No. 12-7085
[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION

On Petition for Interlocutory Appeal from the United States District Court for the District of Columbia

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Circuit's Rule 28(a)(1), amicus curiae certifies:

(A) Parties and Amici. Except for the following, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Opening Brief of Petitioners: Amicus curiae Chamber of Commerce of the United States of America.

(B) Rulings Under Review. References to the rulings at issue appear in the Opening Brief of Petitioners.

(C) Related Cases. Amicus curiae is aware of no related cases pending in this Court or any other Court. A case brought by different plaintiffs, but included within this consolidated multidistrict litigation proceeding, was previously before this Court raising unrelated legal issues. See *Fayus Enters.* v. *BNSF Ry. Co.*, 602 F.3d 444 (D.C. Cir. 2010).

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STATEMENT OF AMICUS INTEREST[1]

The Chamber of Commerce of the United States of America ("the Chamber") has a direct and substantial interest in the issues presented by this case. The Chamber is the world's largest business federation, representing 300,000 direct members, and indirectly representing more than three million businesses and trade and professional organizations of every size, sector, and geographic region. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of vital concern to the Nation's business community.

It is rare for the Chamber to file as an amicus in a case, like this one, which involves businesses as both plaintiffs and defendants, and the Chamber takes no position with respect to the underlying factual allegations at issue here. In the Chamber's view, however, the district court's class-certification decision raises issues of broad significance and enormous prac-

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amicus states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

tical importance. The district court held that the case could proceed as a class action based on a conclusion that plaintiffs would be able to use classwide proof to demonstrate "widespread" injury to members of the class, rather than requiring classwide proof of injury to each individual member. The district court also failed to conduct the careful and rigorous inquiry into plaintiffs' class-certification evidence that is a prerequisite to proper certification of a class. These erroneous rulings directly implicate the interests of the Chamber and its members, who are frequent targets of class actions and bear the substantial burdens that improper class certification inevitably imposes.

SUMMARY OF ARGUMENT

I. A. The district court held that a class may be certified under Federal Rule of Civil Procedure 23(b)(3) even when the plaintiffs cannot demonstrate by classwide proof that all members of the proposed class were injured, so long as it is not "apparent" that "a great many" members of the class were uninjured. That holding is inconsistent with the core premise justifying class-action litigation—*viz.*, that the claims of the named plaintiffs will serve as effective proxies for the claims of *all* absent class members. It is also irreconcilable with the Supreme Court's recent decision in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), which makes clear that com-

mon questions of the sort that may justify class certification under Rule 23(b)(3) are defined as those with the capacity to "resolve an issue that is central to the validity of *each one* of the claims in *one stroke*." *Id.* at 2551 (emphasis added). And it is clear that the district court's erroneous legal approach infected its ultimate certification decision in several important respects.

B. The district court also erred by failing to subject the plaintiffs' class-certification theory to sufficiently careful scrutiny. Portions of the court's opinion suggest that it placed a thumb on the scales *in favor* of certification by treating certification as the presumptive outcome. That is exactly backwards; class treatment is the exception and must be justified by its proponents. Moreover, the district court applied a lenient "plausibility" standard to the plaintiffs' evidence that falls far short of the "rigorous analysis" demanded by *Dukes*, 131 S. Ct. at 2551 (quoting *General Telephone Co. of Southwest* v. *Falcon*, 457 U.S. 147, 161 (1982)).

II. A. The district court's lowering of the bar for certification is highly consequential. As a practical matter, class certification is almost invariably followed by settlement. The risk of catastrophically high liability that could result from continuing to litigate a suit amalgamating hundreds or thousands of claims—combined with the substantial direct and indirect costs

arising from such litigation—almost always compels defendants to settle even meritless cases. That pressure to settle is exacerbated, moreover, when plaintiffs obtain certification of a class that does not meet the requirements of Rule 23. It is therefore vitally important that courts carefully scrutinize plaintiffs' showing at the class-certification stage. If the weaknesses in plaintiffs' showing are not addressed at that stage, they are unlikely to be addressed at all.

