No. 11-864

In the Supreme Court of the United States

COMCAST CORPORATION, ET AL., PETITIONERS

v.

CAROLINE BEHREND, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[*]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of

[*] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. The parties have entered blanket consents to the filing of amicus briefs, and copies of their letters of consent are on file with the Clerk's Office.

every size, in every industry, from every region of the country.

Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies with over $6 trillion in annual revenues and more than 14 million employees. BRT member companies constitute nearly a third of the total value of the U.S. stock market, pay $163 billion in dividends to shareholders, and generate an estimated $420 billion in sales for small- and medium-sized businesses annually.

The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. With offices in New York and Washington, SIFMA is the U.S. regional member of the Global Financial Markets Association.

Amici represent American businesses and business leaders. They routinely file briefs as amici curiae, both in this Court and in other courts, in cases raising issues of vital concern to the business community. This case presents a question of enormous practical importance to amici and their members: *viz.*, whether a trial court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the class is susceptible to awarding damages on a classwide basis. In the decision below, the Third Circuit held that resolution of admissibility is unnecessary at the class-certification stage. That holding directly implicates the interests of amici and their members, which are often the targets of abusive class actions in which the requirements of class certification cannot validly be met.

Amici and their members have extensive experience litigating issues relating to class actions and have frequently participated as amici curiae in cases presenting those issues. For example, the Chamber and SIFMA filed briefs in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), this Court's most recent decision on the requirements for class certification under Federal Rule of Civil Procedure 23. Accordingly, amici have a substantial interest in the question presented here.

SUMMARY OF ARGUMENT

As petitioners' brief explains, the court of appeals erred by holding that the requirements for the admissibility of expert testimony in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), do not apply with full force to expert testimony offered in connection with class certification. In making factual determinations that go to the question of whether the requirements for class certification have been satisfied, a trial court may consider evidence only if it meets the ordinarily applicable standards for admissibility. It necessarily follows that a trial court may consider expert testimony at the class-certification stage only if it meets the standards for admissibility set out in *Daubert*. And where the parties present conflicting evidence on a factual issue relevant to certification, the trial court not only must determine the admissibility of any expert testimony; it also must resolve any factual disputes. The court of appeals' contrary rule cannot be reconciled with this Court's recent decision in *Wal-Mart*, which requires a plaintiff to demonstrate that the applicable requirements of Rule 23 have been satisfied—and specifically, with regard to commonality, that it will be possible to use classwide proof to prove the class members' claims at trial.

As a practical matter, the court of appeals' approach—under which a plaintiff need only show that his expert's testimony "could evolve" to become admissible evidence—dramatically lowers the bar for class certification. That rule seems to have been motivated by a desire to defer difficult decisions on the admissibility of expert testimony until a later point in the litigation. This Court has made clear, however, that trial courts are obligated to ensure actual conformance with the requirements of Rule 23, even where the Rule 23 analysis is difficult. The practical effect of the court of appeals' approach is to outsource a vital judicial function to experts who have been retained, and are usually being compensated, by the parties.

If adopted by this Court, the court of appeals' approach will raise the cost of doing business in the wide variety of industries that find themselves perennial targets of the plaintiffs' bar. Because of litigation costs and damages exposure, a defendant will only rarely choose to litigate a class action past the threshold stage, even if the underlying claims are meritless. Accordingly, billions of dollars are spent settling class actions every year. The costs of abusive class actions impose a drag on the American economy and are ultimately passed on to consumers, employees, and shareholders. The court of appeals' approach will make it easier for plaintiffs with meritless claims to pass through the class-certification gateway. This Court should reject the court of appeals' approach and hold that the rules governing the admissibility of evidence, including expert testimony, apply with full force at the class-certification stage.

ARGUMENT

To obtain class certification under Federal Rule of Civil Procedure 23, a plaintiff must satisfy each of the four requirements of Rule 23(a) and also satisfy the additional requirements of one of the subsections of Rule 23(b). This Court has repeatedly underscored that, in considering those requirements, a trial court is obligated to ensure "actual, not presumed, conformance with Rule 23[]." *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 160 (1982). The court should therefore undertake a "rigorous analysis" of whether each of the relevant requirements has been met. *Id.* at 161.

