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 THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

DAVID B. RIVKIN, JR.
Counsel of Record
ANDREW M. GROSSMAN
BAKER & HOSTETLER LLP
1050 Conn. Ave., N.W.
Washington Sq., Suite 1100
Washington, D.C. 20036
(202) 861-1500
drivkin@bakerlaw.com

THOMAS D. WARREN
DEBORAH H. RENNER
JOHN B. LEWIS
PAUL G. KARLSGODT
CASIE D. COLLIGNON
MATTHEW J. MOODY
BAKER & HOSTETLER LLP

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

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.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. This case is important to Cato because it concerns the misapplication of class action procedures to alter or evade the burdens of substantive law, raising substantial concerns regarding due process and abuse of the class action mechanism.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011), was perfectly clear that, because "[c]ommonality requires the plaintiff to demonstrate that the class members have

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this *amicus* brief are filed with the Clerk.

suffered the same injury" and that their injury is "capable of classwide resolution," the trial court must undertake a "rigorous analysis" of compliance with the requirements of Rule 23. Nonetheless, many lower courts have fallen far short of enforcing that standard, falling back to the pre-*Dukes* fallacy that courts must avoid a critical examination of evidence and evidentiary issues in order to avoid making a ruling on the "merits."

The Third Circuit's decision provides just one example of the ways that lower courts have deviated from the principles of *Dukes* to certify class actions despite the absence of evidence demonstrating that Rule 23's requirements have been met. This practice threatens significant prejudice to both defendants and class members, particularly those absent from litigation, and compromises the basic requirements of due process. And it illustrates the need for this Court to hold, in unequivocal language, that a class action plaintiff must present properly *admissible* evidence to satisfy the burden of proving that his claims are susceptible to common and predominating class-wide proof.

I. The problem of lower courts' certifying class actions in the absence of admissible evidence of commonality is not at all limited to the antitrust context. In just the one year since *Dukes*, the lower courts have repeatedly addressed the issue of the plaintiff's burden to present admissible evidence in support of class certification, reaching conflicting decisions. In some instances, as in the instant case, plaintiffs have

been able to circumvent *Dukes* through certification decisions that effectively relieve the plaintiff of his burden to "affirmatively demonstrate his compliance with [Rule 23]." *Dukes*, 131 S.Ct. at 2551. The result has been to certify classes even where class members' claims are not necessarily susceptible to class-wide resolution.

II. *Daubert* is the appropriate standard for the admission of expert evidence at the class certification stage. Any lower standard would be inconsistent with *Dukes'* "rigorous analysis" requirement for compliance with Rule 23 and risks both substantial prejudice to defendants and the certification of classes that do not warrant Rule 23's narrow exception from the usual rule that litigation be conducted on behalf of named parties only. To avoid those results, the Court should clarify that, although there may be some overlap with the "merits," a full *Daubert* inquiry into the reliability and admissibility of expert testimony is required at the certification stage.

Accordingly, the Court should reverse the decision of the court of appeals and hold that Rule 23 and basic principles of due process require that evidence presented at the class certification stage be subject to the same standards as evidence presented at trial.

ARGUMENT

I. DESPITE *DUKES*, MANY LOWER COURTS STILL DECLINE TO SUBJECT CLASS CERTIFICATION TO "RIGOROUS ANALYSIS"

"[L]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried," *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring), this Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), continues to stalk the lower courts' decisions certifying classes compliance with the basic requirements of Rule 23. While many courts over the years summoned *Eisen* for the proposition that a court could not consider any issue at the class certification stage that happened to overlap with a question on the merits, the Court's decision last year in *Wal-Mart Stores, Inc. v. Dukes* should have killed it off once and for all. *See* 131 S.Ct. at 2552 n.6. But *Eisen* lingers on in the reluctance of some federal courts to subject expert evidence submitted at the class certification stage to the same scrutiny, under the same standards, that prevail at trial. Its continued presence undermines compliance with *Dukes*.

