No. 11-864

IN THE

Supreme Court of the United States

COMCAST CORPORATION, ET AL.,
Petitioners,

v.

CAROLINE BEHREND, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF INTEL CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Intel Corporation is the world's leading semiconductor manufacturer and a major producer of computer, networking, and communications hardware and software. Given its size, Intel is a frequent target in class action litigation. Intel thus has a significant interest in class action procedures and the Question Presented in this case. Intel participated as *amicus curiae* in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___, ___, 131 S. Ct. 2541, 2551 (2011), which should have been dispositive here.

Class certification can transform an ordinary lawsuit into "bet-the-company" litigation, even for a company of Intel's size. Few companies can afford to place that bet—no matter how small the odds are of an adverse judgment—so class certification drives settlement. "Blackmail settlements," as Judge Friendly aptly termed such results, damage Intel and its shareholders, drive up prices, and ultimately harm consumers.

SUMMARY OF THE ARGUMENT

The Court expects district courts to conduct a "rigorous analysis" of class certification. *Dukes*, 131 S. Ct. at 2551. That analysis cannot be satisfied by inadmissible evidence.

Delaying the analysis of admissibility beyond certification is not only the antithesis of rigorous

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[1] Intel submits this brief pursuant to the written consent of the parties, as reflected in letters the parties have filed with the Clerk. No party or counsel for a party has authored this brief in whole or in part, and no person or entity other than Intel has made a financial contribution to its preparation or submission.

analysis but imposes unwarranted costs on the parties, the courts, and society, particularly because class certification decisions are very often case-dispositive.

Thus, the Court's precedent and important practical and jurisprudential interests require a negative answer to the question the Court identified for review: "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."

ARGUMENT

I. Only Evidence That Has Been Found To Be Admissible Satisfies the Court's Rigorous Analysis Requirement

The Court requires "rigorous analysis" of the request to certify a class. *Dukes*, 131 S. Ct. at 2551. To satisfy this standard, the plaintiff must "affirmatively demonstrate his compliance" with Rule 23 and "be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.*

The only means to "prove" these "facts" is evidence admissible under the Federal Rules of Evidence. Those Rules govern "proceedings in United States courts," Fed. R. Evid. 101(a), including district court proceedings in civil cases, Fed. R. Evid. 1101(a)-(b). Rule 1101(d) specifies certain proceedings as exceptions, but class certification is not one of them. Congress enacted the Rules, which are to be interpreted in the same way as statutes,

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587 (1993), and the "cardinal canon" in statutory interpretation is that "a legislature says in a statute what it means and means in a statute what it says there," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992); *see Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 937-938 (7th Cir. 1989) (using this analysis to determine that the Federal Rules of Evidence apply to class action fairness hearings).

The standard for admissibility of expert evidence is set forth in Rule 702 of the Federal Rules of Evidence. Expert evidence must meet four requirements under Rule 702: the expert's opinion must be (1) relevant; (2) based on sufficient facts or data; (3) the product of reliable principles and methods; and (4) reliably applied to the facts of the case. Scientific evidence that fails Rule 702 is irrelevant and unreliable. *Daubert*, 509 U.S. at 594-95; *see Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (*Daubert*'s objective is to "ensure the reliability and relevancy of expert testimony"). Such evidence is thus not sufficient to "prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 131 S. Ct. at 2551.

Consistent with this conclusion, most circuits to consider the issue in recent years, and certainly since *Dukes*, have required plaintiffs to demonstrate at the certification stage that expert testimony is admissible under *Daubert*. *See Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 812-13 (7th Cir. 2012); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011); *Sher v. Raytheon Co.*, 419 Fed. App'x 887, 890-91 (11th Cir. 2011); *cf. In re*

Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 614 (8th Cir. 2011) (affirming district court's application of a "focused" rather than full *Daubert* analysis).

II. Rigorous Analysis at Certification Serves Important Practical and Jurisprudential Interests

Certification is the stage to determine whether plaintiffs can proffer admissible evidence necessary to establish key common issues such as class-wide damages. Accordingly, in *Dukes*, the Court applied rigorous analysis to the expert reports and the "social frameworks" regression analysis. 131 S. Ct. at 2555.