In analyzing some of the requirements for class certification (such as whether an issue is susceptible to classwide proof and therefore "common" for purposes of Rule 23(a) and Rule 23(b)(3)), a trial court will inevitably have to make case-specific and fact-intensive determinations—determinations that, in many cases, will require the consideration of expert testimony. And when considering expert testimony at the class-certification stage, no less than at trial, the court is obligated to "exclud[e] expertise that is *fausse* and science that is junky." *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 159 (1999) (Scalia, J., concurring).

Where a trial court certifies a class based on expert testimony that may not withstand full scrutiny under the standards for admissibility set out in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), it effectively abdicates its gatekeeping responsibility and allows certification based on something less than full compliance with the requirements of Rule 23. Although decisions about the admissibility of expert testimony under *Daubert* may be difficult in particular cases, there is no valid justification for punting on those decisions at the class-certification stage and deferring them until trial. If

allowed to stand, the court of appeals' holding that *Daubert*'s requirements do not apply with full force at the class-certification stage would substantially lower the threshold for class certification and thereby increase the potential for coercive settlements in meritless class actions. Amici therefore urge this Court to reverse the judgment below.

A. The Court Of Appeals Erred By Holding That *Daubert*'s Requirements For The Admissibility Of Expert Testimony Do Not Apply With Full Force At The Class-Certification Stage

1. The Federal Rules Of Evidence Apply Equally In Class-Certification Proceedings

In making factual determinations that go to the question of whether the requirements for class certification have been satisfied, a trial court may consider only evidence that meets the ordinarily applicable standards for admissibility. The very first provision of the Federal Rules of Evidence, Rule 101(a), specifies that the rules "apply to proceedings in United States courts"—not simply to trials. Although Rule 1101(d) contains certain enumerated exceptions to that general principle, it contains no exception for class-certification proceedings, or for the many other types of civil pretrial proceedings (such as preliminary-injunction hearings) at which parties routinely present evidence. As a logical matter, therefore, the conclusion that the Federal Rules of Evidence apply with full force in class-certification proceedings is seemingly inescapable.

It necessarily follows from that conclusion that a trial court may consider expert testimony at the class-certification stage only if it meets the standards for admissibility set out in *Daubert*. Those standards grew out of the text of Rule 702, which directs a court to deter-

mine whether the expert's knowledge "will help the trier of fact to understand the evidence or to determine a fact in issue" (and whether the expert's testimony is sufficiently reliable). And because Rule 702 is triggered whenever a "trier of fact" is confronted with an expert opinion, *Daubert* applies regardless of whether the "trier of fact" is a judge or a jury. See *Metavante Corp.* v. *Emigrant Savings Bank*, 619 F.3d 748, 760 (7th Cir. 2010), cert. denied, 131 S. Ct. 1784 (2011); *Attorney General* v. *Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009); *Seaboard Lumber Co.* v. *United States*, 308 F.3d 1283, 1302 (Fed. Cir. 2002).

The proper application of *Daubert* at the class-certification stage is particularly important in light of this Court's directive that trial courts should undertake a "rigorous analysis" of whether the requirements for class certification have been met. *General Telephone*, 457 U.S. at 161. Where, as here, expert testimony goes to the heart of one or more of those requirements, it is hard to see how a court could conduct that "rigorous analysis" without determining whether the proffered testimony meets the minimum standards for helpfulness and reliability under *Daubert*. After all, the key teaching of *Daubert* is that evidence that is not scientifically valid is unhelpful—*i.e.*, it does not "assist the trier of fact to understand the evidence or to determine a fact in issue," as Rule 702 requires. See *Daubert*, 509 U.S. at 591 (internal quotation marks and citation omitted); *Dukes* v. *Wal-Mart Stores, Inc.*, 603 F.3d 571, 640 n.16 (9th Cir. 2010) (Ikuta, J., dissenting), rev'd, 131 S. Ct. 2541 (2011).

