No. 14-1091

IN THE

Supreme Court of the United States

DOW CHEMICAL COMPANY,

Petitioner,

v.

INDUSTRIAL POLYMERS, INC., QUABAUG CORP., AND SEEGOTT HOLDINGS, INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

(i) Whether, in certifying a class under Federal Rule of Civil Procedure 23(b)(3), courts may presume class-wide injury from an alleged price-fixing agreement, even when prices are individually negotiated and individual purchasers frequently succeed in negotiating away allegedly collusive overcharges.

(ii) Whether a class may be certified or a class-wide damages judgment affirmed where plaintiffs' common "proof" of damages is a model that (a) does not purport to determine the actual damages of most class members, but instead applies an "average" overcharge estimated from a sample of transactions of very different purchasers, or (b) assumes that defendants engaged in multiple antitrust violations, even though plaintiffs attempted to prove only one violation at trial.

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INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF regularly appears as *amicus curiae* before this and other federal courts to oppose the certification of inappropriate and unwieldy class actions under Federal Rule of Civil Procedure 23. *See, e.g., Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Amgen, Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). WLF has also participated extensively in litigation to urge the judiciary to confine itself to deciding only true "cases or controversies" under Article III of the U.S. Constitution. *See, e.g., Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013); *Boumediene v. Bush*, 553 U.S. 723 (2008).

WLF agrees with Petitioner that the Tenth Circuit's opinion exacerbates an existing circuit split on whether, consistent with due process and Rule 23, "inferences" or "presumptions" may be used to

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before the due date, counsel for WLF provided counsel for Respondent with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

establish class-wide antitrust liability; WLF will not repeat those arguments here. Instead, WLF writes separately to urge review because class certification based on a presumption of injury violates Article III by relieving plaintiffs of the burden of showing injury to *all* class members. WLF believes that the panel erred as a matter of law by certifying a class that created liability to uninjured plaintiffs, contravening the injury-in-fact requirement of Article III. By relieving uninjured class members of the obligation to satisfy Article III standing, the decision below improperly expands the jurisdiction of the federal courts, eliminates the defendant's right to challenge the standing of uninjured persons, and calculates damages unfairly.

STATEMENT OF THE CASE

This appeal arises from a $400 million jury verdict (trebled to a judgment of more than $1 billion) in a nationwide class action on behalf of approximately 2,400 industrial purchasers of polyurethane products. Plaintiffs sued under the Sherman Antitrust Act, 15 U.S.C. § 1, and the Clayton Antitrust Act, 15 U.S.C. § 15(a), alleging that Dow Chemical Company ("Dow") and other Defendant polyurethane manufacturers conspired to issue coordinated price-increase announcements, and then *tried* to make those price increases "stick." *See* Appellant's Appendix (AA) at 0862.

Plaintiffs moved for class certification under Rule 23(b)(3). Defendants opposed certification, insisting that whether individual class members were injured by the alleged conspiracy could not be resolved through common evidence, but instead

required individualized determinations. Pet. App. 5a-6a, 97a-98a. Defendants demonstrated that purchasers in the polyurethane market play manufacturers against one another, causing pricing to hinge on such myriad factors as supply and demand, relative bargaining power, and the availability of substitute products. *Id.* Because actual prices were set through aggressive, individualized price negotiations, some class members avoided *any* increase in price. *Id.* Accordingly, Defendants argued, injury to all class members could not be proven in "one stroke," as Rule 23 requires.

Over Defendants' objections, the district court certified a class comprised of *all* industrial purchasers of polyurethane products during the alleged conspiracy period. Pet. App. 122a. The district court rejected Defendants' argument for decertification, reasoning that the industry's standardized pricing structure, as reflected in product price lists and parallel price-increase announcements, "*presumably* establishe[d] an artificially inflated baseline" for negotiations. *Id.* at 104a (emphasis added). While the court was "not nearly as persuaded that the issue of damages [wa]s amenable to class-wide proof," the mere "possibility that individual issues may predominate the issue of damages" did not preclude certification. *Id.* at 107a-108a.