B. Careful judicial scrutiny of class certification is all the more necessary because class actions impose substantial burdens on the national economy. Unjustified class-action liability is a cost of doing business that is inevitably passed along, at least in part, to consumers. With respect to antitrust cases in particular, such liability may cause businesses to alter their operations in ways that deprive consumers of the benefits of perfectly lawful, procompetitive conduct.

ARGUMENT

I. The District Court Employed A Dangerously Lax Standard For Class Certification

A. The District Court Erred In Concluding That A Class Should Be Certified Unless It Is "Apparent" That "A Great Many" Of Its Members Did Not Suffer Injury

The district court concluded that a class may be certified even where the plaintiffs cannot demonstrate by classwide proof that all members of the

proposed class were injured, so long as "the plaintiffs can show widespread injury to the class." Op. 68 (quoting *Meijer, Inc.* v. *Warner Chilcott Holdings Co. III*, 246 F.R.D. 293, 310 (D.D.C. 2007)).[2] Relying on *Kohen* v. *Pacific Investment Management Co.*, 571 F.3d 672 (7th Cir. 2009), the district court held that "[o]nly when it is apparent that 'a great many persons' have not been impacted should a court deny class certification." Op. 68 (quoting *Kohen*, 571 F.3d at 677).

1. The district court's holding that plaintiffs' classwide proof need not show injury to *each* individual member of the class is wrong, and it profoundly misunderstands the role of class actions in our system of adversarial litigation. As the Supreme Court has long recognized—and recently reiterated—"[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700-701 (1979)). In appropriately "limited circumstances," *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996), the claims of numerous similarly situated individuals may be aggregated in a single proceeding. A few named plaintiffs are permitted to present proof

[2] References to "Op." refer to the district court's class-certification opinion, filed in its public version on July 13, 2012 as docket entry 550.

that seeks to establish the core elements of their own and all other individuals' claims simultaneously, thereby avoiding the inefficiency of trying what is effectively the same lawsuit over and over again.

But efficiency alone has never been *sufficient* to justify deviations from the traditional norm of individual litigation. From the earliest historical precursors of modern class actions to the present day, courts have emphasized that class proceedings are appropriate only when the named plaintiffs function as true representatives of the absent class members. In "all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many," the Supreme Court has long held, "care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried." *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288, 303 (1853); see also, *e.g.*, *Richards*, 517 U.S. at 798 (named plaintiffs must "adequately represent[] * * * the same interests" as absent class members).

Indeed, class actions rest on the assumption that it is not necessary to bring every claimant into court precisely because the claims of the class representatives serve as effective proxies for those of absent class members. When they do so, aggregate litigation tests the validity of each of the class members' claims. That is why a properly certified class action is consistent

with the Rules Enabling Act's prohibition on using any procedural device to "abridge, enlarge or modify any substantive right," 28 U.S.C § 2072(b), as well as with the Due Process Clause's guarantee that defendants be afforded the opportunity to raise every available defense, see *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007). Like "traditional joinder (of which it is a species)," proper classwide adjudication permits the resolution of claims of "multiple parties at once, instead of in separate suits," but "leaves the parties' legal rights and duties intact and the rules of decision *unchanged*." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion) (emphasis added).

Rule 23 functions to preserve that core justification for classwide adjudication. The Supreme Court's recent decision in *Dukes* illustrates the point. Addressing Rule 23(a)(2)'s requirement that there be "questions of law or fact common to the class," the Court explained that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" *Dukes*, 131 S. Ct. at 2551 (quoting *General Telephone Co. of Southwest* v. *Falcon*, 457 U.S. 147, 157 (1982)). The plaintiffs' claims, the Court further explained, must depend on a "common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is

central to the validity of *each one* of the claims in *one stroke*." *Ibid.* (emphasis added). Only where the class members' claims all rise and fall together is litigation by representation permissible.