At the class-certification stage, moreover, it is not sufficient for a trial court simply to determine the admissibility of evidence (including expert testimony) and then stop there. As this Court made clear in its recent decision in *Wal-Mart*, "[a] party seeking class certification

must affirmatively demonstrate his compliance with [Rule 23]—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." 131 S. Ct. at 2551. Thus, where, as here, the parties present conflicting evidence on whether an issue is susceptible to classwide proof (and therefore "common" for purposes of Rule 23(a) and Rule 23(b)(3)), the trial court not only must determine the admissibility of that evidence at the class-certification stage; it also must resolve any factual disputes. See, *e.g.*, *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011); *West* v. *Prudential Securities, Inc.*, 282 F.3d 935, 938 (7th Cir. 2002).

2. The Court Of Appeals Applied A Watered-Down Version Of The* Daubert *Standard For The Admissibility Of Expert Testimony

In the decision below, the court of appeals took no heed of the foregoing principles. Instead, the court framed the relevant inquiry as whether the model presented by a plaintiff's expert "could evolve to become admissible evidence" and "could be refined between the time when class certification was granted and trial so as to comply with *Daubert*." Pet. App. 44a n.13. Thus, according to the court of appeals, class certification can be based on the testimony of a plaintiff's expert as long as the theory advanced by the expert is "plausible." See *ibid.*

Plausibility is a familiar standard from the pleadings stage of litigation, where a plaintiff need only show that his allegations are plausible in order to survive a motion to dismiss. See, *e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678-679 (2009); *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). Rule 23, however, "does not set forth a mere pleading standard," *Wal-Mart*, 131 S. Ct. at 2551; a court

may need to "probe behind the pleadings before coming to rest on the certification question," *General Telephone*, 457 U.S. at 160. The text of Rule 23 amply bears that out: in order to grant certification under Rule 23(b)(3), a trial court must "find[]" that common questions predominate over individual ones. The party seeking certification therefore bears the burden of demonstrating that the applicable requirements of Rule 23 have been satisfied—including the burden of proving any disputed factual issue. See, *e.g.*, *Wal-Mart*, 131 S. Ct. at 2548.

More specifically, the legal rule adopted by the court of appeals cannot be reconciled with one of this Court's central holdings in *Wal-Mart*: namely, that, in order to demonstrate actual compliance with the commonality requirement of Rule 23(a), the plaintiff must satisfy the court that it will be possible to use classwide proof to prove the class members' claims at trial. In *Wal-Mart*, the Court explained that "[w]hat matters to class certification * * * is not the raising of common 'questions'—even in droves—but[] rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." 131 S. Ct. at 2551 (ellipses in original; citation omitted). For that reason, the Court concluded that, in order to satisfy the commonality requirement, the plaintiff must demonstrate that it will be possible at trial to "resolve an issue that is central to the validity of each one of the [class members'] claims *in one stroke*." *Ibid.* (emphasis added).

If a plaintiff seeks to satisfy the commonality requirement at the class-certification stage with evidence that may or may not be admissible, he has not demonstrated that it will be possible to resolve the class members' claims at trial "in one stroke," and certification must therefore be denied. As Judge Jordan put it in his opinion dissenting in relevant part, "[a] court should be

hard pressed to conclude that the elements of a claim are capable of proof through evidence common to a class if the only evidence proffered would not be admissible as proof of anything." Pet. App. 66a n.18. Were the rule otherwise, it would greatly increase the risk that a trial would degenerate into an unwieldy spectacle of the type Rule 23 is designed to guard against—a risk posed in this very case as a result of the court of appeals' decision.

Given the Court's holding in *Wal-Mart* that a plaintiff must satisfy the trial court that it will be possible to use classwide proof to prove the class members' claims at trial, it is unsurprising that the Court expressed "doubt" about the proposition that *Daubert* does not apply at the class-certification stage. 131 S. Ct. at 2554. Remarkably, the court of appeals acknowledged that statement, but then cited it in support of its contrary conclusion that the relevant inquiry is whether the model presented by a plaintiff's expert "could evolve to become admissible evidence." Pet. App. 44a n.13. There is simply no support, either in this Court's decisions or in the Federal Rules of Evidence, for that standard. The Court should take this opportunity to make clear what it all but held in *Wal-Mart*: that the *Daubert* standard for the admissibility of expert testimony applies with full force at the class-certification stage.

