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No. 10-277

In the Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPKNOSKI, CLEO PAGE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ASSOCIATION OF GLOBAL AUTOMAKERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973) 14

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Page(s)

Emery G. Lee III & Thomas E. Willging, *Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules* (Fed. Jud. Ctr. Apr. 2008), at http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf. 2

Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991)................................. 15

1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS (6th ed. Supp. 2009) 10

Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. EN BANC 149 (2010) 24

Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71 15

2 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS (4th ed. Supp. 2010) 14, 19

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Neil Weinberg, *Shakedown Street*, Forbes.com, Feb. 11, 2008, at http://www.forbes.com/2008/02/11/lerach-milberg-weiss-biz-cz_nw_0211lerach.html. 15

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BRIEF OF THE ASSOCIATION OF GLOBAL AUTOMAKERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Association of Global Automakers, Inc. ("Global Automakers")—formerly known as the Association of International Automobile Manufacturers, Inc.—is a nonprofit trade organization whose vehicle manufacturer members include American Honda Motor Co., American Suzuki Motor Corp., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Isuzu Motors America, LLC, Kia Motors America, Inc., Mahindra & Mahindra Ltd., Maserati North America, Inc., McLaren Automotive, Ltd., Mitsubishi Motors North America, Nissan North America, Peugeot Motors of America, Subaru of America, Inc., and Toyota Motor North America, Inc. Global Automakers also represents original equipment suppliers and other automotive-related trade associations.[1]

Collectively, Global Automakers members account for almost 40 percent of annual sales of passenger cars and light trucks in the United States. Nationwide, Global Automakers members have invested nearly $44 billion in U.S.-based production facilities. They directly employ over 81,000 Americans

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

and indirectly generate over 500,000 other U.S. jobs through dealerships and suppliers nationwide.

The mission of Global Automakers is to advance the interests of international automobile manufacturers in the United States, including on issues such as free trade, motor vehicle safety, and environmental and energy policy. Global Automakers regularly files *amicus* briefs in cases of importance to its members and the motor vehicle industry.

Global Automakers takes no position on the issues of employment-discrimination law underlying the class-certification order here. Rather, it is the effect of this Court's decision on general principles of class certification that motivates Global Automakers to participate in this case. The interpretation of Rule 23 applied by the court of appeals presents a serious threat to its members' interests in a stable, predictable, and fair legal environment for business in the United States. Although this Court may intend its articulation of the principles governing class certification to be tailored to this case, those principles will not necessarily be limited to employment discrimination cases, which account for less than half the class action proceedings in the federal courts. Emery G. Lee III & Thomas E. Willging, *Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules* 4 (Fed. Jud. Ctr. Apr. 2008), at http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf.

To the contrary, parties to future actions may argue that the principles announced in this case are generally applicable to every class action in every context—including antitrust, product-liability, warranty, and false-advertising lawsuits. As explained

below, the Rule 23 issues presented here arise in class-action litigation against Global Automakers members with some frequency in cases that have nothing to do with employment matters.

Global Automakers has a strong interest in the formulation of those principles because the decision below, if broadly construed, may vastly expand the exposure of Global Automakers members to unwarranted class-action litigation. Because the plaintiffs' bar views Global Automakers members as attractive deep-pocket defendants, members are routinely targeted by improper class-action litigation. Global Automakers accordingly has a powerful interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal Rule of Civil Procedure 23 provides a closely circumscribed exception to the fundamental principle that individual cases are tried on an individual basis and on their own facts. The Rule recognizes that, in some circumstances, similar claims may be aggregated when they can be tried together efficiently and fairly.

But when a court certifies a class action comprising factually dissimilar claims, Rule 23 becomes a means of sacrificing to administrative convenience the right to present individualized defenses to particular class members' claims. And because the class lacks the cohesiveness that aligns the incentives of the class and its representative, Rule 23 becomes a vehicle for the class representative (and his counsel) to sell the rights of the absent class members for private gain. For these reasons, this Court has repeatedly warned "against adventurous application of"

Rule 23 that might lead to improper class certifications. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999); see also *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 622-625 (1997).

The principles applied below, however, threaten to authorize the certification of a class to pursue almost any claim for monetary relief that can colorably be alleged to affect a large number of persons, whether or not that claim can be resolved by common proof. One of the chief protections against the improper certification of those claims is Rule 23(b)(3)'s requirement that common issues predominate over individualized ones. The decision below, however, provides plaintiffs with a potential path around that safeguard whenever a complaint can artfully characterize a damages claim as supplementary to a claim for injunctive relief. The plaintiff then could seek certification under Rule 23(b)(2). But the plain language of Rule 23(b)(2) reserves it for the certification of claims for "final injunctive relief or corresponding declaratory relief"—not money damages. Those terms should preclude insinuation of substantial monetary claims into a class certified under Rule 23(b)(2). The rule permits certification of claims for injunctive or declaratory relief. It does not authorize certification of any combination of injunctive and pecuniary claims so long as a court concludes that injunctive relief is "predominant[ ]," based on an inherently subjective assessment that the injunctive component is "superior in strength, influence, [and] authority" to the pecuniary relief. Pet. App. 86a (internal quotation marks omitted).

Like other forms of "judicial inventiveness" in construing Rule 23 (*Amchem*, 521 U.S. at 620), the Ninth Circuit's approach should be rejected. Certify-

ing a claim for massive pecuniary relief under Rule 23(b)(2) deprives absent class members of their rights to be notified of the proceedings and to opt out of the class. Moreover, because the claim avoids scrutiny under Rule 23(b)(3), that rule's predominance and superiority requirements can no longer winnow out damages claims that lack the cohesiveness to warrant class-action status. Certification under Rule 23(b)(2) should be limited to the actions identified in the Rule itself.

