No. 01-1464

In the Supreme Court of the United States

VISA U.S.A. INC. AND
MASTERCARD INTERNATIONAL INCORPORATED,
Petitioners,

v.

WALMART STORES, INC. *et al.*,
Respondents.

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

BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, AMERICAN CHEMISTRY COUNCIL, AMERICAN COUNCIL OF LIFE INSURERS, AMERICAN INSURANCE ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF AMERICAN RAILROADS, CALIFORNIA BANKERS ASSOCIATION, EUROPEAN-AMERICAN BUSINESS COUNCIL, THE FERTILIZER INSTITUTE, INSTITUTE OF INTERNATIONAL BANKERS, MORTGAGE BANKERS ASSOCIATION OF AMERICA, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND TEXAS BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROY T. ENGLERT, JR.
Counsel of Record
KATHRYN S. ZECCA
SHERRI LYNN WOLSON
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

Federal Rules

Miscellaneous

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

INTEREST OF THE *AMICI CURIAE*[1]

The Alliance of Automobile Manufacturers, Inc. (Alliance) is a trade association composed of 13 car and light truck manufacturers, which account for more than 90 percent of U.S. vehicle sales. The Alliance is the leading advocacy group for the automobile industry on a range of public policy issues.

The American Chemistry Council, formerly known as the Chemical Manufacturers Association, represents the leading companies engaged in the business of chemistry. The business of chemistry is a $460 billion enterprise and is the nation's largest exporter. Chemistry companies invest more in research and development than any other business sector.

The American Council of Life Insurers (ACLI), a nonprofit trade association, is the largest trade association in the United States representing the life insurance industry. The ACLI's members include 399 legal reserve life insurers, accounting for 76 percent of life insurance premiums in the United States. ACLI advocates the interests its members before federal and state legislators, state insurance departments, federal regulatory agencies, and the courts.

The American Insurance Association (AIA) is the leading property and casualty insurance trade organization, representing more than 410 insurers that write more than $87 billion in premiums each year. AIA represents its members at the federal level and in every State in legislative, regulatory, and legal forums.

The American Petroleum Institute (API) is the nation's largest petroleum industry trade association. API's more than 400 members represent all aspects of the petroleum industry, from the search for and extraction of oil and natural gas to the marketing of finished products in the United States and abroad.

---

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Counsel for *amici curiae* wrote this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

The Association of American Railroads (AAR) is a trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and courts.

The California Bankers Association (CBA), one of the largest state banking trade associations, provides comprehensive representation of the California banking industry's interests in the judicial and legislative arenas. The CBA regularly files *amicus* briefs in matters affecting the banking industry.

The European-American Business Council, comprising more than 70 European Union and United States companies, is the leading business association active on transatlantic trade, tax, investment, and policy issues.

The Fertilizer Institute (TFI) represents the makers, providers, and transporters of fertilizer. TFI works with Congress and regulators to preserve and promote the United States fertilizer industry.

The Institute of International Bankers is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Its membership comprises approximately 150 banking organizations headquartered in 50 countries.

The Mortgage Bankers Association of America (MBA) is the primary national trade association devoted exclusively to the field of real estate finance. MBA represents its more than 2500 members, which are engaged in all facets of mortgage lending, in legislative, regulatory, and judicial arenas.

The Pharmaceutical Research and Manufacturers of America (PhRMA) represents leading research-based pharmaceutical and biotechnology companies, which invested more than $30 billion in 2001 in discovering and developing new medicines.

The Texas Bankers Association (TBA), the largest and oldest state bankers association in the United States, is the leadership organization and principal advocate for Texas banks. The TBA frequently files briefs in support of the interests of Texas banks in appellate cases.

Members of the *amici* are routinely named as defendants in litigation in which plaintiffs seek class certification. Class certification regularly transforms a routine lawsuit into a "bet-the-company" proposition. Asbestos litigation, for example, is perhaps the largest challenge facing AIA's members today. And rather than face the risk — no matter how small — of an adverse jury verdict, *amici*'s members are coerced into settlements. For example, members of the American Chemistry Council have been forced to settle product liability class actions. Alliance members General Motors and Ford Motors have each paid multimillion-dollar settlements in product liability class actions. In the 1990s, life insurance companies settled seven class actions for a total of at least $700 million.