Defendants sought interlocutory review of the district court's certification order. The Tenth Circuit denied review, *In re Urethane Antitrust Litig.*, No. 08-602 (10th Cir. Sept. 2, 2008), at which point all Defendants except Dow settled.

Dow next sought to exclude as unreliable the testimony of Plaintiffs' statistical expert, Dr. James McClave, who created regression and extrapolation models purporting to show class-wide injury and "estimated" class-wide damages. *See* Pet. App. 7a, 17a. Concluding that Dow's criticisms of Dr. McClave's methodology went to the weight of his testimony rather than its admissibility, the district court denied Dow's motion. *Id.* The day before trial, Dow moved to decertify the class, arguing that Dr. McClave's models failed to establish injury or damages on a class-wide basis, and that certification contravened *Wal-Mart Stores, Inc. v. Dukes*, which was decided after the class was certified. *See id.* at 8a-9a. The district court deferred ruling on Dow's decertification motion until after trial. AA0716.

At trial, Dr. McClave testified "that nearly all class members had been impacted or overcharged" during the alleged conspiracy. Pet App. 22a. Dr. McClave conceded, however, that he found *no* overcharges on 10% of the transactions he modeled. *See* Pet. at 8; AA2146. Dow rebutted Dr. McClave's extrapolation findings with its own expert, who demonstrated that Plaintiffs' extrapolation model improperly *assumed* overcharges for every purchase, regardless of whether the purchaser was actually injured. *See* AA1419-33, 1436-40. Dow also put into evidence "numerous examples of a broad array of customers [who] refused to accept announced price increases and used their bargaining power to force manufacturers to make price concessions to retain their business." Pet. at 9.

The jury found Dow liable for conspiracy and awarded damages of $400,049,039. *See* AA0513-15.

After supplemental briefing on Dow's pre-trial motion to decertify, the district court denied the motion in conjunction with its denial of Dow's post-trial motion for judgment as a matter of law. *See* Pet. App. 55a-84a. While conceding that "some [class] members may have mitigated their damages or otherwise did not suffer any damages that may be quantified," the court concluded that "all members of the class may be shown to have been impacted by a conspiracy that elevates prices above the competitive level, even if some members may have mitigated their damages or otherwise did not suffer damages." *Id.* at 58a. After trebling the jury award and subtracting all amounts paid by the settling defendants, the district court entered judgment against Dow in the amount of $1,060,847,117, plus interest. *Id.* at 46a-48a.

On appeal, the Tenth Circuit agreed that Dow's pricing adjustments "did not always result in actual price increases," Pet. App. 4a, that buyers "sometimes avoided price hikes by negotiating with the supplier," *id.*, and that "some of the plaintiffs may have successfully avoided damages," *id.* at 12a. The panel nonetheless affirmed the district court's class certification and judgment on the basis that price-fixing "creat[es] an inference of class-wide impact even when prices are individually negotiated." *Id.* at 13a.

As for Dow's motion to decertify on the basis of Dr. McClave's flawed extrapolation models, the appeals court denied that motion in part because it was filed too close to trial and therefore "late." *Id.* at 17a. The panel also denied Dow's motion on the basis that Plaintiffs used extrapolation sampling "only to

approximate damages," not "to prove Dow's liability." *Id.* at 18a. Because Dr. McClave testified that "nearly all class members had been impacted or overcharged," the panel reasoned that his testimony allowed the trial court to find a "fit" between Plaintiffs' theory of class-wide liability and their theory of class-wide damages. *Id.* at 22a.

Dow's petition for rehearing or rehearing en banc was denied. *In re Urethane Antitrust Litig.*, No. 13-3215 (10th Cir. Nov. 7, 2014).