This Court also should articulate the requirements of Rule 23(a) to place concrete and administrable limits on class-certification analysis. In particular, the Court should define the commonality requirement of Rule 23(a)(2) to ensure that only cases suitable for resolution by common proof can satisfy the requirement in Rule 23(b)(3) that common issues predominate over individualized ones. The Court should also clarify that the threshold showing of commonality required by Rule 23(a)(2) rests on the weight of the pertinent evidence rather than mere assertion or a scintilla of supporting evidence. The Ninth Circuit took a different view, mistakenly holding that commonality may be demonstrated by any evidence suggesting that the defendant has a common policy that affects the class. That holding absolves plaintiffs from rebutting defendant's proof—no matter how strong—that no such policy exists, at least until the plaintiff has the added leverage of a prematurely certified class. Uncritical acceptance of allegations (or scant evidence) of a policy or practice lifts plaintiffs' burden of demonstrating that the class members' claims can be resolved by common proof. Yet that inquiry is key to determining whether class-wide adjudication is an appropriate way to resolve the claims.

Another aspect of the decision below reflects the need for this Court to articulate commonality in clearer and more concrete terms. The court of appeals developed an additional means to absolve plaintiffs from presenting evidence that their claims could be resolved collectively through class-wide, common proof. Forced to acknowledge that no plaintiff could recover without prevailing on several individualized issues, the Ninth Circuit proposed that the district court try a series of "sample" cases. That, of course, is a scientific-sounding way of saying that certain individualized trials would be given class-wide significance even though factually disparate individual claims could not be resolved through common proof. Under the Ninth Circuit's plan, the district court would consider the individualized evidence needed to resolve the claims of a few class members, and then generalize the outcome of the "sample" cases to the rest of the class. This "rough justice" approach (Pet. App. 254a) may be inventive, but it violates the Rules Enabling Act. No aspect of the federal rules may "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b). Adjudication by sampling "abridge[s]" a defendant's right to present defenses to each class member's claim. And the rights of plaintiffs who lack meritorious claims are "enlarge[d]"—at the expense of both the defendant and any class members who may have viable claims.

The class-certification issues in this case transcend their employment-discrimination setting, although particular employment-discrimination doctrines may affect the outcome in this case. This Court should return class-certification jurisprudence to the firm moorings of Rule 23. Skewing the Rule 23 analysis to favor certification, as in the decision

below, would have a deleterious impact on the national economy. Because of the massive stakes and enormous defense costs of a class action, class certification already gives plaintiffs the leverage to extract settlements from defendants of even meritless claims. By eliminating the traditional safeguards against the improper certification of damages claims, excessively lenient certification principles encourage shake-down class actions. To prevent that outcome, this Court should articulate and impose a principled certification analysis.

ARGUMENT

I. PERMITTING RULE 23(B)(2) CERTIFICATION TO ENCOMPASS CLAIMS FOR MONETARY RELIEF WOULD ENCOURAGE ARTFUL PLEADING AND VEXATIOUS LITIGATION.

A. Claims For Monetary Relief Cannot Be Certified Under Rule 23(b)(2).

Rule 23(b)(2) authorizes the certification of a class only if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

As petitioner has demonstrated, the most straightforward—and correct—reading of the rule is that it prescribes the standard for certifying claims that seek only injunctive or declaratory relief. Pet. Br. 46-50. Requests to certify claims for monetary relief are governed by Rules 23(b)(1)(B) and 23(b)(3), which were drafted with monetary claims in mind. See FED. R. CIV. P. 23 advisory committee's note, 1966 amendment (Rule 23(b)(1)(B) is for damages

claims "made by numerous persons against a fund [that is] insufficient to satisfy all claims"); *ibid.* (cases in which "individuals within the class" seek "damages" may proceed under Rule 23(b)(3)).

A straightforward reading of Rule 23(b)(2)'s plain language also makes practical sense because of the effects of Rule 23(b)(2) certification on absent class members. Unlike a Rule 23(b)(3) class, a Rule 23(b)(2) class is "mandatory"; class members receive neither notice of the litigation nor the ability to opt out of the class. As this Court has observed, "[b]y its terms subdivision [23](c)(2)," which governs class notice, "is inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b)(2)." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974).

These features of mandatory class actions are departures from "our deep-rooted historic tradition that everyone should have his own day in court." *Ortiz*, 527 U.S. at 846 (quoting *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989) (further citation omitted). Accordingly, as this Court has observed, "mandatory class actions aggregating damages claims implicate the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Ibid.* (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940)). Indeed, this Court has cautioned that due process may require that "actions seeking monetary damages * * * can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not." *Ticor Title Ins. Co.* v.

Brown, 511 U.S. 117, 121 (1994).[2] Due process may not require opt-out rights in a class action seeking a class-wide injunction because an order compelling lawful conduct almost inevitably will resolve any class member's claim for an order addressing the same conduct. But a claim for monetary relief is not similarly indivisible, and so there is no justification for depriving class members of the option to pursue (or abandon) their own claims.[3]

In addition, the certification of damages claims under Rule 23(b)(2) permits representative litigation without regard to one of the fundamental safeguards of the due process rights of both defendants and absent class members alike: the predominance requirement of Rule 23(b)(3). To aggregate claims for monetary relief under Rule 23(b)(3), the plaintiff must establish, among other things, that common issues "predominate" over individualized ones. FED. R. CIV. P. 23(b)(3). The predominance requirement

[2] In *Ticor*, this Court granted certiorari to determine "[w]hether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23[(b)(1)(A) and (b)(2)], on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." 511 U.S. at 120-121 (internal quotation marks omitted). The Court dismissed the writ as improvidently granted, however. *Id.* at 122.