The district court's decision in this case is irreconcilable with *Dukes*. The district court correctly acknowledged that, in order to satisfy Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members," plaintiffs were required to demonstrate, *inter alia*, that the fact of injury from the alleged antitrust violation is a common question amenable to classwide proof. Op. 58; see 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 398a, at 439 (3d ed. 2007) (to satisfy predominance inquiry, plaintiffs must prove that injury can be established on a classwide basis). But by holding that class certification would be denied "[o]nly when it is apparent that 'a great many persons' have not been impacted," Op. 68 (quoting *Kohen*, 571 F.3d at 677), the district court eviscerated *Dukes*' definition of a truly common issue.

The absence of "a great many" exceptions is no substitute for actual compliance with the rule. If the most plaintiffs can establish is that their classwide proof may demonstrate "widespread injury to the class," Op. 68 (quoting *Meijer*, 246 F.R.D. at 310), then they have failed to show that all

class members "have suffered the *same injury*," *Dukes*, 131 S. Ct. at 2551 (emphasis added) (quoting *Falcon*, 457 U.S. at 157), and they have failed to show that the element of injury can be resolved as to each class member "in one stroke." *Ibid.* Moreover, the course of proceedings apparently contemplated by the district court is reminiscent of the "Trial by Formula" disapproved as a "novel project" by the Court in *Dukes*. *Id.* at 2561. Class members would be permitted to recover not on the basis of proof that they, as individuals, suffered injury from the alleged antitrust violation, but rather because they are part of a class that—in the aggregate—was subject to widespread injury. As the Court made clear in *Dukes*, however, a class "cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims." *Ibid.*

2. The district court's erroneous legal standard infected its ultimate class-certification decision in several important respects. In rejecting defendants' argument that so-called captive shippers (*i.e.*, those who are served by only one rail carrier) could not have suffered antitrust injury as a result of the alleged conspiracy, the court determined that "railroads are affected by competitive constraints applying to both captive and non-captive shippers," and therefore concluded that "the class is not defined so broadly as to include a great number of members who 'could not have been harmed' by de-

fendants' allegedly unlawful conduct." Op. 74 n. 13. Thus, the district court explicitly based its rejection of defendants' argument on its flawed legal standard.

The same is true with respect to defendants' argument that the prevalence of discounting and bargaining in the rail-freight market precludes a showing of classwide impact from the alleged conspiracy. Again citing *Kohen*, the district court suggested that "any examples of such discounting are outliers, insufficient to defeat a finding of predominance." Op. 113. But that rationale relies on the flawed premise, rejected in *Dukes*, that the existence of uninjured class members can be safely ignored so long as they are not too numerous. Had the court conducted the proper inquiry and asked whether the fact of injury can be determined as to "each" class member "in one stroke," *Dukes*, 131 S. Ct. at 2551, it would have concluded that the existence of class members who negotiate based on the bottom-line defeated plaintiffs' claim of commonality. See 2A Areeda et al. ¶ 398c, at 442 n.14 ("When transaction prices are negotiated, the actual price paid will be determined at least in part by the negotiating styles of the customers. As a result, proof of antirust injury is bound to be individualized.").

Finally, the district court's flawed legal approach is evident in its response to defendants' argument that injury is not susceptible to classwide

resolution because individualized proof would demonstrate that many shippers would have paid fuel surcharges in the absence of the alleged conspiracy. The district court stated that the fuel surcharges during the period of the alleged conspiracy were a "different breed," Op. 87, from those that were charged previously and that formed the basis of defendants' predictions regarding what shippers would have paid. According to the district court, these new surcharges were more aggressive and uniform in application, *ibid.*, and the evidence showed that defendants "intended" to apply them to all freight shipments, *id.* at 100.