A. *Eisen's* Legacy Continues to Prevent Courts from Undertaking "Rigorous Analysis" of Evidence at the Class Certification Stage

It is now well-settled that "certification is proper only if 'the trial court is satisfied, after rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Dukes*, 131 S.Ct. at 2551 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). Such rigorous analysis may require the court "to probe behind the pleadings," *Falcon*, 457 U.S. at 160-61, and will "[f]requently . . . entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Dukes*, 131 S.Ct. at 2551. This is because the determination of whether a class can be certified "generally involves" considering both factual and legal issues that make up the plaintiff's complaint. *Id.* at 2552; *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

It is all well and good that *Eisen* is no longer taken to mean that a court cannot consider the merits of a case as necessary when determining if a case is appropriate for class treatment. But as the Third Circuit's opinion below reveals, a vestige of the discredited view of *Eisen* remains in courts' reluctance to evaluate expert evidence submitted at the class certification hearing under the standard set forth in

Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993).[2]

This approach was routine before *Dukes*. *See, e.g., In re Monosodium Glutamate Antitrust Litig.*, 205 F.R.D. 229, 234 (D. Minn. 2001) ("On a motion for class certification, the Court cannot, and indeed should not, engage in [*Daubert*] analysis."); *Vickers v. Gen. Motors Corp.*, 204 F.R.D. 476, 479 (D. Kan. 2001) ("The court recognizes that an analysis of expert opinion of the type explained in *Daubert* . . . is not required at the class certification stage."); *Cole v. ASARCO Inc.*, 256 F.R.D. 690, 696 n.3 (N.D. Okla. 2009) ("[A] *Daubert* analysis of expert opinion is not required at the class certification stage").

But this Court did not have the opportunity in *Dukes* to reach the issue of whether evidence submitted at the class certification stage of a proceeding must meet the *Daubert* standard because the expert testimony submitted was inadequate to satisfy even a lesser standard. *Dukes*, 131 S.Ct. at 2553-54 (expert's testimony was "worlds away from 'significant proof' that Wal-Mart 'operated under a general policy of

[2] In *Daubert* and its progeny, this Court held that a trial judge serves as a gatekeeper to preclude expert testimony that is not based on scientific knowledge. *See Daubert*, 509 U.S. at 589-90. In order to determine whether testimony is admissible as evidence under *Daubert*, a court must consider certain factors to determine whether the reasoning or methodology underlying the testimony is scientifically valid and applies to the facts at issue. *Id.* at 593-95. Federal Rule 702 has since been amended in an attempt to codify these factors. *See* Fed. R. Evid. 702.

discrimination'"). *Dukes* did, however, strongly suggest that *Daubert* must be satisfied at the class certification stage: "The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so. . . ." *Dukes*, 131 S.Ct. 2553-54 (citation omitted).

Nonetheless, *Eisen's* legacy persists today in decisions by federal courts that have not understood that the "rigorous analysis" demanded at the class certification stage requires that expert evidence actually be admissible. The Third Circuit's decision in this case may be among the most extreme examples, but other courts have also continued to express reluctance to delve too far into the admissibility of expert testimony at the class certification stage.[3] The Eighth Circuit, for example, has held that a full *Daubert* analysis is not necessary at the class certification stage, and has instead sanctioned a district court's use of a limited, "tailored *Daubert*" analysis. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011). The court rationalized the use of a less-than-complete *Daubert* analysis because

[3] *Cf. Marcus v. BMW of N. Am., LLC*, No. 11-1192, ___ F.3d ___, 2012 WL 3171560, at *14 (3d Cir. Aug. 7, 2012) (in context of consumer fraud, breach of warranty, and breach of contract claims, weighing "conflicting expert testimony at the certification stage is not only permissible" but "may be integral to the rigorous analysis Rule 23 demands").

"[t]he main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated at the class certification stage where the judge is the decision maker." *Id.* And, following *Zurn*, the District of Minnesota recently endorsed an "adapted" *Daubert* analysis at class certification that "only scrutinizes the reliability of expert testimony in light of the criteria for class certification." *In re Wholesale Grocery Prods. Antitrust Litig.*, No. 09-MD-2090, 2012 WL 3031085, at *6 (D. Minn. July 25, 2012) (citing *Zurn*, 644 F.3d at 614).

Notwithstanding *Dukes*, a substantial minority of the lower courts continue to hold on to an unjustified aversion to examining questions about the admissibility or reliability of the plaintiff's evidence too critically. As a result, these courts refuse to examine at the class certification stage whether expert testimony submitted in an attempt to prove the existence of common questions meets the *Daubert* standard that would govern the admissibility of the same evidence at trial.

B. The Lower Courts Have Failed To Settle on a Single Standard for the Admissibility of Evidence, Leading to Inconsistent Results

Inconsistent analysis of evidence by the courts inevitably leads to inconsistent results on class

certification. That has proven true in the year since *Dukes*.