[3] Some courts have attempted to address this due process problem by permitting a hybrid certification: The class is certified under Rule 23(b)(2) but class members are given notice and a chance to opt out as if it were a Rule 23(b)(3) class. See, *e.g.*, *Lemon* v. *Int'l Union of Operating Eng'rs*, 216 F.3d 577, 582 (7th Cir. 2000). Even if permitted by Rule 23, this approach does not remediate the due process problem because it bypasses the predominance requirement, which itself is a substantive protection required by due process.

winnows out classes in which the members' claims are riddled with idiosyncrasies that defeat class unity. As this Court explained in *Amchem*, the "mission" of this requirement is to "assure the class cohesion that legitimizes representative action in the first place." 521 U.S. at 623. Only when the interests of the class and its representative are aligned as a matter of evidentiary presentation as well as ultimate interest can "the named plaintiff at all times adequately represent the interests of the absent class members," as due process requires. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985) (citing *Hansberry*, 311 U.S. at 42-43).

The predominance requirement imposes a "demanding" burden. *Amchem*, 521 U.S. at 623. And it "usually is the greatest obstacle to [Rule 23](b)(3) certification" of dubious class actions. 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 5:23 (6th ed. Supp. 2009).

Yet despite the plain language of Rule 23(b)(2) and the constitutional implications of extending it to damages claims, the court below held that some claims for monetary relief may be certified under that rule. Pet. App. 84a-88a. Indeed, the Ninth Circuit presumed that claims seeking both monetary and injunctive relief *could* be certified under Rule 23(b)(2) *unless* the damages component is "superior [in] strength, influence, or authority to [the requested] injunctive and declaratory relief." Pet. App. 86a (internal quotation marks omitted). This "strength, influence, or authority" standard transforms Rule 23(b)(2) from a rule into a preference—and one that turns on its head the common understanding of the Rule's purpose and limitations.

The Ninth Circuit's set of subjective factors for applying its standard contrasts with the simple, objective, and exclusive language of the Rule, and with other circuits' limitation of certification of monetary claims under Rule 23(b)(2) to those that are "incidental to requested injunctive or declaratory relief." *Allison* v. *Citgo Petroleum Corp.,* 151 F.3d 402, 415 (5th Cir. 1998). In those circuits, Rule 23(b)(2) only encompasses claims for monetary relief that would be "automatic[]" and "flow directly from liability to the class *as a whole* in the claims forming the basis of the injunctive or declaratory relief," without the need for "additional hearings" or the resolution of "new and substantial legal or factual issues." *Ibid.*[4]

The Ninth Circuit's application of the "strength, influence, or authority" standard reveals its malleability. The court first explained that the inquiry involves a "comparison between the amount of monetary damages available *for each plaintiff* and the importance of injunctive * * * relief for each." Pet. App. 89a. But that "comparison" rests on a judicial guess at the subjective importance of the injunction to the absent class members—importance that may vary widely. The Ninth Circuit did not explain why, in its view, the requested backpay did not predominate over the requested injunction but the request for punitive damages might. See Pet. App. 90a-92a, 101a.

If the billions of dollars at stake have less "strength, influence, and authority" than an injunc-

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[4] See also, *e.g.*, *Reeb* v. *Ohio Dep't of Rehab & Corr.*, 435 F.3d 639, 646-651 (6th Cir. 2006); *In re Allstate Ins. Co.*, 400 F.3d 505, 507 (7th Cir. 2005); *Barabin* v. *Aramark Corp.*, 2003 WL 355417, at *2 (3d Cir. Jan. 24, 2003); *Murray* v. *Auslander*, 244 F.3d 807, 812 (11th Cir. 2001)..

tion to alter personnel policies, it is difficult to imagine what sums would be necessary for monetary relief to predominate. And in future cases, plaintiffs may cloud the picture even further by submitting self-serving affidavits extolling the importance of the requested injunction and downplaying the monetary claims as an afterthought. This is no idle concern. See, *e.g.*, *Warren* v. *Xerox Corp.*, 2004 WL 1562884, at *15 (E.D.N.Y. Jan. 26, 2004) (plaintiffs seeking certification under Rule 23(b)(2) testified in deposition that, although they "request significant monetary damages," they "would have pursued this action" even if only injunctive relief were "available").

Turning to the other factors, the Ninth Circuit declared that "the calculation of backpay generally involves relatively uncomplicated factual determinations and few individualized issues." Pet. App. 93a (internal quotation marks omitted). Yet the same court recognized in the very same opinion that deciding the backpay claims would require so many minitrials that it would be impossible to conduct more than a tiny percentage of them. *Id.* at 105a-110a. To be sure, backpay calculations are more straightforward and formulaic than claims in the typical consumer-fraud or product-liability class action. But given the sheer number of mini-trials required here, plaintiffs in very different contexts could argue that a particular monetary claim would be less onerous to adjudicate.

The Ninth Circuit did acknowledge that a multibillion-dollar punitive-damages claim *might* make punitive damages predominate over injunctive relief, in part because punitive damages "will be decided by a jury, rather than a judge." *Id.* at 97a (remanding this point for further consideration). This factor, too,

could be readily manipulated by future plaintiffs. They can improperly recast legal claims for damages as "equitable" claims for restitution, constructive trust, an accounting, or another "equitable" claim for monetary relief. See DAN B. DOBBS, LAW OF REMEDIES § 4.3 (2d ed. 1993). Indeed, restitution is the monetary relief available under one of the most frequent bases for class actions seeking large pecuniary recoveries, California's notorious Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 *et seq.*

The courts of appeal have recognized that an award for backpay under Title VII is *sui generis*, because the award is simply one component of the relief afforded by the injunction. See, *e.g.*, *Allison*, 151 F.3d at 415; *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 332 (4th Cir. 2006). But plaintiffs in future cases will seek to eliminate any stopping point. At a minimum, if the Court were inclined to permit *any* claims for monetary relief to be certified under Rule 23(b)(2), the Court should make clear that its holding is limited to claims for backpay under Title VII. The Court should not interpret Rule 23(b)(2) to be a loophole in search of a limit.

