class plaintiff, but not an individual one, to

demonstrate that the claims at issue meet Rule 23's requirements. Unless Rule 23 has no force and countless Supreme Court decisions are wrongly decided, that cannot be correct.

Plaintiffs cite a Seventh Circuit decision that described *Tyson Foods* parenthetically as indicating that "where there is no *Daubert* challenge, the district court may rely on expert evidence for class certification." Br. 28 (quoting *Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 922 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1582 (2017)). That is true—a district court "may rely" upon expert testimony, or any other evidence, if its admissibility is not challenged—but that does not mean that, absent a *Daubert* challenge, a district court must *uncritically and automatically presume* that the expert testimony satisfies the Rule 23 requirements. As noted above, the Seventh Circuit has held the opposite. *See West*, 282 F.3d at 938.

Plaintiffs also rely on the Second Circuit's decision in *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001), which suggested that district courts should not "weigh conflicting expert evidence" at the class certification stage. *Id.* at 135. But the Second Circuit has since expressly overruled that decision and held that factual disputes related to the Rule 23 requirements "must be resolved." *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 40 (2d Cir. 2006). And even *Visa Check* recognized that the "question for the

district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class," which is precisely the type of question plaintiffs criticize the district court for asking below. 280 F.3d at 135.

Plaintiffs also cite a decision of the Eighth Circuit that, plaintiffs say, suggests that "a truncated analysis under *Daubert* suffices on class certification." Br. 29 (citing *Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 614 (8th Cir. 2011)). But plaintiffs confuse the question of how stringently to assess an expert's report's admissibility—which is not presented by this appeal—with the separate question of how stringently to assess whether all the plaintiffs' evidence demonstrates that Rule 23's requirements are satisfied—which is presented, and which the Supreme Court has already resolved by mandating a "rigorous analysis." And again, the Eighth Circuit has in fact recognized that the proper approach is to determine whether evidence is admissible *and then* to conduct the rigorous analysis mandated by Rule 23. *See Blades*, 400 F.3d at 575.

Plaintiffs assert that, beyond satisfying *Daubert*, "Rule 23(b)(3)'s only additional test for classwide evidence is that of *predominance*, not *persuasiveness*," Br. 28, because the "rigorous analysis is confined to 'the prerequisites of Rule 23.'" Br. 25 (quoting *Dukes*, 564 U.S. at 350-51). Exactly right, but plaintiffs fail to recognize that they need to do more than present

evidence of predominance. Rather, they bear the burden to "prove" to the district court that common questions "in fact" predominate. *Comcast*, 569 U.S. at 33. Plaintiffs repeatedly criticize the district court for describing the expert report at issue as "unpersuasive," apparently based on the belief that they were not actually required to persuade the district court that the Rule 23 requirements were satisfied. But that is exactly what they were required to do: class certification is appropriate *only* if the district court is "persuaded" by the evidence "with respect to whether a certification requirement is met." *Hydrogen Peroxide*, 552 F.3d at 323; *see Ellis*, 657 F.3d at 982. The district court was not so persuaded here. Plaintiffs offer no basis to disturb that conclusion.

C. Plaintiffs' Approach Would Undermine The Purpose Of The Rigorous Analysis Rule 23 Requires And Invite Abuse

Plaintiffs' position that any admissible expert report necessarily suffices to support class certification is not only incorrect as a legal matter, but would, if accepted, result in significant adverse practical consequences.

As an initial matter, plaintiffs' approach would unnecessarily prolong class litigation. After all, plaintiffs would eventually have to actually prove that every class member is entitled to relief, including by showing that each class member was injured. Under the proper approach to class certification, the district court must be satisfied at the class certification stage that such a showing can be made on a classwide basis. But if a district court does not require that showing at the class

certification stage, that does not relieve a plaintiff of the obligation to actually prove the elements of the case—and defeat available defenses—through classwide proof. If it turns out later in the proceedings that the plaintiff cannot do so, then the only way to protect a defendant's due process rights and ensure the suit does not proceed absent Rule 23 efficiencies would be to decertify the class. *See, e.g.*, *Falcon*, 457 U.S. at 160 ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."). Plaintiffs' approach, in other words, would delay the point at which a class is defeated, thereby extending class proceedings for no reason (other than creating unjustified settlement pressure) and wasting judicial and party resources.

This added complexity and cost would be bad enough, but the likely practical consequence would be much worse: class plaintiffs could gain the immense settlement leverage that comes with a class certification order "just by hiring a competent expert," *West*, 282 F.3d at 938, even if the underlying claims are not meritorious, *see AT&T Mobility*, 563 U.S. at 350 ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."). That would result in the settlement of even meritless claims, which would in turn create incentives to bring more such meritless actions in the future. As explained earlier, the Supreme Court has required courts to conduct a "rigorous analysis" of whether the case is suitable for class adjudication *at the class*

certification stage precisely to avoid these adverse consequences—consequences that plaintiffs' certify-now-and-ask-questions-later approach would affirmatively invite. *See supra* at 8-9.

This suit demonstrates the point. Although plaintiffs insist that all class members were injured, the district court found as a matter of fact that the model put forth by plaintiffs' own expert to prove injury on a classwide basis actually indicated that at least 2,037 putative class members are not injured. Op. 192. Worse, although plaintiffs maintained that at least some of those class members had suffered an injury, plaintiffs put forward no other common methodology that could even purportedly "quantify what number or percentage of shippers are actually uninjured," and offered no solution for "how to identify and separate the truly uninjured from the genuinely injured." Op. 196. As a result, later in the litigation "there would need to be individualized inquiries to determine which of at least 2,037 (and possibly more) class members were actually injured by the alleged conspiracy—the central issue of each plaintiff's claim." Op. 198. Kicking these individualized issues down the road in the hopes that a solution will present itself or (more likely) that the case will settle is simply not permissible—again, district courts must "conduct a 'rigorous analysis'" *at class certification* to determine whether the plaintiff has "'affirmatively demonstrate[d] his compliance' with Rule 23." *Comcast*, 569 U.S. at 33 (quoting *Dukes*, 564 U.S. at 350-51).

That is exactly what the district court did here. And, as Appellees detail in their brief, the district court acted well within its discretion in concluding that the report of plaintiffs' expert does not do so. Certainly, the fact that plaintiffs' expert's opinion may have been admissible is not enough to disturb that determination. The decision below should be affirmed.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Dated: May 16, 2018

Respectfully submitted,

/s/ Anton Metlitsky

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because this brief contains 5,064 words—no more than half the length of the parties' principal briefs—excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

Dated: May 16, 2018

/s/ Anton Metlitsky
Anton Metlitsky

CERTIFICATE OF SERVICE

I certify that, on May 16, 2018, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit via the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Dated: May 16, 2018

/s/ Anton Metlitsky
Anton Metlitsky