But although the terms of defendants' surcharge programs and defendants' intent when adopting them could conceivably be indicative of widespread injury to the class (all that the district court thought was required to authorize class certification), it is hard to imagine how they would be sufficient to establish impact as to each individual member of the class (as *Dukes* requires). Indeed, the district court's observations are reminiscent of the questions the *Dukes* Court noted would *not* constitute common issues within the meaning of Rule 23: "Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get?" 131 S. Ct. at 2551. As the Court observed, "[r]eciting these questions [was] not sufficient to obtain

class certification," because they could not be answered in a way that would establish liability at the level of individual class members under the governing law. *Ibid.*

So too here. Although the broad phenomena emphasized by the district court are amenable to common proof, they are insufficient to establish liability under the antitrust laws, because they do not demonstrate that any particular plaintiff paid more than he would have but-for the alleged antitrust violation. See 15 U.S.C. § 15(a) (suit may be brought "by any person * * * injured in his business or property"). As defendants' brief explains (at 38-44), what is required instead is a careful inquiry into what each individual plaintiff would have paid in the absence of the allegedly conspiratorial surcharges—an inquiry not at all suited for resolution on a classwide basis in a case like this one, which involves some customers who negotiated individual agreements governing various elements of price and service, had varying degrees of bargaining leverage, and were already paying fuel surcharges prior to the period of the alleged conspiracy.

B. The District Court Failed To Engage In Rigorous Scrutiny Of Plaintiffs' Class-Certification Showing

As the Supreme Court recently emphasized in *Dukes*, the party seeking class certification under Rule 23 "must affirmatively demonstrate his

compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." 131 S. Ct. at 2551. Rule 23's requirements demand "actual, not presumed, conformance," *Falcon*, 457 U.S. at 160, and "certification is proper only if 'the trial court is satisfied, after a rigorous analysis,'" that Rule 23's requirements have been met. *Dukes*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 161). The district court's decision in this case falls far short of that standard.

For starters, although the district court initially acknowledged that the proponent of class certification bears the burden of demonstrating that Rule 23 had been satisfied, see Op. 23, at times the district court appeared to treat class certification as the norm, rather than the exception. Most prominently, the district court stated that certification should be denied "[o]nly when it is apparent that 'a great many persons' have not been impacted should a court deny class certification." Op. 68 (quoting *Kohen*, 571 F.3d at 677). That not only flouts the principle of representativeness discussed above, see pp. 5-8, *supra*, but also treats certification as the presumptive outcome, with that presumption overcome only when the potential flaw under consideration (a critical mass of uninjured class members) is "apparent."

Likewise, the district court suggested that Rule 23(b)(3) "requires only that [individual] questions not predominate over the common questions affecting the class as a whole." Op. 25 (quoting *Messner* v. *Northshore Univ. Healthsystem*, 669 F.3d 802, 815 (7th Cir. 2012)). In fact, Rule 23(b)(3) requires the trial court to find the converse: "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). By inverting the Rule's formula in this manner, the district court suggested that certification is the presumption, rather than the aberration to be justified only if plaintiffs can carry their very heavy burdens.

And in the same vein, the district court held that plaintiffs could obtain certification by demonstrating that the allegedly conspiratorial surcharges influenced "the starting point for negotiations" between defendants and their customers. Op. 116. To establish injury on a classwide basis, however, plaintiffs must demonstrate that the alleged antitrust violation caused them to pay more than they otherwise would have. See 15 U.S.C. § 15(a). Allowing proof that a conspiracy affected "the starting point for negotiations" to substitute for proof of actual injury flouts the principle that "actual, not presumed, conformance," with Rule 23 is mandatory. *Falcon*, 457 U.S. at 160.