B. Permitting Certification Of Monetary Claims Under Rule 23(b)(2) Would Have Significant Deleterious Effects On Warranty, Advertising, And Other Litigation Against Automobile Manufacturers.

Broadening the scope of Rule 23(b)(2) to permit certification of monetary claims that also seek injunctive relief could have disastrous consequences for the automobile industry by unduly magnifying the risks attending substantive claims that present individualized inquiries or have questionable merit. Already Rule 23(b)(2) class actions have become more

common in those circuits that have a demonstrated "willingness * * * to expand the concept of injunctive relief to encompass equitable or ancillary awards of monetary relief to class members." 2 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 4:11 (4th ed. Supp. 2010).

If the "strength, influence, and authority" formulation became the law, that trend would accelerate, exacerbating the pressure on defendants to capitulate to what Judge Friendly termed "blackmail settlements." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973). As this Court has observed, because of the sheer stakes of a certified class action, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial * * *." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975); see also, *e.g.*, *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims."). And the threat of inevitably costly and disruptive class-wide discovery adds an additional "*in terrorem* increment" to the settlement value of the claim. *Blue Chip Stamps*, 421 U.S. at 741.

The ability to bypass Rule 23(b)(3)'s predominance standard and obtain certification of damages claims under Rule 23(b)(2) will exacerbate the problem of blackmail settlements. Many consumer lawsuits could conceivably be converted into an abusive class action by conjuring up a request for injunctive or declaratory relief as a fig leaf for a huge monetary demand. And because class members would not re-

ceive notice of the litigation, they would have little or no ability to monitor the conduct of the litigation. Commentators have long warned of the risk for abuse of the class action mechanism when class members exercise insufficient oversight of class counsel.[5] For such reasons, Congress recently found that "there have been abuses of the class action device," leading to situations where "counsel are awarded large fees" while "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed." Class Action Fairness Act of

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[5] See, *e.g.*, Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77-83 (often "what purports to be a class action, brought primarily to enforce private individuals' substantive rights to compensatory relief, in reality amounts to little more than private attorneys acting as bounty hunters"); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7-8 (1991) ("[T]he single most salient characteristic of class and derivative litigation is the existence of 'entrepreneurial' plaintiffs' attorneys [who, because they] are not subject to monitoring by their putative clients * * *[,] operate largely according to their own self-interest."). As former securities class action attorney William Lerach once boasted, "I have the greatest practice of law in the world. I have no clients." Neil Weinberg, *Shakedown Street*, FORBES.COM, Feb. 11, 2008, at http://www.forbes.com/2008/02/11/lerach-milberg-weiss-biz-cz_nw_0211lerach.html. In one recent example, an ostensible consumer class representative filed an objection to the settlement, asserting that he did not realize he had been named as the class representative and that class counsel had mishandled the case. See Decl. by Lead Plaintiff James C. Young, Request to Dismiss Current Designated Counsel, Objection to Settlement, Appearance at Hearing, *In re HP LaserJet Printer Litig.*, No. CV 07-0667 AG (RNBx) (C.D. Cal. Jan. 4, 2011).

2005, PUB. L. NO. 109-2, § 2(a)(2)-(3), 119 STAT. 4, 4 (Feb. 18, 2005).

Plaintiffs' lawyers targeting the automotive industry already have forced a wide variety of money-driven litigation under Rule 23(b)(2). For example, one federal district court certified an antitrust class action—premised on sprawling allegations of an anticompetitive conspiracy between domestic automakers and several Global Automakers members to prevent new Canadian vehicles from being imported into the United States—under Rule 23(b)(2). See *In re New Motor Vehicles Canadian Export*, 2006 WL 623591, at *7 (D. Me. Mar. 10, 2006), *rev'd*, 522 F.3d 6 (1st Cir. 2008) (vacating certification because plaintiffs lacked standing to seek injunctive relief). Even though the plaintiffs also sought hundreds of millions—even billions—of dollars in damages under state law, the district court concluded that because "the plaintiffs' federal damages claim * * * has been dismissed," the claims for injunctive relief predominated over any remaining damages claims. *Ibid.*

Other courts have rebuffed plaintiffs' requests for certification under Rule 23(b)(2) as attempted end-runs around the predominance requirement of Rule 23(b)(3). But adoption of a "strength, influence, and authority" standard might change the result. For example:

- In one case, the plaintiffs alleged that automakers and their dealers were violating the antitrust laws in passing along a state tax to car buyers. Although plaintiffs sought treble damages on behalf of every car buyer in Texas during a nine-year period, they tacked on a request for an injunction against future collection of the tax so that they could seek certifica-

tion under Rule 23(b)(2). See *Robinson* v. *Texas Automobile Dealers' Ass'n*, 2003 WL 21756591, at *2 (E.D. Tex. Mar. 25, 2003), rev'd on other grounds, 387 F.3d 416 (5th Cir. 2004).

- Another antitrust plaintiff alleged that the defendants had conspired to inflate the prices of new cars sold or leased in New York during a seven-year period. *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 183 (D.N.J. 2003). To justify certification under Rule 23(b)(2), the plaintiff coupled his request for treble damages with a request for "an injunction against continuing the conspiracy." *Id.* at 186.

