No. 15-835

In The Supreme Court of the United States

THE PROCTOR & GAMBLE COMPANY, PETITIONER,

v.

DINO RIKOS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS AMICI CURIAE SUPPORTING PETITIONER

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS AMICI CURIAE SUPPORTING PETITIONER

The Chamber of Commerce of the United States of America and Business Roundtable respectfully submit this brief as amici curiae in support of petitioner.[1]

INTERESTS OF AMICI CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It directly represents approximately 300,000 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 Chamber is to represent the interests of its members in matters before the Congress, the Executive Branch, and the courts. To that end, the Chamber

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[1] Pursuant to Rule 37.2(a), the parties' counsel of record were notified ten days prior to the due date of the intention to file this brief. A copy of a letter consenting to the filing of this brief by petitioner has been filed with the Clerk of the Court. A letter from respondents providing blanket consent to the filing of amicus briefs is on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

regularly files amicus briefs in this Court in cases raising issues of concern to the Nation's business community, including in cases involving important issues of class-action practice and procedure. *See, e.g.*, *Microsoft Corp. v. Baker*, No. 15-457 (filed Nov. 12, 2015); *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (filed Aug. 14, 2015); *Campbell-Ewald Co. v. Gomez*, No. 14-857 (filed July 23, 2015); *Spokeo, Inc. v. Robins*, No. 13-1339 (filed July 9, 2015).

Business Roundtable is an association of chief executive officers of leading U.S. companies that collectively generate over $7.2 trillion in annual revenues and employ nearly 16 million individuals. Business Roundtable member companies comprise more than a quarter of the total value of the U.S. stock market and invest more than $190 billion annually in research and development, comprising some 70% of U.S. private research and development spending. Member companies pay more than $230 billion in dividends to shareholders and generate nearly $470 billion in sales for small- and medium-sized businesses annually. Business Roundtable companies give more than $3 billion a year in combined charitable contributions.

Businesses are regularly named as targets of class-action lawsuits. Accordingly, amici and their members have a keen interest in ensuring that the courts rigorously analyze whether a plaintiff has satisfied the requirements for class certification before certifying a class.

One such requirement is that the class members have suffered the same injury. This Court has held that, at the class-certification stage, courts must probe behind the pleadings and consider whether the evidence demonstrates that the putative class members in fact have suffered a common injury. The Sixth Circuit held, however, that evidence rebutting the existence of a common injury goes only to the merits and is not relevant at the class-certification stage. Amici and their members have a strong interest in seeing that decision overturned.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a sharply divided opinion, the Sixth Circuit allowed a certified class action to proceed based on the named plaintiffs' mere promise that, at the merits stage of the litigation, they will introduce evidence purportedly showing that all members of the class suffered the same injury. That decision finds no support in this Court's precedents, which demand that such a showing be made before a class is certified. The Sixth Circuit's decision not only contravenes this Court's precedents, but, as shown in the petition, it is also at odds with decisions of other courts of appeals. And it threatens to do grave harm to the Nation's businesses, as well as to consumers. This Court's intervention is needed to restore the class-certification inquiry to its proper scope and to prevent the potential for rampant abuse created by the decision below.

This Court has repeatedly held that a class may be certified only if the named plaintiffs are able to establish—not merely allege—that all members of the proposed class have the same interest and suffered the same injury. The district court must perform a rigorous analysis to determine whether Rule 23's requirements are met, and the named plaintiffs must prove, through evidence, that certification is appropriate. That is so even if the evidence that would be required for such a showing is also highly relevant to the merits. It is often the case that class-certification questions and merits questions are intertwined; that

cannot relieve the named plaintiffs of their burden to establish their entitlement to class certification.

Contrary to this Court's repeated instruction on this fundamental question, the majority below failed to require the plaintiffs to present *any* evidence of common injury, let alone proof that the alleged injury was suffered by *each member* of the proposed class. In an apparent effort to plead around difficult questions requiring individualized proof, plaintiffs articulated a theory of liability that petitioner's product, Align, allegedly does not work for *anyone* in the proposed class. And plaintiffs promised that their theory was capable of being resolved in the by-and-by because clinical trials could, in theory, be conducted. But plaintiffs never offered any *evidence* that the same injury was common to all class members. By contrast, petitioner provided unrebutted scientific studies and other evidence that its product is beneficial for at least some individuals, thus fatally undermining the notion of a common injury. Yet the majority disregarded both petitioner's evidence and plaintiffs' failure to offer any, reasoning that evidence of common injury is relevant only to the merits, not to class certification. That look-the-other-way approach cannot be squared with this Court's repeated instruction that competing evidence concerning class-wide injury is highly relevant to class certification and therefore must be rigorously evaluated before a class can be certified.