These settlements — often aptly described by Judge Friendly's phrase "blackmail settlements" — hurt the members of the *amici* and their customers. Settlements in these actions, for example, drive up the price of product liability insurance. Consumers are also hurt by the deterrent effect these suits have on innovation. The threat of class litigation against new products developed by members of PhRMA, for example, deters the introduction of potentially life-saving medicines.

Because of their significant experience in these matters, *amici* are well situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[C]lass actions are without doubt the most controversial subject in the civil process today." Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1377 (2000). Much of the controversy centers on the certification of

class actions; indeed, class certification can transform a relatively modest case into one with hundreds, thousands, or millions of claimants and billions of dollars in damages. Here, the order certifying the class transformed this case into one with four million business plaintiffs, including the largest company in America, and up to $100 billion at stake in one massive lawsuit (Pet. App. 35a-36a). Many who have studied class certification decisions criticize decisions that, like the majority opinion below, permit class certification without fully addressing and resolving the difficulties posed by certification.

Amici take no position on the merits of the underlying antitrust action; indeed, some members of certain *amici* are likely members of the plaintiff class. Nonetheless, *amici* concur with petitioners, and with Judge Jacobs in dissent, that the majority decision rests on an incorrect interpretation of Federal Rule of Civil Procedure 23 and this Court's precedents.[2] And *amici* agree with petitioners that the majority opinion is in conflict with other federal appellate courts with respect to both battle-of-the-experts and manageability issues. Because the petition fully addresses the splits among the circuits and the legal errors in the Second Circuit's opinion, *amici* will not. Rather, this brief will address why it is intolerable to let the circuit splits linger.

---

[2] Respondents' brief in opposition, which they filed early, debates the relative merits of the Carlton and Schmalensee expert testimony at length and emphasizes the effort the courts below put into analyzing that testimony. From *amici*'s standpoint, respondents have completely missed the point. The relative merits of the Carlton and Schmalensee declarations are just what the Second Circuit said the courts could *not* consider, Pet. App. 11a-12a, carrying forward a legal rule that *amici* regard as wrong and dangerous. And a diligent analysis under the wrong legal standard is no better than a cursory analysis under the wrong legal standard. *Amici* themselves have no position on the relative merits of the Carlton and Schmalensee testimony, but urge the Court to hold that relevant conflicts in expert testimony *must* be resolved at the class certification stage.

I. A. The majority's rule results in the certification of actions inappropriate for class treatment. The Second Circuit's holding routinely favors plaintiffs by permitting an action to be certified based on expert testimony that may be wrong (Pet. App. 12a) and by permitting an action to be certified before resolving potentially intractable manageability problems (see *id*. at 22a). This "excessive deference" (*id*. at 43a) to requests for class certification allows manipulation of the process.

B. Certification of a class coerces defendants into settlement. Defendants simply cannot risk a jury verdict awarding damages to thousands of plaintiffs, let alone the millions — some themselves gargantuan — that are members of the class certified in this case. Moreover, the certification of a class also results in increased costs of litigating the action and increased damage to defendants' reputation.

II. Erroneous certification results in substantial unfairness to the parties to a purported class action.

A. In 1998, Rule 23 was amended to permit the appeal of an adverse class certification decision. See Fed. R. Civ. P. 23(f). The obvious purpose of Rule 23(f) is to *get it right* at the certification stage, yet the Second Circuit has turned the Rule 23(f) appeal into a mere inquiry into the *sufficiency* of plaintiffs' expert testimony.

B. Giving plaintiffs leverage, by certifying a class, to exact a settlement is unfair to defendants when plaintiffs' suits are weak. Defendants are forced into settling meritless cases because they cannot "stake their companies on the outcome of a single jury trial." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995). Because of the intense pressure to settle, the "safeguards" of decertification and sub-classes, relied on by the majority to justify a possibly erroneous certification, offer no protection at all to defendants.

C. Creating such intense pressure to settle is particularly unjustified in a case such as this one, in which the plaintiffs are seeking substantial monetary damages. A denial of class certifi-

cation would not prevent named plaintiffs from having their day in court; thus, there is no social benefit that balances out the harm to defendants caused by certifying this class action.

III. Erroneous certification of a class, by contrast, has severe consequences beyond any particular litigation. Adopting lax standards for certification imposes substantial and unnecessary burdens on the judicial system. It harms many companies doing business in the United States, by putting them at a competitive disadvantage with their competitors who conduct the same business without exposing themselves to the U.S. legal system. And, ultimately, it harms the American consumer.