- Plaintiffs in another action alleged a transmission defect that could cause the vehicle to "slip into the reverse position while not being placed there by the driver." *Walsh* v. *Ford Motor Co.*, 106 F.R.D. 378, 383 (D.D.C. 1985), *rev'd on other grounds*, 807 F.2d 1000 (D.C. Cir. 1986). The plaintiffs sought to certify immense damages claims under Rule 23(b)(2) because they also requested an injunction ordering the alleged defect repaired. See *id.* at 383-385, 391-392; see also, *e.g.*, *Parks Automotive Group, Inc.* v. *General Motors Corp.*, 237 F.R.D. 567, 569, 573 n.4 (D.S.C. 2006) (similar maneuver by plaintiffs alleging weather-related damage to the paint on some new cars).

- Another product-liability plaintiff justified certification of his damages claim under Rule 23(b)(2) by simply adding a request for an injunction requiring the defendant to "recall" the vehicles—trenching on federal regulators'

> safety-recall authority—and to "return[] the full costs paid for purchase or lease of the defective vehicles." *Rosen* v. *J.M. Auto Inc.*, 2009 WL 7115133, at *1-*2, *10 (S.D. Fla. Jan. 26, 2009) (internal quotation marks omitted).

Under the flexible standard applied below, each of these classes potentially could have been certified under Rule 23(b)(2). Indeed, plaintiffs could invoke the Ninth Circuit's rationale when bringing many automotive-warranty claims that seek a model-wide repair-or-replacement remedy or a recall and inspection to determine whether an asymptomatic part or system had failed. Warranty claims for damages generally would require some showing that a part or system had failed and that the manufacturer failed to repair it when presented with a complaint. That analysis is inherently individualized. Yet add a prayer for injunctive relief—perhaps to recall, inspect, and repair all vehicles, or to replace all parts with a higher-than-normal failure rate even if they had not failed in a particular vehicle—and the only thing necessary for class certification would be a conclusion that injunctive relief had more "strength, influence, and authority" than the accompanying claims for damages, especially claims seeking "restitution" for the supposedly diminished value of a functioning part that had an excessive tendency to fail.

The risk for abuse is obvious. A plaintiff could sue an automaker for allegedly causing the cigarette smell in his car, so long as he can concoct a theory by which the air conditioning system is to blame. An individual claim could be defeated on the merits or settled for nuisance value. But under the decision below, the plaintiff might obtain class certification

for a colossal damages claim merely by asking in addition for an order compelling the automaker to repair or replace the air conditioner in every car. A nuisance lawsuit could become a threat to the company's bottom line simply by seeking a broad injunction.

If the ruling below stands, similarly dubious class actions will proliferate. That would benefit no one but a small segment of the plaintiffs' bar.

II. THIS COURT SHOULD ARTICULATE A CLEAR AND COHERENT DEFINITION OF THE COMMONALITY REQUIREMENT IN RULE 23(A)(2).

This Court directed the parties to address whether the class certified in the order under review satisfied the threshold requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy. As petitioner demonstrates, the class does not meet the last three requirements. Pet. Br. 18-33.

We focus here on the proper analysis of commonality: whether "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). What constitutes a "question[ ] of law of fact common to the class" is significant for two reasons. First, the lower federal courts have so diluted the commonality requirement that it is "easily met in most cases." 1 NEWBERG ON CLASS ACTIONS, *supra*, § 3:10. As the leading treatise has observed, because courts "have given [this requirement] a "permissive application," "common questions have been found to exist in a wide range of contexts." 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1763 (3d ed. Supp. 2010).

Second, and more importantly, the definition of commonality has a profound effect on the analysis required for certification under Rule 23(b)(3), which echoes Rule 23(a)(2) in requiring that "the questions of law or fact common to class members *predominate* over any questions affecting only individualized class members." How a court defines a "question * * * common to [the] class" necessarily affects which questions fall on which side of the line drawn in Rule 23(b)(3) between issues consistent with class treatment and issues requiring individual resolution.

As we explain below, this Court should define a "common" question to mean a question amenable to class-wide proof, disapproving the frequent and inappropriate use of legal abstractions to support certification of deeply individualized actions. And the Court should specifically disapprove (or severely limit) two components of the commonality analysis used to certify the class in the order under review. First, the court held that plaintiffs can establish commonality merely by presenting evidence tending to suggest that the class was affected by a common policy or practice, permitting them the advantages of class status (including settlement leverage) while they try to establish the predicate for class-wide cohesion. Second, the court adopted a novel "sampling" technique to shoehorn selected individualized issues into the class action, while sidestepping the rest. Each of these errors increases the likelihood that putative class actions will be inappropriately certified.

A. A "Common" Question Under Rule 23(a) May Not Be Abstract Or Immaterial, But Rather Must Be An Element (Or Subcomponent) Of A Properly Defined Claim That Is Amenable To Class-Wide Common Proof.

The "question of law or fact common to the class" should not be defined so abstractly that any common legal theory or shared factual circumstance would weigh on the "common" side of the balance. The commonality requirement should be defined in accord with its purpose of helping to sift actions that are susceptible to class resolution from those that are not, both as a threshold requirement for all class actions and as one side of the balance in Rule 23(b)(3). As the Court has observed, a class action provides a fair and economical means to litigate disputes that raise questions that apply "*in the same manner* to each member of the class," and thus may be proved through one unified inquiry rather than many. *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979) (emphasis added). For an issue to be common, it must be at least "unlikely that differences in the factual background of each claim will affect the outcome of the legal issue." *Ibid.* As a consequence, a "question[] of law or fact common to the class" must be a question that not only shares characteristics across the class members' individual claims, but that also can be resolved—consistent with due process—through common proof on a class-wide basis.