Without this Court's intervention, the decision below threatens to turn the Sixth Circuit into a magnet for abusive, meritless class-action litigation. Under that circuit's precedent, plaintiffs' lawyers will argue they are now relieved of the need to offer proof of commonality, typicality, and predominance; they need only articulate some theory, however inconsistent with the factual record, that is capable of resolution on a class-wide basis. Once the class is certified—as it seems it automatically will be under the decision below—named plaintiffs have enormous leverage to extract a settlement. At the same time, businesses will be saddled with enormous litigation and settlement costs that ultimately will be borne by consumers. Meanwhile, individuals who like and benefit from products subject to suit will be swept up as plaintiffs, despite their contrary interests, in a suit seeking to establish the product's ineffectiveness.

The Sixth Circuit's decision creates an untenable situation for both businesses and consumers, and it is wholly at odds with this Court's decisions. The Court should either summarily reverse or grant plenary review.[2]

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[2] Although this brief focuses on the first question presented in the petition, the second and third questions are also important and worthy of this Court's review. Indeed, the Chamber has filed amicus curiae briefs urging this Court to grant review of petitions presenting similar questions. *See* Br. of Chamber of Commerce of United States of Am., et al. as *Amici Curiae* in Support of Petitioner, *Spokeo, Inc. v. Robins*, No. 13-1339 (filed June 6, 2014); Br. of Chamber of Commerce of United States of

(Continued on following page)

ARGUMENT

I. THE DECISION BELOW IMPROPERLY POSTPONES THE REQUISITE CLASS-CERTIFICATION INQUIRY UNTIL AFTER THE CLASS IS CERTIFIED

Rule 23 "provide[s] 'structural assurance of fair and adequate representation'" for named plaintiffs and absent class members. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999). These protections grow all the more important as class-action practice becomes more "adventuresome." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617-18 (1997) (internal quotation marks omitted). Among those structural protections is the requirement that the class representative "be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Id.* at 625-26 (quoting *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)).

The Sixth Circuit's ruling contravenes these well-established principles by allowing the certification of broad classes that include members who do not have the same interests and who have not suffered the same injury as the named plaintiffs. Here, the

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Am., et al. as *Amici Curiae* in Support of Petitioner, *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (filed April 20, 2015); Br. for *Amicus Curiae* Chamber of Commerce of United States of Am. in Support of Petitioner, *Direct Digital, LLC v. Mullins*, No. 15-549 (filed Nov. 25, 2015). Should this Court not reach these questions in other cases, this case presents a good vehicle for doing so.

named plaintiffs' theory of liability is that petitioner's nutritional supplement purportedly is "snake oil"—i.e., that it does not provide any health benefit. Pet. App. 41a. On that theory, they sought and obtained certification of classes of *all* consumers who purchased Align in five states during a defined time period. Pet. App. 67a. They achieved certification even though they offered no evidence in support of their "snake oil" theory. Moreover, petitioner put forward unrebutted evidence that its product provides health benefits for at least some individuals, thereby undermining the notion of an injury common to *all* class members. Pet. App. 60a (Cook, J., dissenting); *see* Pet. App. 40a. The majority of the sharply divided Sixth Circuit panel disregarded petitioner's evidence, holding that it "goes solely to the merits; it has no relevance to the class certification issue." Pet. App. 41a-42a. According to the majority, the named plaintiffs need only describe "a common question that will yield a common answer for the class (to be resolved later at the merits stage), and [show] that that common answer relates to the actual theory of liability in the case." Pet. App. 11a.

The majority's holding that petitioner's evidence is irrelevant at the class-certification stage runs directly counter to this Court's repeated and express holdings. This Court has instructed that, before certifying a class of plaintiffs, a district court must undertake a "rigorous analysis" into whether the requirements of Rule 23 have been satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551

(2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). The test is not whether the named plaintiffs have merely managed to imagine a theory that is capable of resolution on a class-wide basis. Rather, the requisite analysis involves carefully examining the *evidence* submitted by both sides to determine whether the named plaintiffs have established that all putative class members have suffered a common injury. *Ibid.*; *see Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2414-17 (2014); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-33 (2013).