SUMMARY OF ARGUMENT

The Tenth Circuit's decision improperly uses the class-action device to grant plaintiffs access to federal court without satisfying the "irreducible constitutional minimum of standing" under Article III. Not only did the panel recognize a "presumption" of class-wide harm from price fixing—even though prices were individually negotiated and many buyers successfully avoided any overcharge—but it also allowed plaintiffs to prove class-wide damages by relying on statistical extrapolations that simply *assumed* all customers were harmed—even though many purchasers suffered no such harm. In doing so, the Tenth Circuit endorsed a class composed of numerous members who lack any injury traceable to the defendant's conduct.

The Tenth Circuit's holding thus strips Article III of its vital gatekeeping function, which is critical to the "proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). By permitting the expediency of the class-action device to substitute for actual,

redressable harm caused by the defendant, the panel effectively gutted Article III and required the defendant to litigate claims without being able to challenge the standing of uninjured class members. Yet the Rules Enabling Act forbids interpreting Rule 23 to abridge or modify the substantive law, including the fundamental constitutional imperative that uninjured persons lack standing to have their claims adjudicated in federal court. The panel's holding also runs afoul of Federal Rule of Civil Procedure 82, which makes clear that Rule 23 cannot extend the jurisdiction of Article III courts.

In affirming certification, the Tenth Circuit relied in part on its view that Dow's challenge to Plaintiffs' statistical expert's extrapolation evidence was somehow "waived" because Dow waited too long to seek decertification. But nothing in Rule 23 prevents district courts from revisiting class certification at *any time* throughout the proceedings before the entry of final judgment. Further, Plaintiffs have the burden of demonstrating that the requirements for class certification are met through trial, and the district court has an independent obligation to reevaluate certification whenever it is presented with evidence that certification is improper. A contrary approach to class-action litigation is not only patently unfair to defendants, but is inconsistent with traditional notions of due process. Accordingly, the Tenth Circuit's "waiver" ruling provides an independent basis for certiorari.

REASONS FOR GRANTING THE PETITION

This Court has been vigilant in ensuring that federal courts do not allow use of class-action procedures to adversely affect the substantive rights of any party. The district court's certification, and the Tenth Circuit's affirmance, of a class based on a presumption that all class members were injured is sharply at odds with this Court's historical understanding of both Article III and the Rules Enabling Act.

Given the increasing frequency with which lower federal courts have been willing to jettison the traditional standing requirements of Article III, review of the egregious class certification below is particularly warranted. Only this Court can provide a single, nationally uniform rule clarifying that district courts may not certify a class based on shortcuts that relieve Plaintiffs of the burden of proving that *all* members have suffered an injury caused by the defendant.

The interests of due process, predictability, and stare decisis were all injured in this case. WLF joins with Petitioner in urging this Court to grant the Petition for writ of certiorari.

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT A COURT MAY NOT CERTIFY A CLASS BASED ON THE USE OF SHORTCUTS THAT RELIEVE PLAINTIFFS OF THE BURDEN OF PROVING INJURY TO *ALL* CLASS MEMBERS.

Article III, § 2 of the Constitution extends the "judicial Power" of the United States to only "Cases" and "Controversies." To be justiciable, every suit brought in federal court must seek to redress an "injury in fact" caused by the defendant. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). This Court has explained Article III's standing requirements as follows:

> The irreducible constitutional minimum of standing contains three requirements. ... First, and foremost, there must be alleged (and ultimately proven) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual and imminent, not 'conjectural' or 'hypothetical.'" ... Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. ... And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-103 (1998) (citations omitted). A plaintiff thus lacks standing unless he has suffered "a distinct and palpable injury to himself." *Warth*, 422 U.S. at 501. This bedrock requirement of Article

III jurisdiction "cannot be removed." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

Article III standing is no "mere pleading requirement" but must be satisfied at each "stag[e] of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Even under Rule 23, a class action can aggregate only those claims that could be brought individually. That is why this Court has consistently held that class certification cannot provide individuals a right to relief in federal court that the Constitution would otherwise deny them if they sued separately. *See, e.g., Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010) (recognizing a due-process violation when "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III's constraints.").