As indicated above, many courts have defined "common" issues so broadly that they necessarily appear in almost any putative class action and predominate far more often than they should. For example, in a product liability action, whether a manu-

facturer violated a duty to warn of an alleged danger turns in part on the individualized inquiry into whether the omitted warning would have prevented the harm. See, *e.g., Koken* v. *Black & Veatch Constr., Inc.*, 426 F.3d 39, 45 (1st Cir. 2005). Yet courts often deem this question a common one. See, *e.g.*, *Keilholtz* v. *Lennox Hearth Prods., Inc.*, 268 F.R.D. 330, 343 (N.D. Cal. 2010). Moreover, some courts decline to identify the issues of law properly in the case, characterizing disputes over the plaintiff's requirement of proof as themselves "common" issues supporting class certification. Those courts eschew proper evaluation of the *elements* of the pleaded claims at the class-certification stage, viewing that inquiry as an inappropriate and premature evaluation of the merits.

But that is not so. For a question to be "common" to the class so as to weigh in the balance, it must be a question properly presented by the case. Otherwise the mere assertion of a groundless legal theory would be sufficient to force class proceedings. The Ninth Circuit appears to have avoided resolving such a question here. See Pet. App. 53a-79a. While we take no position on that question's proper resolution, we urge the Court to hold that the lower courts have a duty to determine which purportedly common questions are *legitimately* at issue before relying on those questions to support certification. Determining whether and how a question must or can be proved does not inappropriately predetermine the merits, so long as the court does not decide whether the necessary element *has* been proved.

B. A Dispute Over The *Existence* Of A Common Practice Or Policy Affecting Class Members Is Not A "Common Question Of Law Or Fact" Under Rule 23(a).

The cohesion of many properly certified classes hinges on the common question whether a particular common policy is unlawful. Unless the common policy exists, however, there can be no common question. The court below, like some other courts, has short-circuited this inquiry to permit certification of a class of plaintiffs precisely in order to inquire into the existence of a common policy that might support the adjudication of dispositive questions using class-wide common proof. That course improperly permits plaintiffs to derive the benefits and leverage of class certification in order to bolster their case for certification itself. While a court's determination whether a common policy exists (and thus permits class-wide determination of its lawfulness) need not be final, the court cannot defer the determination with one hand while with the other certifying a class whose cohesion depends on the determination's outcome.

In this case, the plaintiffs contend that Wal-Mart has a *de facto* policy of delegating pay and promotion decisions on "excessively subjective" terms, which allegedly leads to discrimination against female employees. Pet. App. 80a. Assuming that such a policy exists, whether it constitutes discrimination under Title VII might be a common question under Rule 23(a)(2). But Wal-Mart denied that any such policy exists, and submitted its own contrary evidence to demonstrate that determining whether its employees were subjected to unlawful discrimination would require considering a welter of individualized evidence. *Id.* at 53a-79a, 110a & n.56. Rather than resolve this

disagreement, the Ninth Circuit held that "[t]he disagreement *is* the common question, and deciding which side has been more persuasive is an issue for the next phase of the litigation." *Id.* at 71a.

That approach fundamentally misunderstands commonality under the Rule. As this Court has explained, when a common question may be resolved "in the *same* manner [for] *each* member of the class," a class action "saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 155 (1982) (quoting *Califano*, 442 U.S. at 701) (emphasis added). But the Ninth Circuit focused exclusively on whether, viewed in isolation, the *plaintiffs*' evidence raised a common question; the court declined to determine whether the common policy that would permit common, class-wide resolution of a significant issue actually *existed*.

"Properly understood," however, the commonality inquiry "turns on the capacity of a unitary proceeding to yield common answers" to a question that would advance the litigation. Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. EN BANC 149, 154 (2010). In determining commonality, "courts should determine whether common answers more likely than not exist, based upon the evidence and legal argumentation offered *both* ways." *Ibid.* (emphasis added). The court may reconsider its answer as the case progresses and evidence comes to light. Rule 23(c)(1)(C) provides a means to correct errors in class-certification orders that are revealed by further evidence. But the court must determine whether common issues *exist* at the

certification stage; a court cannot certify a class for the purpose of proving a necessary premise for its own certification.

By refusing to resolve whether plaintiffs had established the existence of a common policy affecting class members, the court below paid only lip service to this Court's command to "evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)," and to ensure "after a rigorous analysis" that the requirements of Rule 23(a) have been met. *Falcon*, 457 U.S. at 160-161. As other courts have recognized, it is not sufficient for a plaintiff simply to present evidence suggesting that the claims at issue may turn on a common question. Rather, the plaintiff must affirmatively prove it.[6]

The Ninth Circuit's approach to commonality could lead to the improper certification of class actions in contexts having nothing to do with either employment or invidious discrimination. For example, plaintiffs suing automobile makers and dealers often attempt to manufacture a common question warranting class certification by alleging the existence of a *de facto* "policy" of some sort—such as to conceal an alleged defect, or to deny full repairs for it. See, *e.g.*, *Veal* v. *Crown Auto Dealerships, Inc.*, 236 F.R.D. 572, 580-581 (M.D. Fla. 2006) (class ac-

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[6] See, *e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 322 (3d Cir. 2008) (district court should have resolved dispute over whether there was class-wide antitrust injury); *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 42-43 (2d Cir. 2006) ("*IPO*") (requiring proof, not merely "some showing," of "the existence of an efficient market to invoke" fraud-on-the-market "presumption").

tion plaintiff "alleg[ed] a common scheme and course of conduct" to deceive car buyers about value of the "Etch product"). But if it were enough for the plaintiff to present *some* evidence of the alleged policy—such as declarations from a handful of other plaintiffs who felt misled—then the class could be certified regardless of a defendant's proof that it made disclosures to particular customers and rendered the proper resolution of any class member's claim dependent on individualized factual determinations.[7]

The potential efficiency gains from certifying a class action would be realized only if the alleged common policy of deceiving customers in fact exists. But if the evidence demonstrates that the existence of such a policy is doubtful, the case for certification is equally suspect. To certify first and ask questions later improperly treats a question that should be a prerequisite for class certification as *itself* a common question justifying certification.