ARGUMENT

I. THE RULE ADOPTED BY THE SECOND CIRCUIT MAJORITY RESULTS IN THE ERRONEOUS CERTIFICATION OF CLASS ACTIONS, WHICH IN TURN COMPELS DEFENDANTS TO SETTLE

A. The Second Circuit's Rule Results In the Almost-Automatic Certification of Class Actions

Without question, the majority opinion favors the party seeking certification. According to the majority, in deciding whether a purported class action meets the requirements of Rule 23(b)(3), the district court has no power to "weigh conflicting expert evidence" (Pet. App. 12a) if that evidence may bear on the merits. Instead, "[t]he question for the district court at the class certification stage is whether *plaintiffs'* expert evidence is *sufficient* to demonstrate common questions of fact warranting certification of the proposed class, *not whether the evidence will ultimately be persuasive*." *Ibid.* (emphasis added).[3] Similarly,

---

[3] "[U]ltimately * * * persuasive" to whom?, one must wonder. In cases such as this one, in which the very detailed expert testimony bore *entirely* on the Rule 23 issues, and subsumed the underlying antitrust merits *only* to the extent relevant to Rule 23, there will never be a reason to place that testimony before any finder of fact other than *the judge deciding the Rule 23 issue itself.*

the majority opinion does not require the district court actually to determine how a case will be tried on a class-wide basis; instead, the majority took refuge in the possibility that the district court might, at a later date, take some action to make the class manageable. *Id*. at 22a-23a. By refusing to "face[] and squarely decide[]" "tough questions" that stand in the way of class certification (*West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002)), the Second Circuit has created a system by which plaintiffs' classes will be certified regardless of whether they are appropriate for class treatment.

The majority opinion permits plaintiffs to manipulate the outcome of a class certification decision. Obtaining a certification order is as easy as artfully drafting a complaint (the merits of which the court will not analyze) and hiring an expert (whose opinion the court will not challenge if it crosses a threshold so low as to be indistinguishable from mere admissibility). Certification without resolving a "clash" between each side's experts "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *West*, 282 F.3d at 938; see also *Szabo* v. *Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001), *cert. denied*, 122 S. Ct. 348 (2001) ("Certifying a class on the basis of incontestable allegations in the complaint moves the court's discretion to the plaintiff's attorneys * * *.").

Such a permissive approach to class certification results, of course, in certification of classes that would *not* be certified if the court actually resolved all the Rule 23 issues – classes, for example, that are not manageable or in which common claims do not predominate. In one recent article criticizing the Second Circuit's approach, the authors emphasized:

> The practical result [of this rule] is to insulate almost any expert's statistical evidence from challenge at the certification stage and virtually guarantee plaintiffs' success in establishing certification requirements when they depend on such evidence. * * * This is a prescription for high error risk and a strong inducement to frivolous class action suits.

Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1252, 1326-27 (2002).

The risk associated with this approach is compounded by the frequency with which courts use this approach to grant certification. Since the Second Circuit first announced that it would not permit the resolution of a dispute between experts on a motion for class certification in *Caridad* v. *Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000), at least eight district courts within the Second Circuit (including the district court below) have cited *Caridad* in rejecting a challenge to class certification. See Bone & Evans at 1320 (collecting cases).[4] *Caridad* has also been followed by district courts in other circuits. See, *e.g.*, *DeLoach* v. *Philip Morris Cos.*, No. 1:00CV01235, 2002 WL 559453, at *13 (M.D.N.C. Apr. 3, 2002) (in certifying class, declining to resolve dispute between experts). Moreover, just as the Second Circuit did here, numerous other courts have certified class actions without resolving, let alone meaningfully addressing, potentially crippling challenges to class certification. See, *e.g.*, Pet. 14, 17 n.2; *DeLoach*, 2002 WL 559453 at *17 (certifying class of "hundreds of thousands" without addressing how case would be tried). Thus, the risk of erroneous certification is not confined to this case, or even to the Second Circuit.[5]

---

[4] The Bone & Evans article focuses on the opinion in *Caridad*, which the *Visa* majority opinion cites extensively. The article also criticizes the *Visa* majority for "refus[ing] to resolve a critical dispute between experts." Bone & Evans at 1257 n.12. The authors disclose that one of them worked on both *Caridad* and *Visa*. *Id*. at 1321 n.246.