3. Plaintiffs' Expert Testimony Does Not Satisfy The Daubert *Standard*

If the court of appeals had applied the *Daubert* standard here, it surely would have concluded that the expert testimony offered by plaintiffs in this case was deficient—and therefore that, because the issue of damages was not susceptible to classwide proof, plaintiffs could not satisfy the predominance requirement of Rule 23(b)(3).

In seeking to meet their burden of showing that the issue of damages was susceptible to classwide proof, plaintiffs relied on the opinion of a single expert, who attempted to demonstrate anticompetitive effects from alleged misconduct in the relevant market area. To do so, the expert developed a model based on a number of theories of anticompetitive impact by comparing cable prices in that market area to those in other counties. But that model, by the expert's own admission, could not be used to isolate damages attributable to some forms of conduct rather than others. Accordingly, after the district court rejected every theory of impact but one, the expert did not alter his opinions or model. At that point, the expert's model was useless, because it had built into its comparative prices the effects of conduct that, according to the district court, did not constitute anticompetitive impact. The expert's testimony was therefore neither relevant nor reliable—indeed, it was not even "plausible"—because it was based on a patently flawed methodology. See Pet. App. 68a-70a (Jordan, J., dissenting in relevant part).

If the testimony of the damages expert had been excluded, plaintiffs would not have been entitled to class certification. And because it is far from clear that the expert's testimony will be admissible at trial, there is every reason to believe that, if the court of appeals' decision is allowed to stand, the resulting trial will be little more than an aggregation of individualized proofs. That sort of unmanageable proceeding is surely not what the framers of Rule 23 contemplated—nor what this Court contemplated when it interpreted Rule 23's requirements in *Wal-Mart*.

B. The Court Of Appeals' Approach Dramatically Lowers The Bar For Class Certification

The problems with the testimony of plaintiffs' expert in this case reflect the fundamental problem with the court of appeals' legal rule: as a practical matter, it dramatically lowers the threshold for class certification. At the outset, it is important to remember that the *Daubert* factors—whether an expert's theory has been tested, has been subjected to peer review, has a known or potential rate of error, and enjoys general acceptance, see 509 U.S. at 593-594—do not require absolute perfection. A trial court applying *Daubert* must simply ensure that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152. In fact, according to the Third Circuit, an expert's opinion may be admissible under *Daubert* "even if the judge thinks that [an expert's] methodology has some flaws such that if they had been corrected, the [expert] would have reached a different result." *In re Paoli Railroad Yard PCB Litig.*, 35 F.3d 717, 744 (1994), cert. denied, 513 U.S. 1190 (1995). The Third Circuit's evident uncertainty in this case about whether the testimony of plaintiffs' expert would ultimately be admissible under *Daubert* amply demonstrates just how low the court set the bar for class certification.

The court of appeals' rule—under which the relevant inquiry at the class-certification stage is whether the model presented by a plaintiff's expert "*could* evolve to become admissible evidence," Pet. App. 44a n.13 (emphasis added)—seems to have been motivated by a desire to defer difficult decisions on the admissibility of expert testimony until a later point in the litigation. Such an approach is not within the district court's discretion at the class-certification stage. It is the court's affirmative

obligation to ensure "actual, not presumed, conformance with Rule 23[]," even where the Rule 23 analysis is difficult. *General Telephone*, 457 U.S. at 160. To be sure, the *Daubert* inquiry routinely requires courts to make difficult decisions on complex matters that may be outside their comfort zone. But those difficulties do not abate after class certification. There is no valid justification for relaxing the obligation to ensure conformance with Rule 23 simply because the analysis turns in whole or in part on expert testimony.