More fundamentally, the district court departed from the "rigorous analysis" required by *Dukes* when it evaluated portions of plaintiffs' expert evidence under a lenient "plausibility" standard, see Op. 36, derived in part from the Third Circuit's dubious decision in *Behrend* v. *Comcast Corp.*, 655 F.3d 182 (2011). In that decision, which is currently before the Supreme Court on writ of certiorari, see 133 S. Ct. 24 (2012), the panel majority affirmed class certification even though the model developed by the plaintiffs' expert could not (by the expert's own admission) isolate damages associated with the only theories of antitrust harm the district court had allowed to proceed. See 655 F.3d at 203. Any standard that permits such transparently deficient evidence to form the basis for class certification simply does not represent "rigorous analysis." *Dukes*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 161). It is therefore telling that the district court repeatedly relied on the plausibility standard derived from *Comcast* in responding to, and rejecting, defendants' objections to the model proposed by plaintiffs' expert. See Op. 35-36, 37, 38-39, 118, 134.

The shortcomings in the district court's analysis are particularly apparent with respect to defendants' argument that the model developed by plaintiffs' expert could not reliably determine whether prices would have been lower across-the-board in the absence of the alleged conspiracy. See

Op. 133-134. In response to this argument, the district court stated that plaintiffs "do not need to prove at the class certification stage that prices would have been lower across-the-board." *Ibid.* In the district court's view, plaintiffs' only burden was to demonstrate that injury would be capable of common proof at trial, and the relevant question for that purpose was "whether the plaintiffs have established a workable multiple regression equation, *not whether plaintiffs' model actually works*." Op. 134 (quoting *In re Amaranth Natural Gas Commodities Litig.*, 269 F.R.D. 366, 383 n.118 (S.D.N.Y. 2010)).

With respect, that response completely misses the point of defendants' objection. In arguing that plaintiffs' expert had not clearly identified a but-for world with which to compare defendants' actual pricing data, defendants were not merely arguing that plaintiffs' model was insufficient to prove injury—they were challenging the basic conceptual validity of plaintiffs' experts' methodology. And *Dukes* confirms that, whatever the outer boundaries of the rigorous analysis called for by Rule 23, it surely includes that sort of challenge. There, the plaintiffs' expert had 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, 152-153 (N.D. Cal. 2004)). The Court held that this opinion added nothing to the plaintiffs' class-certification case, because the expert had conceded in a deposition 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 *Dukes* v. *Wal-Mart Stores, Inc.*, 222 F.R.D. 189, 192 (N.D. Cal. 2004)). Thus, even though the expert's opinion was facially classwide proof—it pertained, after all, to Wal-Mart's national corporate culture—the Court held that defendants could attack its basic validity in order to demonstrate that certification would be improper. The district court should have followed the same approach here.

II. Reducing The Threshold For Class Certification Would Effectively Determine Liability In Many Cases And Would Impose Substantial Burdens On The National Economy

It may be tempting to conclude that, because class certification is nominally a preliminary stage of a lawsuit, a district court's mistakes in certifying a class will work themselves out later in the proceeding. Indeed, this line of thinking was invoked by the panel majority in *Comcast*, 655 F.3d 182. In particular, the *Comcast* majority stated that determining whether the methodology proposed by the plaintiffs' expert was "a just and reasonable

inference or speculative" was not a question for the class-certification stage, but rather one that would be decided later, "on the merits." *Id.* at 206.

That reasoning, however, blinks reality. Because of the substantial costs—and potentially catastrophic risks—associated with litigating a class action to judgment, the vast majority of certified class actions settle long before trial. It is therefore vitally important that courts rigorously enforce Rule 23's threshold requirements for class certification. That task is all the more necessary because the high costs of class actions impose a substantial burden on the national economy as a whole.

A. Class Certification Coerces Settlement Of Even Meritless Claims

1. As a general rule, class certification is almost invariably followed by settlement. 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 Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1875 (2006). "[I]f class action certification is granted, defendants are often unwilling to suffer the risks of trial," and they "face enormous pressure to settle the case for a very substantial amount."