[5] Nor is the risk confined to antitrust cases. *Caridad* was an employment discrimination case. *Szabo* was a product liability case. *West* was a securities case. Mass tort cases present (along with antitrust cases) perhaps the greatest threat of all. See George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 547 (1997).

B. Certification of a Class Action Coerces Settlement

1. The certification of a class is hugely consequential for the litigants. Once a class is certified, defendants, who might otherwise have been willing to contest the case on its merits, almost always feel compelled to settle. As this Court has noted, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). That concern was echoed by the dissent below: "[C]lass certification 'places inordinate or hydraulic pressure on defendants to settle * * *.'" Pet. App. 35a (quoting *Newton* v. *Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001)). "No doubt, true 'death knell' cases are few; and a reviewing court must be wary lest the mind hear a bell that is not tolling. But in this case — in which the aggregated and trebled claims of the four million class members are alleged to top $100 billion — a carillon is in full peal." Pet. App. 35a-36a. (internal quotation omitted).

The statistics demonstrate that the courts' concerns are well founded. A 1995 study of more than 400 class actions brought in four U.S. districts showed that every single one in one of those districts, the Southern District of Florida, settled. THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 184 tbl. 40 (1996). Most of the cases in the other three districts — anywhere from 62 to 88 percent — also settled. *Ibid*. Other empirical studies have produced similar results. See Bone & Evans at 1285 n.129, 1291-1292 (collecting authorities and noting that class action settlement rates exceed those for civil litigation generally).

How could the case be otherwise? The most readily apparent (and widely cited) reason for settlement is that defendants cannot "stake their companies on the outcome of a single jury trial." *In re Rhone-Poulenc*, 51 F.3d at 299. But there are other reasons. Defending a class action can be vastly more expensive

than defending an individual action. For example, where (as here) there are affirmative defenses such as failure to mitigate damages, the defendant must take discovery from each class member to prepare its case. 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, 417 (Winter/Spring 2000) (discussing increased costs associated with litigating class action). Thus, not only is the risk of losing at trial magnified, so is the cost of getting there.[6]

Moreover, there are substantial costs to a defendant's reputation associated with defending a class action. See, *e.g.*, *Abdallah* v. *Coca-Cola Co.*, 186 F.R.D. 672 (N.D. Ga. 1999) (describing negative publicity resulting from class action). Additionally, a company's stock price often will drop on word of a class action's being filed or certified. See, *e.g.*, Statement of F. James Sensenbrenner to U.S. House of Representatives, Mar. 13, 2002 (www.house.gov/judiciary/news0313.htm) (Sensenbrenner Statement). And class actions are likely to be tried in a manner that is ultimately prejudicial to the defendant. As one witness testified before an Advisory Committee, explaining her own experience in trying a mass tort class action:

> [T]he playing field changes dramatically when there is a class certified. All the rules are different. * * * For each plaintiff who may have been in a different period of time, with different facts in a single trial, much of the evidence would not come in to that particular plaintiff, that particular claim. Everything gets mixed together.

---

[6] The cost of complying with an order imposed by a class action, particularly a nationwide class action, also may be prohibitive. For example, life insurers (many of whom are members of *amicus* ACLI), are regulated on a state-by-state basis. A rule imposed by a court in one State may conflict with regulatory requirements in another State, thereby putting the defendant in a position where it cannot satisfy both a court order and state regulators.

III WORKING PAPERS OF THE ADVISORY COMMITTEE ON PROPOSED AMENDMENT TO CIVIL RULE 23 pt. 3, 107-108 (1997); see also *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Aggregation of claims also makes it more likely that a defendant will be found liable * * *.") (citations omitted).

In sum, the Second Circuit's rule, which refuses to resolve issues critical to the Rule 23(b)(3) analysis if they are related to the merits, and which allows real manageability issues to be swept under the rug, leads to coerced settlements.

2. Because of the intense pressure to settle, defendants can take little comfort in the majority's assurances that changes to the class might be made later. According to the Second Circuit, there is no real error in the district court's failure to decide, *before certifying the class*, how this case could be tried on a class-wide basis. Instead, in the eyes of the majority, it is sufficient that "[t]he [district] court specifically recognized its ability to modify its class certification order * * * or even decertify the class." Pet. App. 23a. But a class, once certified, is rarely modified or decertified. Indeed, in the 1995 study of class actions, certification decisions were altered in fewer than two percent of the cases. WILLGING ET AL. at 180, tbl. 32.