The court of appeals' rule is problematic for an additional reason. If a trial court can certify a class simply by deferring to the conclusions of a plaintiff's expert without conducting an independent assessment of his methodology—much less resolving any conflicts between that expert's conclusions and those of the defendant's expert—it will effectively put a thumb on the scales in favor of class certification. Such deference bespeaks undue passivity at best and a bias toward class certification at worst: it "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *West*, 282 F.3d at 938; see Kermit Roosevelt, III, *Defeating Class Certification in Securities Fraud Actions*, 22 Rev. Litig. 405, 425 (2003) (noting, in discussing *West*, that "[a]n expert who testifies * * * that every plaintiff has suffered injury is in effect testifying that injury may be established by common proof," but that "the decision as to whether the elements of a claim are susceptible to common proof is for the judge and may not be handed off to experts").

This case presents a context in which the court of appeals' rule will have a particularly acute effect. In class actions for monetary damages—particularly antitrust and securities class actions—plaintiffs frequently seek to satisfy the predominance requirement of Rule 23(b)(3)

by asserting that, notwithstanding the fact that damages will ordinarily vary from class member to class member, the issue of damages should be regarded as a "common" one in a given case because it is susceptible to classwide proof through an expert's damages model. Under the court of appeals' approach, however, all a plaintiff will have to do in order to take the damages issue off the table for certification purposes is to come forward with an expert with a purportedly "plausible" damages model in hand. Should this Court adopt the court of appeals' rule, therefore, it promises to make it considerably easier than the framers of Rule 23 intended for plaintiffs to obtain class certification in this context—and a host of others.

C. If Adopted By This Court, The Court Of Appeals' Approach Would Increase Pressure On Defendants To Settle Class Actions And Impose A Burden On The Nation's Economy

It is hard to overstate the significance of the standards that trial courts apply in making class-certification decisions. That is because the class-certification decision will often be the most important decision a trial court makes in a class action; indeed, one commentator has aptly described it as "the whole shooting match." David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN's Prod. Liab. L. & Strategy 10 (Feb. 2009).

If this Court were to loosen the standards for class certification in the manner contemplated by the court of appeals, it would have pernicious consequences due to the peculiar dynamics of class-action litigation—dynamics that this Court has frequently recognized. In particular, once plaintiffs obtain class certification, the costs and risks of litigation compel defendants to settle even meritless claims. As explained below, such settle-

ments result in costs not only to defendants, but to the entire economy.

1. Class Actions Impose Substantial Costs On Defendants

To begin with, defendants that choose to litigate a class action face enormous and asymmetric discovery costs. Discovery in a class action typically results in an uneven playing field, because discovery will ordinarily be focused on the defendants (who have much more discoverable material in their possession). And the costs of discovery have only risen in recent years, with the ubiquity of electronic communication and the advent of "e-discovery." As one lower court recently put it, "[w]ith the electronic archives of large corporations or other large organizations holding millions of emails and other electronic communications, the cost of discovery to a defendant has become in many cases astronomical." *Swanson* v. *Citibank, N.A.*, 614 F.3d 400, 411 (7th Cir. 2010). And the costs of discovery are not simply monetary; they "can include * * * the disruption of the defendant's operations," as a defendant's management and employees are required to devote time to responding to document requests and preparing and sitting for depositions. *Ibid.*; see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975).

The costs of discovery, moreover, are but one of the costs of litigating class-action claims through to final judgment. Preparing for trial in class action cases can be particularly challenging where, as here, the defendant has no certainty as to what a trial in the case would look like. In this case, it is concededly uncertain whether the plaintiff will be able to present admissible evidence at trial from which damages can be awarded on a classwide basis. If the plaintiff is unable to do so, there is every

chance that the case will devolve into a series of individualized mini-trials on damages. In those circumstances, it is hard to square the decision to grant certification with the "critical need * * * to determine how the case will be tried" at the class-certification stage. Fed. R. Civ. P. 23 advisory committee's note (2003).

When it comes to certain types of class actions, including antitrust class actions, the costs of litigation are particularly pronounced. Antitrust class actions are "arguably the most complex action[s]" to litigate. *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003) (citation omitted). That is because they typically involve "voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money." *Manual for Complex Litigation* § 30, at 519 (4th ed. 2004). And if antitrust class actions are the most difficult to litigate, securities class actions are not far behind—as this Court has repeatedly recognized. See, *e.g.*, *Blue Chip Stamps*, 421 U.S. at 739 (noting that securities-fraud litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general").

