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 RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The question presented in this case is of crucial importance to the retail industry, which stands on the front line of class-action litigation in virtually every jurisdiction nationwide. Major retailers are subject to a steady barrage of cases that rely upon

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[1] No counsel for a party authored this brief, in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to this brief's preparation or submission. Petitioners and respondents have filed blanket letters of consent to the participation of *amici curiae*.

novel and sometimes dubious theories seeking to achieve class-action status. The reason plaintiffs and their lawyers are so eager to obtain class certification is simple: Class actions almost always settle before they are subject to adversarial testing in the courtroom. Modern class actions are large, expensive, and highly unpredictable—so much so that rational corporate decisionmakers can seldom afford to do anything but settle. Class certification, simply put, is the ballgame.

Accordingly, diluting the requirements set forth in Fed. R. Civ. P. 23 imposes a crippling and unwarranted burden that retailers in this economy can scarcely afford. The requirement that a proposed class adduce significant, admissible evidence to show that damages may actually be proved on a class-wide basis represents a reasonable safeguard against abuses of the class-action device. Essentially, the decision below undermines this Court's holding in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), and disregards the principle that courts must rigorously analyze the facts and plaintiffs must introduce admissible evidence that the case is amenable to an award of damages on a class-wide basis before certification. RLC and its members thus have a significant interest in ensuring that this and related standards under Rule 23 are fully enforced.

SUMMARY OF ARGUMENT

I. A. The decision below represents a serious threat to defendants who face class-action lawsuits on a daily basis. The panel majority's decision

remakes what is supposed to be a "rigorous analysis" of the Rule 23 certification criteria into a dangerously low standard that virtually any group of plaintiffs could satisfy. According to the court below, an expert's conclusion that damages can be proved on a class-wide basis not only is immune from a threshold showing of admissibility under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), but also may be riddled with other inadequacies and weaknesses. So long as an expert's theory could "evolve" into admissible evidence, the panel majority concluded, it passes muster. Moreover, an expert need not connect a theory of damages to a particular theory of injury, and even openly "speculative" conclusions are permitted at the class-certification stage. A standard with so many gaping holes is no meaningful threshold at all.

B. Remarkably, the decision below pays almost no heed to this Court's recent pronouncement in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). The district court in *Dukes* had concluded, like the decision below, that *Daubert*'s admissibility requirements did not apply at the certification stage; this Court expressed "doubt" about that conclusion. From that guidance, the panel majority somehow drew the opposite conclusion that expert evidence need *not* be admissible, but merely be capable of "*evolv[ing]* to become admissible evidence." The decision below also overlooked the probing examination of the plaintiffs' expert evidence in *Dukes*. Indeed, the very sort of analysis this Court undertook in *Dukes* would have been dismissed as premature by the panel majority.

II. A. The decision below justified its lax standard on the assumption that defects in an expert's methodology would be addressed later in the litigation. In the real world, that opportunity seldom exists. It is widely recognized that most class actions settle after certification. The risks of trying thousands of claims in a single lawsuit often are too great for rational corporate decisionmakers to bear. That is true even where the merits of the underlying case are weak, because even a single error in determining liability may have catastrophic consequences and because the direct and indirect costs of defending such an action can be overwhelming. In short, plaintiffs who succeed in certifying a class are almost always able to extract what Judge Friendly aptly termed a "blackmail settlement."

B. The pressure to settle would be even greater if the rule adopted below were affirmed. By expressly condoning "evolv[ing]" expert theories—even those that fail to connect injury and damages or are otherwise "speculative"—the decision below introduces still further uncertainty when evaluating a case for purposes of trial or settlement. Defendants will be unable to meaningfully analyze plaintiffs' expert theories, and plaintiffs likewise will not be forced to undertake a candid evaluation of their own cases. Shifting theories make for uncertain outcomes, and uncertainty coerces unwarranted settlements.

III. Requiring admissible evidence is an important protection against abuses of the class-action device. Retailers and other large businesses

face a constant stream of class-action lawsuits. Those lawsuits frequently invoke novel or aggressive theories of class-wide liability and damages, often requiring significant expert evidence regarding whether the claims can be properly certified. The exceedingly permissive standard adopted below opens the door to further attempts to shoehorn cases into Rule 23 that have no business proceeding as class actions.