Putting off relevance and reliability determinations until after class certification "ignore[s] this basic truth about class action litigation: the fight over class certification is often the whole ball game." *Hartford Accident & Indem. Co. v. Beaver*, 466 F.3d 1289, 1294 (11th Cir. 2006); *see* Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1875 (2006) ("[A]ll sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis . . . result in settlements."). Unfortunately, a post-certification settlement is often "induced by a small probability of an immense judgment in a class action"—what Judge Friendly referred to as "blackmail settlements." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

Allowing district courts to decide the critical certification stage on the basis of what could turn out to be irrelevant and unreliable evidence would encourage the use of superficial expert conjecture to accomplish certification. It would lead to certification in some cases where there was no scientifically acceptable method to prove on a class-wide basis damages or other elements necessary to class treatment, potentially forcing defendants to consider paying out class settlements in meritless cases.

It is not just defendants such as Intel that suffer from blackmail settlements. Class action litigation is often used for, or has the effect of, creating or enforcing policy choices that affect all of society. *See* Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 Geo. L.J. 295, 328 (1996) ("[M]ass torts more closely resemble the issues of broad public concern that constitute the daily business of the administrative state."). Regardless of whether that is acceptable in a representative democracy, surely the costs and risks of class litigation should not drive implicit policy decisions where the basic scientific integrity of the plaintiffs' position has been assumed.

This case illustrates how delaying the application of Rule 702 and *Daubert* can impose costs on others who are not parties to the litigation. The methodology for establishing class-wide damages advanced by plaintiffs in this case threatens to deter legitimate competition because the expert's model included damages from all sixteen counties in which Comcast operated, despite the fact that the expert assumed that no damages in eleven of those counties

were from reduced overbuilding—the plaintiffs' only surviving theory of impact. *See Behrend*, 655 F.3d at 218 (Jordan, J., dissenting). Furthermore, the analysis, which was designed to cover all of plaintiffs' theories, was "incapable of identifying any damages caused by reduced overbuilding." *See id.* at 214-15. This overbroad, ill-fitting model risks the inclusion of "damage" resulting from "superior product, business acumen, or historic accident," *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), or even simple lack of skill, interest, or capacity by competitors. Given this risk to competition, the proposed methodology should be evaluated as soon as possible. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993) (reviewing the sufficiency of a plaintiff's flawed competitive injury evidence instead of remanding, in light of "the benefits of providing guidance concerning the proper application of a legal standard"). Courts certainly should not allow a speculative methodology to drive class certification, which might lead to a blackmail settlement and prevent the court from protecting the public from acceptance of a flawed model that mistakenly treats legitimate competition as causing antitrust injury.

Although postponement usually eliminates the evaluation of relevance and reliability completely, a few cases will not settle, and defendant's *Daubert* challenge will eventually result in decertification or judgment on the merits years after certification. But postponing *Daubert* until that stage wastes judicial and party resources. Such a "'basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007)

(omission in original) (quoting 5 Wright & Miller § 1216, at 233–234).[2]

Delay in the admissibility analysis also undercuts Congress's decision to create a permissive interlocutory appeal as a means of reducing the pressure to settle improperly-certified cases. *See* Fed. R. Civ. P. 23(f). As this case shows, a Rule 23(f) appeal cannot meaningfully review the appropriateness of class certification when the district court postpones, or is presumed to have postponed, a critical part of the Rule 23 analysis. *See Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 185 (3d Cir. 2006) (certification order must include "precise parameters defining the class and a complete list of the claims, issues, or defenses to be treated on a class basis").