Accordingly, the costs associated with defending class-action claims are staggering. Class-action cases are not only complex; they often drag on for years. With regard to securities class actions, for example, the median length of time between the filing of the complaint and the settlement hearing is 3½ years. See Ellen M. Ryan & Laura E. Simmons, Cornerstone Research, *Securities Class Action Settlements: 2011 Review & Analysis* 5 (2012) (Ryan & Simmons). In such circumstances, the legal fees, expert fees, and miscellaneous costs associated with defending even a relatively modest class-

action claim can easily run into the millions of dollars. And in complex antitrust or securities cases, those fees and costs can be orders of magnitude higher.

Finally, should a defendant choose to litigate class-action claims through to final judgment, the risks at trial will be great. Empirical research suggests that, as the number of plaintiffs in a case increases, juries are "much more likely" to find fault and to return "significantly higher" damages awards than the merits of the case would warrant. Barry F. McNeil & Beth L. Fancsal, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 491-492 (1996). And once again, when it comes to certain types of class actions, those risks are particularly pronounced. In antitrust class actions, defendants are subject to treble damages. And in securities class actions, the most miniscule effects on a company's share price from an alleged misrepresentation can result in massive damages even without the threat of trebling.

2. The Costs And Risks Of Litigating Class Actions Force Defendants To Settle Even Meritless Claims

This Court has long recognized that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). The very fact of certification gives a class-action plaintiff enormous leverage in settlement negotiations; lower courts have variously described the pressure on defendants to settle in the wake of certification decisions as "inordinate," "hydraulic," and "intense." See *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001); *In re Rhone-*

Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir.), cert. denied, 516 U.S. 867 (1995).

Even if they face only a marginal chance of defeat at trial, therefore, most rational defendants will succumb to what Judge Friendly aptly termed "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). That intuition has amply been borne out in practice: a recent study found that, once certification has been granted, approximately 90% of class actions settle. See Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (2005). It is almost unheard of for an antitrust or securities class action involving a major company to go to trial; between 1996 and 2011, aggregate settlements of securities class actions have averaged just under $4.5 billion per year. See Ryan & Simmons 2.

Those settlements have little to do with the merits of the claims at issue. In the securities context, for example, the best indicators of the settlement value of a case are (1) the size of the decline in stock price and (2) the amount of insurance coverage available to cover defendants' potential exposure. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 516-518 (1991). Largely for that reason, class actions have a "weak" deterrent effect at best, because "the merits of claims" are "frequently irrelevant to their initiation or [their] settlement values." Ralph K. Winter, Jr., *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 952 (1993).

The pressure to settle even meritless class actions results in windfalls to the plaintiffs. In perhaps the most famous example, the plaintiffs in the Agent Orange liti-

gation received a $180 million settlement, even though the trial court "viewed [their] case as so weak as to be virtually baseless." *In re 'Agent Orange' Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145, 151 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988). And the practical reality is that those windfalls redound to the primary benefit not of the plaintiffs, but of their lawyers. The average class action settles for pennies on the dollar, with lawyers taking a substantial percentage off the top; in 2011, the average settlement in a securities class action was for 2.1% of the claimed losses. See Ryan & Simmons 7. And no one is under any illusions about the proposition that class-action litigation is driven by the plaintiffs' class-action bar. As the Senate Judiciary Committee observed while considering the Class Action Fairness Act of 2005, "the lawyers who bring the lawsuits effectively control the litigation," and "the clients are marginally relevant at best." S. Rep. No. 109-14, at 4 (2005).