ARGUMENT

I. The Third Circuit's Standard Is Dangerously Lax And Squarely At Odds With *Dukes*

While paying lip service to the principle that district courts must undertake a "rigorous analysis" of Rule 23(b)(3)'s requirements, the panel majority in reality demanded no such thing. Rather, it endorsed a rule that imposes no meaningful restraint on plaintiffs asserting a class-wide damages theory. Plaintiffs need only offer a theory that might "evolve" to become the kind of proof that would actually justify class-wide treatment—indeed, the panel majority expressly acknowledged that its rule would accommodate "speculative" methodology. That is no hurdle at all, and it is certainly not the genuinely rigorous threshold showing of "significant proof" reaffirmed in *Dukes*. 131 S. Ct. at 2553 (quoting *General Telephone Co. of Southwest* v. *Falcon*, 457 U.S. 147, 159 n.15 (1982)).

A. The Decision Below Eviscerates The Rule 23(b)(3) Inquiry

To understand why affirming the decision below would be disastrous for companies that deal with class-action litigation on a daily basis, it is necessary first to appreciate just how low the court of appeals set the bar. Troubling legal principles lurk in the panel majority's opinion—propositions that, if taken at face value, would permit almost *any* proposed class to claim that damages could be measured on a class-wide basis.

1. *Evolution.* In its lengthy footnote responding to Judge Jordan's statement that *Daubert* should apply to expert opinions offered at the certification stage, the panel majority made a startling confession: Not only is it unnecessary for such an opinion to survive the *Daubert* threshold, but the opinion need not even be close to passing. So long as "an expert is presenting a model which *could evolve* to become admissible evidence," that is sufficient. Pet. App. 44a n.13 (emphasis added). But almost anything could be described as capable of such "evolution."

Indeed, when the panel majority briefly tried to explain what that concept means, it said only that an acceptable model would be "based on data." *Ibid.* What data? Here, for example, there is great controversy over whether certain counties outside of the Philadelphia Designated Market Area offer appropriate benchmarks by which to compare prices. The panel majority said such questions do not matter at the certification stage, but "data" are entirely

irrelevant to this case if they do not meet that basic condition. Simply put, if the cable market in Chicago is not similar in relevant respects to the market in Philadelphia, an expert might as well be comparing the prices of pizzas to cheesesteaks.

The lack of content in this "evolutionary" test is evident from the panel majority's inability to identify how the district court decided that the plaintiffs' model was sufficient. All the panel majority could say was that "the District Court *likely* determined that Dr. McClave's model could be refined between the time when class certification was granted and trial so as to comply with *Daubert*." *Ibid.* (emphasis added). A district court decision that contains a truly "rigorous analysis" yielding "significant proof" should not require such guesswork by a reviewing court.

2. *(No) Connection.* The panel majority then went a step further. Responding to the concern that the class-wide damages theory failed to distinguish among the four theories of antitrust injury plaintiffs initially asserted—three of which had been rejected by the district court on grounds not disputed on appeal—the panel majority concluded that it was not necessary to link the asserted class-wide damages theory to a particular injury. "At the class certification stage," the panel majority concluded, "we do not require that [p]laintiffs tie each theory of antitrust impact to an exact calculation of damages." Pet. App. 46a. Rather, plaintiffs need only "assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations." *Ibid.*

But how can a court be "assured" that damages can be measured and proved on a class-wide basis when the only expert evidence offered does not distinguish between cognizable and legally invalid injuries? The report says only that damages to plaintiffs who suffered a *combination* of injuries are susceptible to class-wide proof; it does not answer whether such proof could suffice for a single injury.

A brief example illustrates the point. Suppose that a class of plaintiffs asserted claims against a state agency under the Equal Protection Clause and 42 U.S.C. § 1983, claiming that the plaintiffs were discriminated against on the basis of their race and height. Suppose further that the plaintiffs offered an expert report concluding that the State tended to promote tall applicants from one particular racial subgroup and that the plaintiffs tended to suffer diminished income and professional opportunities as a result. Discrimination on the basis of height, of course, is not constitutionally cognizable so long as it is supported by any conceivable rational basis. But the hypothesized expert report makes no effort to determine how many plaintiffs were (a) tall, (b) from a preferred or disfavored racial group, or (c) some combination thereof. It cannot reliably opine that a particular form of proof would establish damages to all class members without attempting to isolate the cognizable injuries from the invalid ones. That is, it is not enough to say: "We have a class-wide way to show damages to all plaintiffs, even if we can't tell whether a legally cognizable injury caused those damages."