Unlike those courts that have been reluctant to reach "merits" issues at the certification stage, others, both before and after *Dukes*, have held precisely the opposite. *See, e.g., In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001); *Gariety v. Grant Thorton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Coastal Neurology, Inc. v. State Farm Mut. Auto. Ins. Co.*, 458 F. App'x 793 (11th Cir. 2012).

More specifically, a number of appellate decisions since *Dukes* have heeded this Court's guidance regarding the application of the *Daubert* standard at the certification stage. For example, the Seventh Circuit recently held that where the admissibility of expert testimony "critical" to class certification is challenged, the court must conduct a full *Daubert* analysis prior to denying certification. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 812 (7th Cir. 2012). Previously, that court had required a full *Daubert* analysis of critical testimony before *granting* class certification. *Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 819 (7th Cir. 2010).

Similarly, the Ninth Circuit has recognized not only the need for full *Daubert* inquiry into the admissibility and reliability of the plaintiff's expert testimony, but also a factual finding after a rigorous analysis that the plaintiff has met his or her burden

of proof that the issues are common and not individualized. *See Ellis v. Costco Wholesale Corp.,* 657 F.3d 970, 982 (9th Cir. 2011) ("Instead of judging the persuasiveness of the evidence presented [in the commonality context], the district court seemed to end its analysis of the plaintiffs' evidence after determining such evidence was merely admissible [in the motion to strike context]."); *see also Bolden v. Walsh Constr. Co.*, No. 12-2205, ___ F.3d ___, 2012 WL 3194593, at *3 (7th Cir. Aug. 8, 2012) ("We need not determine whether [the expert's] study should have been excluded under Fed.R.Evid. 702. It is enough to say that it does not show any common issue that would allow a multi-site class."); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 07-489, ___ F. Supp. 2d ___, 2012 WL 2870207, at *16-17 (D.D.C. June 21, 2012) (critically analyzing and weighing credibility and admissibility of expert evidence, but without express reference to *Daubert*).

In sum, a year after *Dukes*, the lower courts are split as to one of the most basic questions regarding class certification and which the Court all but answered in its decision. Clearer guidance is necessary.

C. Because This Disarray Is Not Limited to the Antitrust Context, the Remedy Must Be Broadly Applicable

The refusal of some lower courts to evaluate the admissibility of purportedly "common" evidence

proffered by a plaintiff in support of class certification, often in the form of expert opinion testimony, is a problem that is not limited to the antitrust context, the employment discrimination context, or any other subject area. Nor is it unique to the questions regarding the existence or extent of damages. It is an issue that arises whenever a plaintiff takes the position that class certification is proper because one or more elements of a claim can be proven based on common, class-wide evidence.

Even in the year since this Court issued its decision in *Dukes*, the issue of how the trial judge should approach the admissibility issue has arisen in numerous contexts in the lower courts, with standards varying from jurisdiction to jurisdiction. *See, e.g., Marcus v. BMW of N. Am., LLC,* No. 11-1192, ___ F.3d ___, 2012 WL 3171560, at *14-17 (3d Cir. Aug. 7, 2012) (consumer fraud, involving alleged breach of warranty and breach of contract); *Messner*, 669 F.3d at 812 (Sherman and Clayton Acts); *Bolden*, 2012 WL 3194593, at *3 (race discrimination); *Ellis*, 657 F.3d at 982 (sex discrimination); *Zurn,* 644 F.3d at 612 (products liability); *Bennett v. Nucor Corp.*, 656 F.3d 802, 815-16 (8th Cir. 2011) (race discrimination); *Gray v. Hearst Commc'ns, Inc.*, 444 F. App'x 698, 701-02 (4th Cir. 2011) (consumer fraud, involving alleged breach of contract, breach of the implied covenant of good faith and fair dealing, and deceptive trade practices); *Casida v. Sears Holdings Corp.*, No. 1:11-cv-01052, 2012 WL 3260423, at *2-3 (E.D. Cal. Aug. 8,

2012) (employment misclassification); *Madanat v. First Data Corp.*, No. CV 11-364, 2012 WL 2905931, at *3 (E.D.N.Y. July 16, 2012) (consumer fraud, involving alleged unauthorized electronic funds transfers and conversion, and seeing injunctive relief).

The lack of uniformity in the standards applied by the lower courts makes clear that further guidance by the Court should not be limited to specific types of cases or issues, but apply broadly to all class certification determinations.