As this Court has explained, "Rule 23 does not set forth a mere pleading standard." *Wal-Mart*, 131 S. Ct. at 2551. Named plaintiffs cannot allege their way into class certification. To the contrary, determining whether the named plaintiffs have made the requisite showing may necessitate that the court "probe behind the pleadings." *Ibid.* (quoting *Falcon*, 457 U.S. at 160). The named plaintiffs must "'prove that there are *in fact* sufficiently numerous parties, common questions of law or fact,' typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)." *Comcast*, 133 S. Ct. at 1432 (quoting *Wal-Mart*, 131 S. Ct. at 2551 (emphasis in *Wal-Mart*)). The named plaintiffs "must also satisfy *through evidentiary proof* at least one of the provisions of Rule 23(b)." *Ibid.* (emphasis added).

Often the Rule 23 inquiry is intertwined with the merits of the plaintiffs' underlying case. *Wal-Mart*, 131 S. Ct. at 2551. "That cannot be helped." *Ibid.*

But this Court's decisions mandate a rigorous inquiry into whether Rule 23's requirements are met, "even when that requires inquiry into the merits of the claim." *Comcast*, 133 S. Ct. at 1433.

In *Wal-Mart*, the class representatives alleged that there was a common question concerning "whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies * * * that may have worked to unlawfully discriminate against them in violation of Title VII." 131 S. Ct. at 2549. Although that class-wide question was capable of being answered at the merits stage, this Court peered into the plaintiffs' evidence to determine whether there in fact was a common injury. *Id.* at 2553-57. The Court explained that in that case, "proof of commonality necessarily overlaps with [the plaintiffs'] merits contention that Wal-Mart engages in a pattern or practice of discrimination." *Id.* at 2552 (emphasis omitted). The Court concluded that because the plaintiffs "provide[d] no *convincing proof* of a companywide discriminatory pay and promotion policy, * * * they have not established the existence of any common question." *Id.* at 2556-57 (emphasis added).

In *Comcast*, the court of appeals had refused to consider Comcast's argument that the plaintiffs' antitrust-damages model was not tied to the certified class, concluding that this was a merits question about quantifying damages, not a class-certification question. 133 S. Ct. at 1430-31. But this Court held that "[b]y refusing to entertain arguments * * * that

bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of [this Court's] precedents requiring precisely that inquiry." 133 S. Ct. at 1432-33.

And in *Halliburton*, the Court reiterated 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." 134 S. Ct. at 2412. The Court thus held that, in an action for securities fraud, the defendant may defeat class certification by rebutting the presumption of market reliance on the alleged misrepresentation, through evidence that the stock price was not in fact affected. *Id.* at 2414-17. Courts cannot ignore the defendant's evidence negating price impact, even though price-impact evidence "is also highly relevant at the merits stage." *Id.* at 2416-17.

Here, plaintiffs had not introduced any *evidence* of common injury, much less that petitioner's product is ineffective for everyone in the putative class. Rather, plaintiffs presented, and the majority accepted, expert testimony stating merely that scientific studies evaluating the product's efficacy could in theory be performed. Pet. App. 43a. The majority observed that plaintiffs' expert "attested that whether Align works for *anyone* can be tested by correctly designed randomized, double-blind and placebo controlled clinical trials testing relevant outcomes." *Ibid.* (emphasis in majority op.) (internal quotation marks omitted). By contrast, petitioner presented

"scientific studies and anecdotal evidence tend[ing] to show, at the very least, that patients suffering from irritable bowel syndrome (IBS) benefit from" petitioner's product. Pet. App. 60a (Cook, J., dissenting); *see* Pet. App. 40a-41a. That is, counter to plaintiffs' assertion that studies *could be* performed to establish a class-wide injury, petitioner introduced *already-performed* studies and other evidence showing that Align was effective for at least some members of the class and that the effectiveness varied by individual.