3. *Speculation.* Last but not least, the panel majority relieved plaintiffs from showing even that a proffered expert report is internally sound. Distinguishing cases in which courts had challenged experts' damages theories on methodological grounds, the court stated that "[w]e have not reached the stage of determining on the merits whether the methodology is a just and reasonable inference *or speculative*." Pet. App. 47a (emphasis added). The court put it just as starkly when rejecting Comcast's specific challenges to the expert's methodology: Such challenges "have *no place* in the class certification inquiry." *Id.* at 48a (emphasis added).

These statements illustrate in dramatic fashion just how low the panel majority set the bar. In the panel's view, a theory of class-wide damages is subject to no significant adversarial testing at the class-certification stage. Plaintiffs need only proffer a theory that the court is willing to accept under the minimal standards described above; a defendant apparently has no meaningful role to play at the certification stage in explaining why the plaintiffs' theory is flawed. That asymmetry leaves courts at a profound disadvantage, because defendants are more likely than the district court to have the expertise and resources to identify flaws in an expert's methodology. The predictable result is certification of classes that should not ultimately pass muster under Rule 23.

B. *Dukes* Demands Much More

As described above, the panel majority did not hold merely that evidence supporting a class-wide

damages theory need not be fully admissible—it eviscerated the class-wide damages element of the class-certification inquiry. Petitioners have explained at length, Pet. Br. 16-49, why that is squarely at odds with Rule 23 and this Court's precedent. It is worth highlighting here three ways in which the panel majority's "close enough" theory of class certification is particularly at odds with this Court's most recent pronouncement in *Dukes*.

For starters, the panel majority misread *Dukes* to contain only a "*hint*[] that *Daubert may* apply for evaluating expert testimony at the class certification stage." Pet. App. 44a n.13 (emphasis added). With respect, that hardly seems a fair characterization of the Court's statement that it "doubt[ed]" the lower court's conclusion that *Daubert* did not apply, followed by the Court's rejection of the plaintiffs' expert opinion. 131 S. Ct. at 2554. And it is far from clear how the panel majority made the leap from that passage in *Dukes* to the *contrary* idea that a district court need only "evaluate whether an expert is presenting a model which could evolve to become admissible evidence." Pet. App. 44a n.13. The Court in *Dukes* said nothing about "evolution" and gave no indication that some lesser version of *Daubert* would apply, much less the heavily diluted standard endorsed below.

The panel majority also overlooked the fact that *Dukes* specifically examined the defendants' objections to the expert testimony offered in support of certification. There, the plaintiffs' expert opined that Wal-Mart operated under "a 'general policy of discrimination'" that he claimed was evidenced by

Wal-Mart's "'strong corporate culture,'" which made Wal-Mart "'vulnerable' to 'gender bias.'" 131 S. Ct. at 2553 (quoting *Dukes* v. *Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 152 (N.D. Cal. 2004)). The defendant then challenged his opinion in deposition, eliciting testimony conceding that "'he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.'" *Ibid.* (quoting 222 F.R.D. at 192). This Court specifically relied on that objection in holding that the plaintiffs had failed to satisfy Rule 23. In the panel majority's view, however, such questioning of the expert's methodology would have been premature.

Similarly, *Dukes* examined in detail whether the plaintiffs had offered "significant proof" to connect their claim of injury (denial of promotion and higher pay) with "the existence of a class of persons who have suffered the same injury as that individual." 131 S. Ct. at 2553. The Court held that plaintiffs must "bridge[]" the "conceptual gap" between those two allegations, and found such evidence lacking. *Ibid.* Although the issue there arose in the context of Rule 23(a)'s commonality and typicality requirements, the Court's analysis is equally applicable here to the plaintiffs' lack of connection between a particular theory of antitrust injury and the assertion that damages can be proved on a class-wide basis. The panel majority concluded that such connections need not be shown "[a]t the class certification stage." Pet. App. 46a. *Dukes* required exactly the opposite.