Rather than heed this Court's directives, the courts below ignored ample evidence that the alleged price-fixing conspiracy did not injure all class members. As the Petition ably demonstrates, it is undisputed that actual prices were set through aggressive, individualized price negotiations whereby class members frequently avoided any increase in price. The record evidence reveals that some class members were insulated from a price increase by contractual provisions that precluded any such increase for the remainder of the contract. *See* Pet. at 6. Other purchasers were able to avoid paying higher prices either by buying their

chemicals from alternate suppliers or by utilizing non-polyurethane substitutes. *Id.* And still other members of the class were highly sophisticated companies who leveraged the high volume of their business, and the threat of taking that business elsewhere, to secure below-list prices. *Id.*; Pet. App. 11a.

The district court conceded that "some [class] members may have mitigated their damages or otherwise did not suffer any damages that may be quantified." Pet. App. 58a. Even the plaintiffs' own damages expert, Dr. McClave, freely acknowledged that some class members "did not suffer any damages." *Id.* In fact, Dr. McClave found *no* overcharges on 10% of the transactions he modeled. *See* Pet. at 8; AA2146. On appeal, the Tenth Circuit confirmed that, because of the unique nature of the polyurethane market, purchasers "sometimes avoided price hikes by negotiating with the supplier" and "successfully avoided damages." Pet. App. 13a. Nevertheless, the panel was satisfied by the fact that "*nearly* all class members had been impacted or overcharged." Pet. App. 22a (emphasis added).

Despite highly individualized negotiations that yielded below-list prices, the district court presumed a uniform overcharge on *every* transaction and certified a class comprised of *all* industrial purchasers of polyurethane products during the class period. *See* Pet. App. 122a. In doing so, the district court sidestepped "the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth*, 422 U.S. at 498. As a result, the increased prospect that class-action lawsuits will seek recovery for uninjured plaintiffs

poses a serious threat—not only to this Court's precedents, but to the rule of law. "In an era of frequent litigation [and] class actions, . . . courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011).

By permitting a procedural mechanism—Rule 23's class-action device—to create substantive rights where none existed before, the appeals court violated the Rules Enabling Act, 28 U.S.C. § 2072(b). The decision below also permits Rule 23 effectively to eliminate the substantive defenses that a class-action defendant may raise, including lack of Article III standing, which is also plainly forbidden. *See, e.g.*, *Dukes*, 131 S. Ct. at 2561 ("Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." (citations omitted)); *Shady Grove Orthopedic Assocs., Inc. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion) (recognizing that class-wide adjudication enables the trial of claims of "multiple parties at once, instead of in separate suits," but "leaves the parties' legal rights and duties intact and the rules of decision unchanged").

Allowing uninjured persons to bring their claims in federal court also violates the principle that Federal Rules of Civil Procedure "do not extend" the "jurisdiction of the district courts." Fed. R. Civ. P. 82; *see Amchem*, 521 U.S. at 613; Theane Evangelis & Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 EMORY L.J.

383, 398 (2014) ("Expanding [Article III] power to allow uninjured plaintiffs to litigate their claims in federal court solely because they are aggregated with others in a class action would violate the Rules Enabling Act, Rule 82, and due process.").

It is beyond question that if any class member were to sue Dow in an individual capacity in district court, he would need to satisfy Article III. But there is a constant temptation for district courts, which invariably face crowded dockets and finite resources, to adopt shortcut procedures designed to achieve quick resolution of cases raising similar issues. As this Court has cautioned, the "desire to obtain (sweeping relief) cannot be accepted as a substitute for compliance with [the standing requirements of Article III]." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974) (quoting *McCabe v. Atchison, T. & S.F.R., Co.*, 235 U.S. 151, 164 (1914)). Indeed, "[t]empting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).