Yet the majority refused to consider petitioner's evidence and excused plaintiffs' total failure to support their theory of injury. And its rationale for abjuring any inquiry behind plaintiffs' allegations is nearly identical to ones that this Court has rejected repeatedly. The majority stated that petitioner's evidence goes only to the merits and that the "key point at the class-certification stage is that this kind of dueling scientific evidence will apply classwide such that individual issues will not predominate." Pet. App. 43a. But that completely misses the import of petitioner's evidence: if some, but not all, individuals benefit from petitioner's product—as petitioner's evidence shows—then there is no common injury applicable to the whole class. *See Wal-Mart*, 131 S. Ct. at 2551-52. As Judge Cook explained in dissent, there is no common injury "[b]ecause the evidence tends to show that these two groups [i.e., IBS patients and non-IBS patients] respond differently." Pet. App. 61a.

Under this Court's clear precedents, the Sixth Circuit was obligated to hold the named plaintiffs to their burden of affirmatively offering evidence demonstrating a common injury. *Comcast*, 133 S. Ct. at 1432; *Wal-Mart*, 131 S. Ct. at 2551-52. The Sixth Circuit's refusal to do so clearly contravenes this Court's decisions and is also contrary to the decisions of its sister circuits. *See* Pet. 16-18; *see also Parko v. Shell Oil Co.*, 739 F.3d 1083, 1086 (7th Cir. 2014); *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1218 (10th Cir. 2013); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013). Indeed, the Sixth Circuit's disregard for this Court's precedents is so blatant that summary reversal would be appropriate.

II. THIS COURT'S INTERVENTION IS WARRANTED TO PREVENT ABUSIVE CLASS-ACTION LITIGATION

If left undisturbed, the Sixth Circuit's erroneous decision would have serious consequences for businesses. The decision invites an array of vexatious class-action suits to be filed against businesses large and small, seeking damages in the millions or billions of dollars. This Court has recognized that the more novel and expansive the class action invention, "the greater the likelihood of abuse." *Ortiz*, 527 U.S. at 842. The Sixth Circuit's decision permitting certification of a class that includes individuals who were never harmed—indeed, individuals for whom petitioner's product actually provided health *benefits*—invites abuse.

The logical consequence of the Sixth Circuit's decision is to dramatically lower the bar for class certification, particularly consumer actions alleging that a product is ineffective. Under this Court's decisions, named plaintiffs must "affirmatively demonstrate" that all proposed class members have suffered the same injury. *Wal-Mart*, 131 S. Ct. at 2551. In stark contrast, the decision below requires named plaintiffs merely to *articulate* a "theory of liability" that is "capable of" being litigated on a class-wide basis. Pet. App. 42a-43a.

The majority's departure from this Court's precedents sharply tilts the playing field in favor of class certification. Plaintiffs here should have had to introduce evidence to try to establish that all members of the proposed class actually suffered the same injury—as this Court's precedents require. For example, they might have tried to offer evidence purportedly showing that petitioner's product has the same effect in every individual who takes it. The district court then would have had to weigh any such evidence against petitioner's contrary evidence. But under the decision below, the burden on the named plaintiffs vanishes because such weighing of the evidence gets a "merits" label and thus can be dispensed with until after certification. Pet. App. 41a-43a. As Judge Cook explained, rather than introduce evidence to show the cohesiveness of the proposed class, plaintiffs' expert merely "*promised* to design and conduct a clinical trial that will prove definitively whether Align works as advertised." Pet. App. 61a

(emphasis added). "With nothing more than that promise, the district court certified a class of millions across five states," and the majority affirmed. *Ibid.*

Indeed, the decision below essentially lays out a roadmap for enterprising plaintiffs' lawyers to follow. In the Sixth Circuit, rather than proffer evidence of commonality, typicality, and predominance, plaintiffs' lawyers need only articulate some "theory of liability" that is "capable of resolution" on a class-wide basis. Pet. App. 42a-43a. That will not be difficult to do, especially in consumer actions asserting that a product does not work as advertised. Under the Sixth Circuit's decision, simply by alleging that the product is ineffective for *everyone*, plaintiffs could be able to sue on behalf of everyone who purchased the product—even satisfied consumers who benefited from the product. The decision below will thus mean that every product becomes a massive class action in waiting.