Similarly, ducking the question of the admissibility of expert testimony at the certification stage stymies creation of a concrete plan for adjudicating the remainder of the action, an all but essential test of the suitability of a case for class treatment. *See* ALI, PRINCIPLES OF THE LAW OF

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[2] For example, in *In re Credit Suisse-AOL Sec. Litig.*, 253 F.R.D. 17, 30 n.16 (D. Mass. 2008), the district judge certified a class without performing a *Daubert* analysis, even though the plaintiff's expert's testimony had been recently excluded from another case on a basis similar to defendant's challenges. Three years later, defendants won summary judgment as a result of the delayed performance of the *Daubert* analysis. *See Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse First Bos.*, ___ F. Supp. 2d. ___, 2012 WL 118486, at *9 (D. Mass. Jan. 13, 2012); *see also Marlo v. United Parcel Serv., Inc.*, 251 F.R.D. 476, 485 (C.D. Cal. 2008) (applying *Daubert* and decertifying a class nearly four years after certification), *aff'd*, 639 F.3d 942 (9th Cir. 2011).

AGGREGATE LITIGATION § 2.12 (2010) ("[T]he court should adopt an adjudication plan that explains . . . the procedures to be used in the aggregate proceeding to determine the common issue . . . ."). Deficiencies in an expert's model and application, unlike hearsay or authentication issues, are not the type of evidentiary flaws that more fact discovery or other case developments typically can remedy.[3] The possibility that expert testimony will evolve, in some unspecified fashion by some unspecified stage of the proceedings, is neither concrete nor a plan.

That is not to say that certification is proper if conditioned on a plan to later test the admissibility of the necessary evidence. Congress amended Rule 23 in 2003 to end conditional certification, and a "court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." Fed. R. Civ. P. 23(c)(1) advisory committee's note. "A party's assurance to the court that it intends or plans to meet the requirements is insufficient." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2008).

III. The Court of Appeals Erred in Disregarding the Requirements of *Dukes*

Expert testimony was the cornerstone of plaintiffs' contention that damages could be determined on a class-wide basis, *Behrend*, 655 F.3d

[3] Of course, if a plaintiff cannot meet the certification burden, but can demonstrate the need for additional discovery to meet Rule 23's standards, the court may grant time to do so, but should also delay determination of class certification.

at 200, but the panel majority refused to evaluate the model's scientific relevance and reliability under *Daubert*, *id.* at 204 n.13. Apparently seeking to avoid duplication with resolution of the merits, and abjuring "perfect[ion]," the panel regarded Comcast's attack on the validity of "Plaintiffs' proposed damages calculation methodology" as "prematurely attack[ing] the merits of the model." *Id.* at 203; *see id.* at 206 (litigation had not reached stage of determining whether methodology is speculative); *id.* at 207 ("attacks on the merits of the methodology . . . have no place in the class certification inquiry"). Instead, the majority allowed class certification to be based on possibly inadmissible scientific evidence because it presumed that the district court had "likely determined" that the expert analysis "could evolve to become admissible evidence." *Id.* at 204 n.13.

It was error to refuse to apply *Daubert* due to fear that doing so would duplicate resolution of the merits. The district court must assess relevance and reliability of the expert testimony at some point. If the court decides those issues at class certification, then it typically need not revisit them in any depth at trial. As the Court in *Dukes* understood and accepted, attacks on expert testimony that do not disqualify the testimony under *Daubert* can be used to attack the weight of the testimony on the merits. *See* 131 S. Ct. at 2551. But that "frequent" overlap is not duplication of the *Daubert* test, and the overlap is a necessary consequence of rigorous analysis. *Id.* at 2551, 2552 n.6; *see In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) (rejecting the idea that "a district judge may not weigh conflicting evidence and determine the existence of a Rule 23

requirement just because that requirement is identical to an issue on the merits").

Nor is it a valid objection that *Daubert* would "requir[e] a district court to determine if a model is perfect at the certification stage." *Behrend*, 655 F.3d at 204 n.13. *Daubert* does not require perfection, it only requires that economic or other expert evidence meet basic scientific and legal standards designed to ensure relevance and reliability. *Daubert*, 509 U.S. at 594-95; *see Kumho Tire*, 526 U.S. at 147. Expert testimony that fails *Daubert* is not imperfect; it is valueless and in fact dangerous, both to fair adjudication for the defendant and to society.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted.

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