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). That is so because the aggregation of thousands of individual claims into a single proceeding—with liability turning on a single jury's verdict—can raise the stakes so dramatically that settlement becomes the only realistic choice for a defendant. The risks associated with continuing to litigate a suit following certification therefore give plaintiffs profound leverage in extracting a settlement from defendants. See *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F. 3d 154, 192 (3d Cir. 2001) (noting the "hydraulic pressure on defendants to settle" class-action cases). Indeed, it is in recognition of this practical reality that Rule 23 was amended in 1998 to authorize interlocutory appeals from class-certification decisions. See 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.").

The pattern of certification followed by settlement holds, moreover, without regard to the strength of the plaintiffs' case. As the Supreme Court has explained, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it eco-

nomically prudent to settle and *abandon a meritorious defense*." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) (emphasis added); see also *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102 (D.C. Cir. 2002) ("[T]he grant of class status can put substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims."). Even a remote chance of losing hundreds of millions (or billions) of dollars is a risk that few rational defendants are able to accept. "[D]efendants 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). It is this dynamic that led Judge Friendly to label "settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995 (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

The pressure to settle is magnified by the possibility of error in determining liability if a large class action goes to trial. Suppose, for instance, that a defendant faces lawsuits by several thousand plaintiffs claiming a combined $5 billion in damages, but the defendant believes the claims to be

weak and worth a tiny fraction of that amount. If the plaintiffs' claims are litigated individually, 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 and Co.*, 624 F.3d 842, 849 (7th Cir. 2010). When the claims are aggregated into a class action, by contrast, "a trial becomes a roll of the dice," with only a "single throw" to "determine the outcome of an immense number of separate claims." *Ibid.* Despite the weakness of the claims, trial outcomes are never perfectly accurate—and the result of an erroneous determination would be a loss of $5 billion *at once*. A single error would be so costly that the only rational strategy for defendants is often to settle.

In addition to the risk of potentially ruinous damages liability, class actions also impose substantial out-of-pocket costs on defendants—chief among them the cost of discovery. As Judge Wood recently observed, "[w]ith the electronic archives of large corporations or other large organizations holding millions of emails and other electronic communications, the cost of discovery to a defendant has become in many cases astronomical." *Swanson* v. *Citibank, N.A.*, 614 F.3d 400, 411 (7th Cir. 2010); see also H.R. Conf. Rep. No. 104-369, at 37 (1995) (noting, in connection with the Private

Securities Litigation Reform Act, that "[t]he cost of discovery often forces innocent parties to settle frivolous securities class actions"). In some cases, such as a discrimination action that is transformed from a case about one employee's dismissal into a challenge to an employer's nationwide personnel policies, class certification can vastly broaden the scope of the dispute subject to litigation, and thereby increase the scope and burden of discovery. And because discovery in class actions is typically focused on the defendants, moreover, it tends to cost defendants much more than plaintiffs—an asymmetry that offers opportunistic plaintiffs a powerful means by which to extract settlements from defendants. See, *e.g.*, See *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.").

The stakes are particularly high in suits, like this one, that arise under the antitrust laws. Antitrust class actions are "arguably the most complex action[s]" to litigate, *In re Motorsports Merchandise Antitrust Litig.*, 112 F.Supp.2d 1329, 1337 (N.D. Ga. 2000), because they often involve "voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money." *Manual for Complex*

Litigation § 30, at 519 (4th ed. 2004); see also *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 558-559 (2007) (discussing the high costs of discovery in antitrust cases). The sheer complexity of antitrust litigation creates ample opportunities for plaintiffs to impose staggering costs on defendants and thereby to exert powerful settlement pressure.

The indirect costs of litigating class actions also exert substantial pressure on defendants to settle. Most notably, the disruption wrought by discovery obligations and depositions can divert defendants' resources from productive activities. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740-741 (1975). The broad (and mostly unsupervised, see *Twombly*, 550 U.S. at 559-560) discovery afforded in complex class actions will often "permit[] a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value" that produces a "social cost rather than a benefit." *Blue Chip Stamps*, 421 U.S. at 741.