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[7] The vague allegations made in litigation against automakers asserting a "policy" to deceive consumers or to deny warranty claims have nothing in common with the "pattern or practice" discrimination actionable under Title VII. There is no analogue in consumer-fraud and product-liability cases to the *Teamsters* presumption of discrimination against each class member that follows upon a finding of a pattern or practice of discrimination. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 (1977). Should this Court find commonality satisfied here, it should make clear that its ruling is limited to claims under Title VII and does not resolve the showing necessary to establish commonality for other causes of action.

C. A Question Not Susceptible To Common Proof Cannot Be Made "Common" By Sampling The Individualized Evidence Needed To Answer It.

The Ninth Circuit more than once has acknowledged that purported "class" claims in huge classes cannot be resolved without individualized evidence. See Pet. App. 84a, 88a; see also *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 785-787 (9th Cir. 1996) (claims of 10,000 plaintiffs claiming to have been harmed by Marcos regime in Philippines). Rather than acknowledge that this defeated predominance under Rule 23(b)(3) (*Hilao*) or the fundamental cohesion required under Rule 23(b)(2), that court simply has relabeled the problem as one of "manageability." Pet. App. 105a. To address that concern, the court proposed sampling techniques. *Id.* at 105a-110a

Under that approach, the district court would conduct a few "sample" trials to decide individualized issues on elements of the plaintiffs' discrimination claims, and then assume that the same percentage of other class members would prevail on that element. See Pet. App. 110 n.56 (Wal-Mart may "present individual defenses in the randomly selected 'sample cases,' thus revealing the approximate percentage of class members whose unequal pay or nonpromotion was due to something *other* than gender discrimination"). But sampling a series of individual trials and then extrapolating their results to thousands or millions more plaintiffs violates Rule 23 and elementary principles of due process.

The impossibility of considering all of the necessary evidence in one proceeding is proof positive that the claims are not susceptible to common proof, as

Rule 23(a)(2) requires. Moreover, this probabilistic, "rough justice" approach to commonality almost certainly would make a defendant liable to class members who could not prove their claims in an individual trial. See Pet. Br. 36-38. As petitioner has demonstrated, this proposal violates due process and the Rules Enabling Act, 28 U.S.C. § 2072(b), by allowing a person who could not recover on her own nonetheless to recover damages based on harms caused to others. Indeed, for these reasons, the Fifth Circuit has rejected the adoption of a "sampling" approach to the trial of asbestos claims. See *Cimino* v. *Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998).[8]

Unless this Court condemns adjudication by sampling, such probability-based liability would encourage the pursuit of a limitless number of illegitimate lawsuits involving proposed classes of consumers that were defined irrespective of actual exposure to, or injury from, the challenged conduct of the defendant. In every case, an overbroad class could be defined and liability whittled in bulk by the use of sampling techniques—but only those uninjured parties who were unfortunate enough to be included in the sample would risk being excluded from a windfall based on others' injuries.

Under traditional class-action principles, many product-liability lawsuits against automakers are not suitable for class-wide adjudication precisely be-

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[8] In addition, to the extent that different juries hear the trials of the common issues and the "sample" cases, the Ninth Circuit's "sampling" approach runs afoul of the defendant's Seventh Amendment right not to have the verdict of one jury reexamined by another. See *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1303 (7th Cir. 1995).

cause, even when a vehicle component is allegedly defective, the defect does not manifest in most vehicles. An individualized inquiry is therefore needed to determine whether any given vehicle has the problem. The tort law of almost every state bars recovery when an allegedly defective vehicle has never manifested the alleged defect. See, *e.g.*, *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2002) ("No injury, no tort, is an ingredient of every state's law."); *Briehl* v. *General Motors Corp.*, 172 F.3d 623, 627-628 (8th Cir. 1999) (collecting cases). And even when a vehicle suffers damage, often the damage could have resulted from other causes, such as driver misuse. These individualized defenses on injury and causation often lead courts to reject requests for class certification. See, *e.g.*, *Cole* v. *General Motors Corp.*, 484 F.3d 717 (5th Cir. 2007) (affirming denial of certification of class of car buyers alleging that a defect causes unexpected side air-bag deployments).

Class-action plaintiffs' counsel have responded by recharacterizing their claims under theories of consumer protection or warranty. For example, the plaintiff might allege that the automaker violated a state consumer-protection law by inadequately disclosing the possibility that a defect might affect performance. See, *e.g.*, *Chamberlan* v. *Ford Motor Co.*, 223 F.R.D. 524, 525 (N.D. Cal. 2004), Rule 23(f) pet. denied, 402 F.3d 952 (9th Cir. 2005). Or plaintiffs might assert that the mere possibility that a vehicle component might fail is itself a breach of warranty entitling the purchaser to immediate recovery for any diminution in the value of the vehicle, or restitution for an excessive price paid.

Claims of this type are brought in an effort to render individualized issues of causation and injury irrelevant to class certification. Moreover, these claims are particularly susceptible to abuse because any hypothetical vehicle defect could support a claim. So long as a lawyer (or hired expert) can imagine a way in which a vehicle component might fail or degrade, then all purchasers could state a claim for damages—even if the alleged defect rarely if ever manifests itself or would almost never be the cause of any damage.