II. TO AVOID PREJUDICE TO DEFENDANTS AND CLASS MEMBERS, THE SAME EVIDENTIARY STANDARD SHOULD APPLY AT THE CLASS CERTIFICATION STAGE AS AT TRIAL

A. Only *Daubert* Provides "Rigorous Analysis" of Evidence at the Class Certification Stage

Permitting courts to apply a lower standard for evidence at the class certification stage than at trial is inconsistent with the Court's approach in *Dukes*. *Dukes* echoes the Court's previous decisions holding that lower courts must engage in a rigorous analysis in determining the propriety of class certification, and further discredits those courts that have read *Eisen* to preclude even a peek at the merits at the class certification stage. But *Dukes* specifically stated that plaintiffs must *prove* the propriety of class certification, even if that means proving the issue "again at

trial in order to make out the case on the merits," 131 S.Ct. 2552 n.6, to satisfy the requirements of Rule 23 and comport with basic notions of due process. Any lower standard falls short of these obligations.

To avoid proceeding to a class trial based on inadmissible and unreliable evidence, courts should conduct a full *Daubert* analysis of proffered evidence even at the class certification stage. *See Zurn*, 644 F.3d at 630 (Gruender, J., dissenting) ("We should be concerned . . . that the case will proceed beyond class certification on the basis of inadmissible, unreliable expert testimony."); *Am. Honda Motor Co.*, 600 F. 3d at 819 (Evidence that is "not . . . reliable should not be admitted, even at this early stage of the proceedings.").

The justifications provided for applying a less stringent standard fall short of common sense. The Third Circuit's rationale that to make an admissibility determination at the class certification phase is somehow a decision on the "merits" is wrong as a matter of logic, as well as relying on a misinterpretation of precedent that this Court has already clarified in *Dukes*. And the Eighth Circuit's justification for applying a limited *Daubert* standard – the belief that a full blown *Daubert* hearing is premature before a case reaches a later stage – is not reconcilable with Rule 23's rigorous analysis standard. By definition, an analysis cannot be rigorous if it is not done at all, if it is deferred for a later ruling, or if it is completely deferential to the allegations of the plaintiff and her expert. *See West v. Prudential Sec., Inc.*, 282 F.3d 935,

938-39 (7th Cir. 2002) (a district court cannot "duck hard questions" or delegate its judicial power to evaluate evidence); *Ellis*, 657 F.3d at 982 ("the trial court must act as a 'gatekeeper' to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards by making a preliminary determination that the expert's testimony is reliable.").

B. Any Lower Bar for Class Certification Would Prejudice Defendants and Class Members

To avoid prejudice to defendants, as well as prejudice to absent class members who, pinning their hopes on what may be inadmissible evidence, decide to remain in a class, a full *Daubert* analysis should be required at the class certification stage of a proceeding.

As set forth in the 1966 Advisory Committee notes relating to Rule 23(b)(3): "[This Subdivision] encompasses those cases in which a class would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23 advisory committee's note, 39 F.R.D. 69, 102-03 (1966).

The text of Rule 23(b)(3) requires that the court "find," not assume, that there are questions of law or

fact common to class members that predominate. *See Unger v. Amedisys Inc.,* 401 F.3d 316, 321 (5th Cir. 2005). As one commentator has recognized:

> It would be bizarre to conclude that the framers of Rule 23 would have set forth a careful set of prerequisites for class certification only to deny trial courts the ability to apply those prerequisites in a factually-based and reasoned manner.

Geoffrey P. Miller, Review of the Merits in Class Action Certification, 33 Hofstra L. Rev. 51, 63 (2004).

This Court has acknowledged the significant impact of a class certification on the parties. "A district court's ruling on the certification issue is often the most significant decision rendered in" class proceedings. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

As to defendants, "[c]lass certification magnifies and strengthens the number of unmeritorious claims." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). Similarly, the aggregation of claims makes it much more likely that a defendant will be found liable, resulting in a higher damage award. Manual for Complex Litig., Fourth § 33.26 n.1069 (2004). Class certification creates "insurmountable pressure on defendants to settle, whereas individual trials would not." *Castano,* 84 F.3d at 746. This pressure squeezes the defendant, regardless of the merits. *See* Theodore Eisenberg & Geoffrey P. Miller, Attorneys' Fees and

Expenses in Class Action Settlements: 1993-2008, 7 J. Empirical Legal Stud. 248, 260 tbl. 4 (2010) (noting that the average settlement in certified federal class actions was well over $100 million).