It will make no difference in most of these suits whether the named plaintiffs will ever be able to *prove* that the product is ineffective. Named plaintiffs and their lawyers can be successful even by articulating a theory of liability that has very little chance of success on the merits. It is no secret that, in most cases, the class representatives never actually have to prove liability because most certified class actions settle before trial. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812

(2010) ("[V]irtually all cases certified as class actions and not dismissed before trial end in settlement.").

In truth, delaying proof of a common injury until the merits stage is entirely about creating leverage for settlement. "As a practical matter, the certification decision is typically a game-changer, often the whole ballgame, for plaintiffs and plaintiffs' counsel." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012). "[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). Thus, the certification of a large class raises the stakes so high that "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). Because "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs," even a defendant with the most surefire defense "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also* Fed. R. Civ. P. 23(f) advisory committee's note to the 1998 amendments ("An order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."); S. Rep. No. 109-14, at 20 (2005) (Class Action Fairness Act)

(discussing "frivolous lawsuits" that "essentially force corporate defendants to pay ransom to class attorneys by settling").

The decision below therefore paves the way for a fresh round of enormous, meritless class-action litigation against the Nation's businesses. While such litigation would be a boon to the class-action bar, it would needlessly harm businesses and leave consumers dealing with the ripple effect. Businesses subject to large class actions are forced to spend massive amounts of money on litigation defense costs, which can soar into the tens of millions of dollars. "In 25 percent of bet-the-company class actions, companies spend more than $13 million per year per case on outside counsel. In 75 percent of such actions, the cost of outside counsel exceeds $5 million per year per case." *The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 14 (2015), http://classactionsurvey.com/pdf/2015-class-action-survey.pdf. These litigation costs, as well as the settlement payouts, are ultimately borne by customers, employees, and investors.

Small businesses are particularly vulnerable. "Small businesses create most of the nation's new jobs, employ about half of the nation's private sector work force, and provide half of the nation's nonfarm, private real gross domestic product (GDP), as well as a significant share of innovations." U.S. Small Bus. Admin., *The Small Business Economy: A Report to the President* 1 (2009). Small businesses struggling to

grow can ill afford the threat of vexatious, meritless class-action litigation. Yet, under the decision below, each product sold by a small business has the potential to turn into bet-the-company litigation.

Although the Sixth Circuit's decision makes that court an outlier among the courts of appeals, the decision nevertheless has nationwide implications. If the Sixth Circuit is allowed to remain an outlier, that would welcome expansive yet unsupported class-action allegations on behalf of consumers from throughout the country. Indeed, this case involves classes of consumers who purchased petitioner's product in California, Illinois, Florida, New Hampshire, and North Carolina—i.e., five states outside the Sixth Circuit. Pet. App. 7a-8a. The decision below should not be allowed to stand for any length of time; all it takes is one overly permissive circuit for abusive litigation to take hold.

Finally, the majority's decision results in a completely different kind of harm: harm to the interests of absent class members. The requirements of Rule 23 exist not only to protect class-action defendants but also absent members of the putative class. "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart*, 131 S. Ct. at 2550 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). "In order to justify a departure from that rule, 'a class representative must be part of the class and "possess the same interest and suffer the same injury" as the class members.'" *Ibid.* (quoting

E. Tex. Motor Freight Sys., 431 U.S. at 403 (citation omitted)). Due process demands as much: due process "requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

But the Sixth Circuit's decision allows named plaintiffs to represent absent class members whose interests are contrary to theirs. Here, for example, the certification sweeps into the class individuals for whom the product is beneficial. As Judge Cook explained, "[t]he class definition includes all purchasers of Align despite the fact that Plaintiffs offer no proof to rebut the studies showing that the product improves digestive health for IBS patients." Pet. App. 63a. "The only evidence before the court shows that IBS patients suffered no injury (because Align works as-advertised for them) * * * ." *Ibid.* At least these individuals, and probably many more, are satisfied, unharmed users of petitioner's product who are nonetheless being dragged into a class action to establish that the product is ineffective—despite their contrary interests in maintaining the product's availability to meet their health needs. Left undisturbed, the decision below will result in many more consumers being wrongly caught up as plaintiffs in litigation that runs counter to their interests.

CONCLUSION

For the foregoing reasons and those in the petition for a writ of certiorari, the decision below should be summarily reversed, or the petition should be granted and the case set for plenary review.

Respectfully submitted,

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