3. The Costs Of Abusive Class Actions Burden The American Economy And Undermine American Capital Markets

The costs of abusive class actions do not simply fall on individual defendants; they impose a drag on the entire economy. As one lower court recently noted, "[n]o one sophisticated about markets believes that multiplying liability is free of cost." *SEC* v. *Tambone*, 597 F.3d 436, 452 (1st Cir. 2010) (Boudin, J., concurring). In this regard, any rule that permits meritless class actions to proceed to trial is functionally equivalent to a rule that lowers the applicable standards of substantive liability, because it incentivizes lawyers to bring claims they otherwise might forgo. See Joseph A. Grundfest, *Why Disimply?*, 108 Harv. L. Rev. 727, 732 (1995). As a result, "too many resources * * * [are] spent on litigation and on litigation avoidance," with those costs affecting

capital formation "just as if a wasteful tax had been imposed." *Ibid.*

Inevitably, the costs resulting from abusive class actions "get passed along to the public." *Tambone*, 597 F.3d at 453 (Boudin, J., concurring). When confronted with the cost of a class action that improperly gets past the certification stage, a company may pass some of that cost on to consumers in the form of higher prices. Or it may be forced to take some other action to offset that cost, such as scaling back its operations. In either instance, the ultimate burden will be borne by innocent parties with no connection to the alleged wrongdoing.

In addition, the costs of abusive class actions move markets. The average securities class action alone reduces a defendant company's equity value by 3.5%. See Anjan V. Thakor, *The Unintended Consequences of Securities Litigation* 14 (U.S. Chamber Institute for Legal Reform 2005). Smaller companies often suffer an even greater loss in equity value, in part because they are less able to achieve economies of scale in litigation costs. See *id.* at 9-10.

As this Court has noted, therefore, the costs associated with class actions are "payable in the last analysis by innocent investors for the benefit of speculators and their lawyers." *Blue Chip Stamps*, 421 U.S. at 739 (quoting *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring)). In securities class actions, in particular, the result is often simply to transfer wealth from current shareholders to former ones, with the plaintiffs' bar collecting a sizable tax on the transfer. See, *e.g.*, Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 Stan. L. Rev. 1487, 1503 (1996). In those circumstances, allowing class actions to proceed is "like seeking to deter burglary by imposing penalties on the victim for having suffered a

burglary." John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1537 (2006).

The costs of abusive class actions are not only harming individual businesses; they are threatening the longstanding preeminence of American capital markets. To begin with, abusive class actions hinder the very functioning of those markets. Perversely, "[a]busive litigation severely affects the willingness of corporate managers to disclose information to the marketplace," because managers are afraid that any statement has the potential to become the basis of a civil lawsuit. H.R. Conf. Rep. No. 104-369, at 42 (1995). That fear creates an incentive for management "to volunteer nothing" about the company's prospects. Frank Easterbrook & Daniel Fischel, *The Economic Structure of Corporate Law* 339 (1991). But that is precisely the wrong incentive for management, because markets function best when there is robust information available about participating companies.

In addition, as this Court has recognized, abusive class actions are "shift[ing] securities offerings away from domestic capital markets." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). With the ever-greater liquidity of capital, it is imperative that American markets remain attractive to outside investment. Yet it is widely perceived that the United States legal system imposes greater costs on businesses than the legal systems of other major capital markets (such as the United Kingdom). See, *e.g.*, Michael R. Bloomberg & Charles E. Schumer, Introduction, *Sustaining New York's and the US' Global Financial Services Leadership* ii (2007) <tinyurl.com/nyreport>. As a result, "foreign companies [are] staying away from US capital markets for fear that the potential

costs of litigation will more than outweigh any incremental benefits of cheaper capital." *Id.* at 101. The perception of higher litigation costs has frequently been cited as one of the reasons for the recent decline in the competitiveness of American capital markets. See, *e.g.*, Committee on Capital Markets Regulation, *Interim Report of the Committee on Capital Markets Regulation* 5 (2006).

* * * * *

As a legal matter, the specific question presented by this case may seem an obscure one. As a practical matter, however, there can be no dispute that the court of appeals' approach will make it easier for plaintiffs with meritless claims to pass through the class-certification gateway, imposing deleterious costs on the Nation's economy. There is no valid justification for relaxing the standard of admissibility in the class-certification context. Amici respectfully urge this Court to reject the court of appeals' approach and reaffirm the foundational principle that the requirements for class certification should be rigorously applied.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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