Plaintiffs have succeeded in obtaining class certification on these theories in a few cases. For example, in one case, the plaintiffs alleged that a defect in the alignment of certain Land Rover models could cause excessive tire wear in a small fraction of vehicles. *Gable* v. *Jaguar Land Rover N. Am., LLC*, 2008 WL 4441960, *1 (C.D. Cal. Sept. 29, 2008). The district court declined to certify a class of all Land Rover purchasers because individualized issues on causation and injury swamped any common issues. *Id.* at *3. But the Ninth Circuit reversed, pointing to a diminished-value theory of liability that (in its view) rendered these individualized defenses irrelevant. See *Wolin* v. *Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173-1174 (9th Cir. 2010).

Similarly, in *Daffin* v. *Ford Motor Co.*, 458 F.3d 549 (6th Cir. 2006), a plaintiff alleged that a defect in his van's throttle body assembly caused the accelerator to stick. *Id.* at 550. Although the alleged defect would not cause accelerator problems in the vast majority of vans, and unintended acceleration could result from numerous other issues—such as driver error—the court nonetheless affirmed the certification of a class of all van purchasers on a diminished-value

theory. *Id.* at 554; see also, *e.g.*, *Chamberlan*, 402 F.3d at 955 (affirming class certification on a diminished-value theory of claim that alleged defect in manifold might lead to coolant leaks in some vehicles).

Another recent decision involves a variation on the theme. In *Marcus* v. *BMW of North America, LLC*, 2010 WL 4853308 (D.N.J. Nov. 19, 2010), a car buyer sued BMW for the cost of replacing his damaged run-flat tires. When he purported to represent a class of BMW car buyers, BMW pointed out that that there was no common proof: The nail that had punctured the named plaintiff's tire would have destroyed any tire, and given the absence of a defect in the run-flat tires, nothing unified the claims of anyone else whose tires might have been damaged. See *id.* at *4. But a class was certified based on the plaintiff's diminished-value theory that the class had not been adequately informed of how expensive it would be to replace a damaged run-flat tire; the "common" issue was whether BMW knew "that the[tires] were costly and difficult to repair." *Ibid.*; see also *In re Mercedez-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 73 (D.N.J. 2009) (certifying claim that Mercedes failed to inform customers that third party supplier might not maintain telecommunications network for road-side assistance service in perpetuity, because "each class member got something less than he or she was promised").

These cases remain outliers. Most courts have rejected plaintiffs' attempts to skirt the individualized issues of injury and causation in product-liability and warranty cases by pursuing a diminished-value claim. As the Seventh Circuit has explained, because "tort law fully compensates those

who are physically injured, * * * any recoveries by those whose products function properly mean excess compensation." *Bridgestone/Firestone*, 288 F.3d at 1017. For this reason, plaintiffs' attempts to obtain certification of classes defined irrespective of class members' actual injury often have failed.[9]

But approval of a sampling approach—if extended beyond the employment-discrimination context—could nullify both the commonality screen in Rule 23(a)(2) and the predominance analysis in Rule 23(b)(3). Plaintiffs would not have to rely on a diminished-value theory that few states recognize. Rather, plaintiffs could simply aggregate thousands or millions of consumers in an all-buyers or all-owners class, and then circumvent their inability to try the claims through common proof by proposing to consider individualized evidence in "sample" cases. See Pet. App. 110a n.56.

That result, however, would be profoundly unfair to both the defendant and the absent class members. The defendant would be deprived of the right to present all defenses to each plaintiff's claim, thus "abridg[ing]" the defendant's rights in violation of the Rules Enabling Act, 28 U.S.C. § 2072(b). In addition, that Act, Article III, and due process alike would be violated if "individual plaintiffs who could not recover had they sued separately *can* recover only be-

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[9] See, *e.g., Briehl*, 172 F.3d at 628-629; *Angus* v. *Shiley Inc.*, 989 F.2d 142, 148 (3d Cir. 1993); *Carlson* v. *General Motors Corp.*, 883 F.2d 287, 297-298 (4th Cir. 1989); *Chin* v. *Chrysler Corp.*, 182 F.R.D. 448, 460 (D.N.J. 1998); *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 805 (E.D. La. 1998); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 603 (S.D.N.Y. 1982).

cause their claims were aggregated with others' through the procedural device of the class action." *Philip Morris U.S., Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers) (suggesting due process limits on state-court procedure with that result). And the absent class members with meritorious claims would be undercompensated in order to provide a windfall recovery to class members who could not prevail on their own.

Moreover, the actual trials of sample cases would almost certainly never take place. Defendants could not assume the risk, because the consequences of any cases lost would be multiplied a thousandfold or more. Settlement would become nearly inevitable if certification were that easy. While plaintiffs always have the option to pursue individual actions or actions on behalf of a properly defined but smaller class, for the defendant, class certification often *is* the whole ball game. See page 14, *supra*. The enormous potential liability forces a settlement regardless of the merits.

If class certification became automatic because individualized issues of causation and injury (and thus standing and Article III jurisdiction) may be pigeonholed as "manageability" issues and resolved through sampling, class certification would become the primary (but fundamentally unfair) mode of dispute resolution. Congress never intended Rule 23—and Rule 23(a)(2) in particular—to have that result.

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The commonality requirement of Rule 23(a)(2) is not a simple pleading exercise, but provides a critical tool for separating cases that can be resolved through common proof from those that cannot. Fail-

ing to articulate firm, concrete, and practically applicable standards for commonality (and thus for the Rule 23(b)(3) predominance analysis that incorporates it) would allow certification of class actions that could never be tried consistent with due process. The Court should clarify the Rule's meaning to prevent that result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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