What is more, the inherent complexity in litigating a large class action means that the disruption of defendants' business activities is likely to be prolonged. As this case illustrates all too well, complex class actions often take years to litigate. The Judicial Panel on Multidistrict Litigation transferred the separate putative class actions underlying this litigation to the dis-

trict court in November 2007. See *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27, 29 (D.D.C. 2008). Only now—more than *five years* later—is the essential threshold question of class certification ripe for appellate review.

In addition, a class action may threaten reputational harm to a defendant entirely out of proportion to the merits of the claims. See, *e.g.*, *Abdallah* v. *Coca-Cola Co.*, 186 F.R.D. 672, 676 (N.D. Ga. 1999) (describing negative publicity resulting from class action). A nationwide class action alleging widespread wrongdoing at a major company inevitably makes headlines that corporate decisionmakers are understandably eager to avoid. See Steven B. Hantler et al., *Extending the Privilege to Litigation Communications Specialists in the Age of Trial By Media*, 13 CommLaw Conspectus 7, 10 (2004). Even the highly publicized *threat* of a "mega-verdict" can cause the defendants' stock price to plummet. See *id.* at 31-32 (describing how an HMO company's stock price fell by 30% when plaintiffs' lawyers met with Wall Street analysts about HMO class actions).

2. Significant pressure on defendants to settle is an inevitable (though regrettable) cost of even properly certified class actions. When a court certifies a class action that does not meet Rule 23's threshold requirements for certification, however, the pressure becomes even more extreme. Most ob-

viously, any aggregation of claims beyond those authorized for class treatment by Rule 23 only adds to the sheer size of a class action and thus to the defendants' contemplated liability, in the process exacerbating the already substantial pressure to settle without regard to the case's merits. In addition, certification of a class that does not meet Rule 23's prerequisites confers significant advantages on plaintiffs and leads to a corresponding increase in settlement pressure. For instance, a failure to ensure that the named plaintiffs truly represent the entire class, see Fed. R. Civ. P. 23(a), may allow plaintiffs' counsel to cherry-pick the most sympathetic individuals with the strongest possible claims to serve as the named plaintiffs. When a class seeking monetary relief that does not meet Rule 23(b)(3)'s predominance requirement is certified, moreover, the likely outcome is that individual inquiries relevant to absent class members' claims tend to evaporate, and the presentation of defenses that are specific to individual class members will suffer. See, *e.g.*, *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) ("Meineke was often forced to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation."). As a result, the claims of a few plaintiffs hand-picked to serve as class representatives can mask the shortcomings of the absent class members' claims. And when defendants

are faced with the likelihood that they will be unable to present a complete defense, the pressure on them to settle is likely to become irresistible.

3. In sum, the expense and risk of continuing to litigate a case after a class has been certified almost invariably compel defendants to settle. It is therefore vitally important that courts rigorously enforce the proper limitations on the class-action device, and that they resist the temptation to defer addressing weaknesses in the plaintiffs' showing at the certification stage. If those weaknesses are not addressed at the certification stage, they are unlikely to be addressed at all, with the result that massive sums will be extracted from defendants in a case that had no business proceeding as a class action in the first place.

That lesson underscores the importance of interlocutory review in this case. As defendants' brief carefully explains (at 27-33), the district court's decision meets all of this Court's criteria for granting interlocutory review of class-certification decisions: it creates a "death-knell" situation for defendants; it presents unsettled and fundamental issues of law pertaining to class actions that are unlikely to be subject to review following a final judgment; and it is manifestly erroneous. See *In re Veneman*, 309 F.3d 789, 794 (D.C. Cir. 2002). The district court has certified a class of roughly 30,000 shippers, see Op. 143, claiming billions of dollars in damages, *before* trebling,

see Op. 5 (quoting plaintiffs' second amended complaint). Given the massive potential liability defendants now face as a result of the district court's class-certification decision, it may be unrealistic to expect them to persevere in litigating until final judgment. If the Court does not correct the district court's erroneous class-certification decision now, it is unlikely ever to have the opportunity to do so.