This impact of class certification stretches across all types of litigation, regardless of subject matter. For example, "[t]he risks associated with antitrust class actions dictate that most cases will be on the fast track to certification, long before a summary judgment motion or merits adjudication of any kind can play a role." John T. Delacourt, Protecting Competition by Narrowing *Noerr*: A Reply, 18 Antitrust 77, 78 (2003); *see also* Eisenberg & Miller, *supra*, at 262 tbl. 5 (average settlement for antitrust certified class action over $160 million). Indeed, the settlement values of certified class action lawsuits can run into the hundreds of millions, regardless of subject area: mass torts average approximately $255 million; consumer actions average $128 million; and tax cases average $188 million. *Id*. And employment lawsuits, like the *Dukes* action, average over $12 million at settlement following certification. *Id.*

As the Eleventh Circuit has recognized, "blackmail" may be the only value of class certification:

> Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is,

> except the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement.

Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (emphasis added).

And Judge Easterbrook, writing for the Seventh Circuit in *Szabo*, articulated the issue as follows: "[c]lass certification turns a $200,000 dispute (the amount that *Szabo* claims as damages) into a $200 million dispute. Such a claim puts a bet-your-company decision to . . . managers and may induce a substantial settlement even if the customer's position is weak." 249 F.3d at 675.

Class certification also has an important impact on absent class members. Class actions are "exception[s] to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). Absent putative class members who do not exclude themselves from a class will be bound by any judgment and will not be able to proceed individually. *Hansberry v. Lee,* 311 U.S. 32, 42-43 (1940); Restatement (Second) of Judgments § 41(1)(e). Allowing inadmissible evidence to be considered at the class certification stage may color their view of the likelihood of the action's potential for success and encourage them to stay in the class. As a recent

article explained, regarding the impact of class certification decisions on individuals:

> Class actions . . . are different. The named plaintiff seeks to represent hundreds (or, in the case of Dukes, hundreds of thousands) of people who will never see the inside of the courtroom and will never talk to a lawyer about legal strategy. If she wins, so do they. But if she loses, so do they, and because they could have litigated those claims in the class action, they will be precluded from bringing a new case based on the same subject matter.

Andrew J. Trask, *Wal-Mart v. Dukes*: Class Actions and Legal Strategy, 2010-2011 Cato Supreme Ct. Rev. 319, 353 (2011).

In this way, loose and fuzzy standards for class certification threaten to sweep in and then decide the claims of disparate class members, including those who are absent, to their great potential detriment. While class actions subject to rigorous scrutiny at the certification stage may justify this departure from the norms of due process, that exception must be confined to circumstances where classes can be defined with precision and commonality is truly predominant. There is a great inequity in binding class members, and potentially compromising their legal rights, on the basis of a showing less rigorous than that by which they might prevail as individual plaintiffs.

* * *

The Third Circuit's approach signals a return to the "certify now, worry later" approach that plagued the courts when they were saddled with a fundamental misperception of what this Court's *Eisen* decision meant. It is now clear that *Eisen* does not prohibit a court from examining the merits of an action at the class certification stage if necessary to the class certification decision. Yet a vestige of *Eisen* remains, as courts now struggle with the question of whether the evidence presented at the class certification stage, particularly expert evidence, must be admissible. There is no justification for lowering the standard for admissibility at the class certification stage. To the contrary, there is every reason to ensure that courts uniformly apply *Daubert* at the class certification stage to protect both defendants and absent class members from the ramifications of a wrongly decided class certification decision.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to uphold and enforce the basic commonality requirement of Rule 23 and prevent its circumvention through certification decisions premised on unreliable, inadmissible evidence. The Court should reverse the decision of the court of appeals.

Respectfully submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

DAVID B. RIVKIN, JR.
Counsel of Record
ANDREW M. GROSSMAN
BAKER & HOSTETLER LLP
1050 Conn. Ave., N.W.
Washington Sq., Suite 1100
Washington, D.C. 20036
(202) 861-1500
drivkin@bakerlaw.com

THOMAS D. WARREN
DEBORAH H. RENNER
JOHN B. LEWIS
PAUL G. KARLSGODT
CASIE D. COLLIGNON
MATTHEW J. MOODY
BAKER & HOSTETLER LLP

Counsel for Amicus Curiae

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