In sum, the Court should grant review to prevent the lower federal courts from continuing to use Rule 23 as a mechanism to avoid the constitutional limits of Article III jurisdiction.

II. THE COURT SHOULD GRANT REVIEW TO CORRECT THE TENTH CIRCUIT'S ERRONEOUS VIEW THAT DOW "WAIVED" ITS RIGHT TO CHALLENGE PLAINTIFFS' USE OF EXTRAPOLATION MODELS.

The Tenth Circuit's affirmance of class certification was premised in part on the panel's view that Dow's challenge to Dr. McClave's statistical extrapolation evidence "was filed late" because Dow "waited until the day before trial to seek decertification." Pet. App. 17a. The panel thus effectively held that Dow had an obligation to move for decertification well in advance of trial and presumably could not even move to decertify on that basis after trial based on the trial record. This holding is not only clearly erroneous, but it also provides an independent basis for this Court's discretionary review.

As a preliminary matter, Dow clearly preserved its extrapolation argument below. In 2008—*five years* before trial commenced—Dow vigorously opposed class certification on the basis that neither antitrust impact nor damages could be established through common evidence, necessitating individualized proceedings. *See* Pet. App. 86a (noting Dow's "vigorous and well-presented efforts to defeat class certification"). That was more than "sufficient to preserve the right of the objectors to contest the class certification on appeal." *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1145 (8th Cir. 1999); *see also Namoff v. Merrill Lynch, Pierce, Fenner & Smith (In re Dennis Greenman Sec. Litig.)*, 829 F.2d 1539, 1542–43 (11th Cir. 1987) ("In order to preserve an

appeal from a class settlement, a class member must, during the course of proceedings, object to either the terms of the settlement or to the nature of the class certification.") (citations omitted).

After the Tenth Circuit denied interlocutory review, Dow moved to exclude Dr. McClave's testimony, *see* Pet. App. 7a, 17a, and moved separately to decertify the class. *See* Pet. App. 8a-9a. Even the district court acknowledged that Dow's pre-trial decertification motion was timely "with respect to issues based on events occurring *at trial*." Pet. App. 57a. (emphasis added).[2] At trial, of course, Dow squarely challenged Dr. McClave's extrapolation findings, rebutting his conclusions with a defense expert who testified that Dr. McClave's extrapolation model improperly *assumed* overcharges for every purchase, regardless of whether the purchaser was actually injured. *See* AA1419-33, 1436-40. After trial, Dow moved for judgment as a matter of law and renewed its decertification motion, all on the basis that Dr. McClave's use of extrapolation techniques and averaged estimates did not satisfy the plaintiffs' burden of proof at trial. *See* Pet. App. 66a-70a. Simply put, Dow *never* waived its right to contest the sufficiency of plaintiffs' proof of class-wide injury and damages in this case.

The panel opinion cites no precedent—and none is available—that would permit a court to bar as "untimely" a defendant's decertification motion

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[2] The district court deferred consideration of the decertification motion until after trial and granted Dow leave to "supplement" based on developments at trial. *See* AA0523.

because it was filed too close to trial. It is well established that "a district court's order respecting class status is not final or irrevocable, but rather, it is inherently tentative." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 633 (9th Cir. 1982). "Even after a certification order is entered, the judge remains free to modify it in light of subsequent developments in the litigation." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982). Contrary to the view of the Tenth Circuit, nothing in Rule 23 precludes a defendant from seeking to decertify a class on the eve of trial.