B. Improper Class Actions Burden The National Economy Without Offering Significant Offsetting Benefits

Vigilant judicial enforcement of Rule 23's limits on class actions is particularly needful because the heavy costs associated with improperly certified class actions extend far beyond the individual defendants that are forced to defend against them. These costs impose substantial burdens on the national economy.

Precisely because opportunistic plaintiffs can extract lucrative settlements by asserting even meritless claims, class actions are filed in staggeringly large numbers each year. See Nicholas M. Pace, *Group and Aggregate Litigation in the United States*, 622 Annals Am. Acad. Pol. & Soc. Sci. 32, 37 n.9 (2009) (estimating that "about thirty-three hundred new class actions are initiated in federal courts annually"). As a result, class-action litigation has become another cost of doing business that is inevitably "passed along to

the public," at least in part. *SEC* v. *Tambone*, 597 F.3d 436, 453 (1st Cir. 2010) (Boudin, J., concurring) (citing *Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 189 (1994)). For example, some of the costs associated with abusive class-action litigation may be passed along to consumers in the form of higher prices. Alternatively, defendants may be forced to scale back their operations, to curtail capital investment, and in extreme cases to forego entering new markets and developing new products, in response to the costs or threats of class actions. Consumers ultimately suffer due to the reduction in competition and innovation.

The latter risk is particularly acute with respect to antitrust cases. As the Supreme Court has emphasized, in the antitrust context "false condemnations 'are especially costly, because they chill'" procompetitive conduct. *Verizon Commc'ns* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). As a practical matter, a settlement coerced by the "hydraulic pressure" associated with a class action, *Newton* 259 F. 3d at 192, is no different from the sort of false condemnation produced by an overly expansive understanding of the governing substantive law that concerned the Court in *Trinko*. In both cases, the prospect of undue liability may cause

businesses to alter their operations in ways that deprive consumers of the benefits of perfectly lawful, procompetitive conduct.

To be sure, when class actions are properly employed, they can be a valuable part of our legal system. In appropriate cases, the class-action device allows individuals to join together and efficiently seek legal relief by avoiding the costs of redundant proceedings. When class actions are *improperly* certified, however, they offer little in the way of benefits to offset the substantial costs they impose on the national economy. Because it is the fact of class certification itself that confers settlement leverage on the plaintiffs, "settlement is guided only in small part by the merits of the underlying claim," and the deterrent effect of class-action litigation is accordingly "weak" at best. Ralph K. Winter, Jr., *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Costs of Capital in America*, 42 Duke L.J. 945, 952 (1993). Moreover, in a case that is certified under Rule 23(b)(3) but in which common issues do not in fact predominate over individual ones, the promised efficiencies of classwide adjudication are likely illusory. Unless defendants are to be deprived of their statutorily and constitutionally guaranteed rights to present individualized defenses, see pp. 6-7, *supra*, the proceeding is apt to devolve into a series of costly mini-trials. See, *e.g.*, *Vinole* v. *Countrywide Home Loans*, 571 F.3d 935, 947 (9th Cir.

2009). Finally, there is little reason to think that an improperly certified class action will deliver compensation to plaintiffs with meritorious claims. That is a doubtful proposition generally, in part because of the attenuated connection between settlement value and the merits, and in part because, as the Senate Judiciary Committee observed when considering the Class Action Fairness Act, "the lawyers who bring the lawsuits effectively control the litigation," with their clients only "marginally relevant at best." S. Rep. No. 109-14, at 4 (2005). But when a class is not "sufficiently cohesive to warrant adjudication by representation," *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1998), the risk intensifies that the class will be beset by the sorts of internal divisions that make fair compensation highly unlikely. See *id.* at 624-626.

CONCLUSION

The petition for permission to appeal should be granted, and the judgment of the district court should be reversed.

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Respectfully Submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations set forth in Fed. R. App. P. 28(d), because this brief contains 6,619 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that, on December 10, 2012, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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