* * *

In sum, the decision below and *Dukes* read like two ships passing in the night. The former set an improbably low standard for evidence necessary to achieve class certification, rejecting the need for admissible expert evidence under *Daubert* and dismissing basic logical defects as irrelevant. The latter not only suggested that *Daubert* should apply, but also subjected plaintiffs' evidence to detailed scrutiny. This Court should reaffirm the rigorous analysis required in *Dukes* and expressly hold that admissibility is a necessary precondition for evidence submitted in support of class certification.

II. Delay In Confronting Errors In An Expert's Methodology Coerces Unwarranted Settlements

The premise of the panel majority's reasoning was that defects in an expert's class-wide-damages theory would be addressed later in the proceeding. In practical reality, that premise is false: The vast majority of class actions settle long before trial. As a result, massive sums will be extracted from defendants in cases that have no business proceeding as class actions.

A. Certification Coerces Settlement

The panel majority's desire to defer challenges to an expert's methodology until after certification ignores the indisputable fact that most class actions never see a courtroom. That is because—regardless of whether certification was proper—certified class actions are simply too risky to try. The combination

of thousands of claims into a single lawsuit—subject to a single jury verdict—transforms many otherwise ordinary lawsuits into bet-the-company litigation. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). Accordingly, "[w]hatever their partisan stakes in a given litigation, all sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis (and not otherwise resolved by dispositive motion) result in settlements." Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1875 (2006).

That enormous pressure to settle is present even where the merits of plaintiffs' claims are weak. Simply put, a remote chance of a severe outcome is untenable; "defendants would rather settle large class actions than face the risk, even if it be small, of crushing liability from an adverse judgment on the merits." Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1546 n.74 (2000); see also Roger H. Trangsrud, *James F. Humphreys Complex Litigation Lecture: The Adversary System and Modern Class Action Practice*, 76 GEO. WASH. L. REV. 181, 189 (2008) ("[I]f class action certification is granted, defendants are often unwilling to suffer the risks of trial—even in marginal cases—and face enormous pressure to settle the case for a very substantial amount."). Judge Friendly aptly labeled "settlements induced by a small probability of an immense judgment in a

class action 'blackmail settlements.'" *Rhone-Poulenc,* 51 F.3d at 1298 (quoting Henry J. Friendly, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

The possibility of error if the case proceeds to trial (or if a defendant mistakenly evaluates the risk of liability) exacerbates that pressure. Suppose, for example, that a defendant faces lawsuits by several thousand plaintiffs claiming a combined $100 million in damages, but the defendant believes those claims are worth no more than $10 million. If the plaintiffs' claims are litigated individually or in smaller groups, errors in determining liability would tend to cancel each other out; the defendant would win some and lose some and eventually something approaching the expected aggregate liability would result. See *Thorogood* v. *Sears, Roebuck & Co.*, 624 F.3d 842, 849 (7th Cir. 2010), cert. granted and judgment vacated, 131 S. Ct. 3060 (2011). When the claims are aggregated into a class action, however, the defendant has just one "roll of the dice" to decide the fate of every claim. See *Rhone-Poulenc*, 51 F.3d at 1298. A single error would be so costly that the only rational strategy for defendants is often to settle.

The out-of-pocket costs of litigating class actions also exert pressure on defendants to settle. See, *e.g.*, Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 LAB. LAW. 415, 416-17 (2000) (discussing steep costs associated with litigating class action). Pretrial discovery, for example, is especially costly in class actions, and tends to cost defendants far more than plaintiffs. *Thorogood*, 624 F.3d at 850 ("[T]he pressure on [the

defendant] to settle on terms advantageous to its opponent will mount up if class counsel's ambitious program of discovery is allowed to continue."). Defendants may settle to avoid facing such a massive outlay all at once.

There are still further indirect costs of defending a class action. Resources are diverted from productive activities, see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740-41 (1975), sometimes causing defendants to forgo millions of dollars in missed opportunities, see Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 374 (2009). Class actions also involve substantial reputational risk—a class action alleging widespread wrongdoing also makes for headlines that corporate decisionmakers are understandably eager to avoid. See Steven B. Hantler, Victor E. Schwartz & Phil S. Goldberg, *Extending the Privilege to Litigation Communications Specialists in the Age of Trial By Media*, 13 COMMLAW CONSPECTUS 7, 10 (2004). Even the *threat* of a "mega-verdict" can cause the defendants' stock price to plummet. See *id.* at 31-32 (describing 30% stock-price dip when plaintiffs' lawyers met with Wall Street analysts about class actions). In today's viral social-media environment, reputational risks are greater than ever.