By its very terms, Rule 23(c)(1)(C) provides district courts with broad discretion to revisit class certification at *any time* throughout the proceedings before the entry of final judgment. Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); *see Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 199 n.12 (3d Cir. 2008) (noting that a "request that the district court alter or amend its order on class certification . . . can be made at any time prior to the entry of final judgment"); *McNamara v. Felderhof*, 410 F.3d 277, 280-81 (5th Cir. 2005) ("[A] district court is free to reconsider its class certification ruling as often as necessary before judgment."); *In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1261 (10th Cir. 2004) (holding that a district court may "modify or decertify a class at any time before final judgment"); 7A Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE § 1785.4 (2014) (explaining that a court's initial decision that a class is maintainable "is not irreversible and may be

altered or amended at any later date, as recognized in numerous judicial opinions").[3]

In all events, the Tenth Circuit's view of "waiver" ignores the basic requirement that class *plaintiffs* bear the burden of demonstrating that every prerequisite for class certification has been met throughout the litigation, including at trial, by a preponderance of the evidence. *Dukes*, 131 S. Ct. at 2552 n.6 ("[P]laintiffs seeking 23(b)(3) certification must prove [commonality] . . . an issue they will surely have to prove again at trial in order to make out their case on the merits."). *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012) ("Plaintiffs bear the burden of showing that a proposed class satisfies the Rule 23 requirements . . . by a preponderance of the evidence."); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 536 F.3d 196, 202 (2d Cir. 2008) (holding "that the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements"). When that burden has not been met, decertification is mandatory.

To hold otherwise would sidestep the continuing obligation that all district courts have to

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[3] Indeed, "so important are the Rule 23 class prerequisites that courts often decertify classes *sua sponte*, even at the appellate level, after finding that class litigation is no longer appropriate." *White v. National Football League*, 756 F.3d 585, 594 (8th Cir. 2014); *see also Rector v. City & County of Denver*, 348 F.3d 935 (10th Cir. 2003) (decertifying class *sua sponte*); *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207 (6th Cir. 1997) (same).

ensure that class certification is appropriate at *each* phase of the litigation. A district court must decertify where, as here, "the course of trial on the merits reveals the impropriety of class action maintenance." *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 276 (4th Cir. 1980). As several circuits have recognized, a district judge has an ongoing duty to supervise a class action to ensure that its continued maintenance satisfies the exacting standards of Rule 23. *See, e.g., Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) ("But under Rule 23(c)(1), courts are 'required to reassess their class rulings as the case develops'") (quoting *Barnes v. The American Tobacco Co.*, 161 F.3d 127, 140 (3d Cir. 1998)); *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 189 (4th Cir. 1993) (holding that a "district court must be prepared to use its considerable discretion to decertify the class, either on a defendant's motion, or *sua sponte*"); *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir. 1983) ("The district judge must define, redefine, subclass and decertify as appropriate in response to the progression of the case from assertion to facts."); 1 MCLAUGHLIN ON CLASS ACTIONS § 3:6 (3d ed. 2006) ("Accordingly, even if a class is certified, Rule 23(c)(1) obligates courts to reassess their class rulings as the case develops.") (internal quotation and footnote omitted).

If anything, Plaintiffs' burden to satisfy Rule 23 becomes greater as the case progresses toward trial. In many cases, including this one, it is only once a case is ready for trial that the necessity to prove the claims through representative evidence comes into clearer focus. Therefore, the propriety of

class certification must be tested with more, *not less*, rigor as the case proceeds to trial.

In relying on waiver, the panel indicated that it would be improper to consider Dow's decertification motion because the plaintiffs "relied" on certification in preparing for trial. This only further underscores the panel's fundamental failure to understand that plaintiffs bear the burden of demonstrating that the requirements for class certification are satisfied through trial, and district courts have an independent obligation to decertify a class when presented with evidence that certification was improper.

The basic guarantee of due process in a civil trial is that a defendant will not be held liable (and deprived of property) without a meaningful opportunity to contest *all* elements of liability, including damages. Dow's absolute right to contest the sufficiency of Plaintiffs' proof of damages simply could not be "waived" on the basis of its filing of a motion to decertify on the eve of trial. Absent discretionary review by this Court, the decision below will radically transform the class action from a device designed to avoid the inefficiencies of deciding the same claims repeatedly into a device that alters substantive rights by excusing plaintiffs from proving all elements of their claims.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court grant the Petition for writ of certiorari.

Respectfully submitted,

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