None of this is a secret—indeed, the class-action-settlement phenomenon is well documented. See Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1292 (2002) ("[E]mpirical studies * * * confirm what most class action lawyers know to be true: almost all class actions settle."); 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."). These pressures explain why plaintiffs fight so hard to certify the biggest class possible. It is also why Rule 23 authorizes interlocutory appeals from class certification decisions. Fed. R. Civ. P. 23(f) Advisory Committee's Notes to 1998 Amendments ("An order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

These pressures have a predictable effect on the quality—or lack thereof—of class actions. "[T]he ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions." S. REP. NO. 109-14, at 21 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 21; see also *id.* at 20 ("[A] class attorney * * * can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits."). Regrettably, the prophecy that even a meritless class action will settle if certified tends to be self-fulfilling: Each settlement that is extracted from a deep-pocketed defendant encourages the filing of still more frivolous lawsuits—particularly because it is overwhelmingly likely that the merits of the suit will never be tested. See Bone & Evans, *supra*, DUKE L.J. at 1302.

For all these reasons, the panel majority's desire to defer addressing errors or weaknesses in an expert's theory of class-wide damages (or any other showing at the certification stage) is fundamentally misguided. There often is no "later" after a class is certified. Precisely because the class-certification decision significantly impairs the defendant, courts must remain especially vigilant and enforce the proper limitations on the class-action device.

B. The Uncertainty Inherent In The Panel Majority's Rule Magnifies The Pressure To Settle Even Unmeritorious Class Actions

If the risk surrounding *properly* certified class actions coerces unwarranted settlements, the pressure generated by the rule adopted below would be even greater. That is because the panel majority's rule introduces still further uncertainty—indeed, the rule seems to cultivate it.

The panel majority required only that an expert's theory of class-wide damages could "evolve" into admissible evidence by the time of trial; held that a damages theory need not yet identify a particular source of injury; and ruled that an expert may even offer a "speculative" conclusion at the certification stage. All of this gives plaintiffs almost unlimited opportunity to alter their expert theories after certification. If an expert theory offered in support of certification need not even approach standards of admissibility, it may bear only passing resemblance to the theory offered afterward.

That flexibility, in turn, drastically limits a defendant's ability to evaluate the strength or weaknesses of the plaintiffs' expert evidence. It likewise compromises the ability of plaintiffs to evaluate candidly their own case. Setting such a low and malleable bar means that hard questions are neither asked nor answered. The ultimate outcome of these and related issues will therefore remain in doubt beyond the certification stage.

As explained above, uncertainty in certified class actions coerces settlements. The sheer size of a class action significantly increases the likelihood that a defendant will settle the action with little regard to its merits. The aggregation of claims beyond those authorized for class treatment by Rule 23 only adds to those already substantial pressures. If defendants are unwilling to risk proceeding to trial even with a well-developed understanding of the plaintiffs' expert testimony, the additional pressure generated by plaintiffs' opportunity to alter—and, predictably, improve—that evidence after certification will be tremendous.

III. Vigilant Enforcement Of Rule 23's Requirements Is Essential To Prevent Abuse Of The Class-Action Device

Requiring the production of reliable, admissible evidence at the class-certification stage is necessary to rein in widespread misuse of class actions. To be sure, there are those cases in which aggregation is proper and necessary to the fair and efficient adjudication of certain claims. But it is equally—if not more—common that plaintiffs' lawyers seek

certification of cases that lack the cohesion demanded by Rule 23 to generate the settlement pressure described above, reaping significant attorney-fee awards in the process. Defendants' only significant protection against such tactics is the meaningful application of Rule 23's requirements at the certification stage.

Dukes is perhaps the prime example of the need for close scrutiny at certification. That case assembled a staggering 1.5 million plaintiffs claiming employment discrimination at the hands of thousands of decisionmakers across thousands of stores and facilities nationwide. 131 S. Ct. at 2547. Certification was granted by the district court and affirmed by the court of appeals based largely on the plaintiffs' expert's "'social framework' analysis." *Id.* at 2553 (quoting 222 F.R.D. at 152). As noted above, the district court accepted that evidence on the assumption that *Daubert*'s admissibility standard did not apply at the certification stage. This Court ultimately reversed that decision without squarely deciding the *Daubert* issue, but the district court's refusal to demand admissible expert evidence led it to certify a sprawling mélange of claims that had no business proceeding as a single class action.

Dukes is hardly an isolated instance of such overreaching. Class actions continue to be filed in staggeringly large numbers. According to one recent estimate, "about thirty-three hundred new class actions are initiated in federal courts annually." Nicholas M. Pace, *Group and Aggregate Litigation in the United States*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 32, 37 n.9 (2009). Many of those involve claims

or theories of liability or damages that do not appear readily susceptible to class-wide treatment. As a result, the introduction of reliable, admissible expert evidence will be essential to distinguishing potentially valid invocations of the class-action device from those simply seeking to exert settlement or other pressures on defendants.

For example, a district court recently certified a nationwide class of plaintiffs claiming that a retail store's use of elevated "porch-like" entrances violates the Americans with Disabilities Act despite the availability of separate entrances for wheelchair users. See *Colorado Cross-Disability Coalition* v. *Abercrombie & Fitch*, No. 09-CV-02757-WYD-KMT, 2012 WL 1378531 (D. Colo. Apr. 20, 2012). And in *Shields* v. *Walt Disney Parks & Resorts US, Inc.*, 279 F.R.D. 529 (C.D. Cal. 2011), a court certified a class of plaintiffs claiming that the defendant had not allowed special access to park parades for visually impaired patrons.

The point here is not to opine on the underlying merits of these cases; rather, these cases serve simply to illustrate the wide variety of contexts in which the class-action device is successfully employed. Defendants—particularly the large retailers whose interests *amicus* represents—are constantly faced with lawsuits stretching the boundaries of class-wide proof. As in the present case, experts necessarily play an important role in determining whether liability and damages for such a wide variety of claims really can be proved on a class-wide basis. That is why admissible evidence is

essential to avoiding the certification of actions that should not be afforded class treatment.

Some courts take this responsibility seriously and have denied certification to classes where experts cannot demonstrate the necessary connections or where other defects in methodology are apparent. In *Kottaras* v. *Whole Foods Market, Inc.*, 281 F.R.D. 16 (D.D.C. 2012), for example, the district court denied certification because plaintiffs' damages expert's methodology failed to account for products whose prices decreased after the merger. Indeed, the court held that the "low hurdle" for such analysis set by a prior D.C. Circuit decision "now seems inconsistent with what the Supreme Court has articulated [in *Dukes*]." *Id.* at 22. Similarly, in *Roberts* v. *The Scott Fetzer Co.*, No. 4:07-CV-80 (CDL), 2010 WL 3937312 (M.D. Ga. Sept. 30, 2010), the district court rejected expert proof of class-wide damages strikingly similar to that offered here. Seeking to prove damages to plaintiffs who had purchased an appliance not knowing it was refurbished, plaintiffs offered expert evidence of the "but for outcome"—*i.e.*, what a plaintiff would have paid if he or she had been aware of the item's history. 2010 WL 3937312 at *11 n.13 (internal quotation marks omitted). The district court rejected the expert's theory as "'so insubstantial as to amount to no method at all.'" *Id.* at *11 (quoting *Klay* v. *Humana, Inc.*, 382 F.3d 1241, 1259 (11th Cir. 2004)).

Class-action practice needs *more*, not fewer, examples of district courts reining in aggressive uses of the class-action device at the certification stage. If the decision below is affirmed, however, district

courts will be almost powerless to question an expert's methodology or to look behind an assertion that class-wide proof is appropriate. The expert theories in either of the above cases, for example, could have been characterized as capable of "evolving" into admissible proof. But delaying the day of reckoning serves no legitimate purpose. It is far better for courts to resolve such questions up front on the basis of competent, reliable evidence than to them unanswered—particularly when the practical consequence of deferring them is that unwarranted settlements will be extracted in larger numbers and at great cost.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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