In the words of the dissent, "[c]onditional certification is not a hedge against present error." Pet. App. 42a. Once the class is certified, "plaintiffs and their counsel * * * have in hand the means to extract a favorable settlement of what may be weak claims." *Ibid.* (quoting *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)). And, because certification decisions are rarely revised or reversed, plaintiffs never lose this leverage.

II. COERCED SETTLEMENTS THROUGH ERRONEOUS CERTIFICATION OF CLASS ACTIONS CREATE REAL BURDENS FOR LITIGANTS

According to one world view, a class certification decision is a mere preliminary stage of the case, neither the occasion for consideration of the merits nor particularly important to the out-

come of the case. That is the Second Circuit's apparent view. It also is a view that implies that erroneous class certification decisions, even erroneous class certification rules that create inconsistency among the circuits, are not the kind of urgent matter that requires this Court's attention. It is an utterly wrong view.

Legal rules that are biased in favor of class certification thwart the purpose of the 1998 amendments to Rule 23, which recognized the vital importance of the certification decision. They also force defendants to pay substantial sums to settle cases that are objectively meritless. Moreover, with regard to class actions claiming significant monetary damages (such as this one), a refusal to certify the class would result in no unfairness to plaintiffs — the titanic negative consequences of an erroneous certification decision are completely unnecessary.

A. The Majority Opinion Undermines a Goal of the Amendments to Rule 23

The Advisory Committee on the proposed amendments to Rule 23 recognized that "[a]n 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." Fed. R. Civ. P. 23, Advisory Comm. Notes. To alleviate this concern, subsection (f) was added to Rule 23. It gives parties the opportunity to appeal a class certification decision.

Testimony before the Advisory Committee established that the availability of direct appeal was necessary to allow defendants to avoid the burdens of erroneous certification. One witness testified that Xerox Corporation had been a defendant in an antitrust class action that was certified notwithstanding plaintiffs' failure to show that they could establish the fact of injury through common proof. II WORKING PAPERS at 493. Although the court of appeals was "not convinced that the * * * class of plaintiffs will ultimately be able to sustain its burden to prove classwide impact from the alleged monopolization and tying practices of Xerox" (*id.* at 495), it denied Xerox's petition for mandamus because of the extraordinary nature of the mandamus

remedy. *Id*. at 495-96. Xerox, therefore, "was bludgeoned by an erroneous court ruling into settling" (*id*. at 492), a result that the company believed could have been avoided had an appeals court had the power freely to review the district court's decision. *Id*. at 494.

Just like the district court in the Xerox example above, neither the district court nor the majority opinion below was convinced that damages from the defendants' alleged tying practices could be established on a class-wide basis. Pet. App. 20a-21a, 90a-91a. The district court conceded, in fact, that its result might be different if it were allowed to determine which opinion was more persuasive. Pet. App. 97a. Nonetheless, the Second Circuit eschewed a "rigorous analysis" of the Rule 23(b)(3) elements, in favor of a rule doling out class certification so long as a plaintiff plays its cards right. The opportunity given by Rule 23(f) to correct errors by appealing becomes virtually meaningless if the court of appeals looks only to the sufficiency, not the persuasiveness, of the plaintiffs' expert testimony. In the words of the dissent, settlement "will be coerced by abuses that Rule 23(f) was specifically designed to correct." Pet. App. 55a.

B. By Permitting Erroneous Certifications, The Second Circuit Rule Forces Defendants to Settle Suits That Have No Merit

Certification of a class action forces a defendant to settle, even if the claim has no merit. "Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" *In re Rhone-Poulenc*, 51 F.3d at 1298 (quoting Henry J. Friendly, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)). As one commentator explained: "[C]lass certification can give plaintiffs tremendous leverage in settlement negotiations, even where the claims are tenuous. * * * [T]enuous claims are hard to dispose of before trial; and jury trials are risky propositions * * *." Bartlett H. McGuire, *The Death Knell*

for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits, 168 F.R.D. 366, 370-71 (1996).

The courts' and commentators' concerns derive from real-world experience. One example is the Agent Orange litigation. Beginning in the late 1970s, veterans of the Vietnam War filed lawsuits — heard, like the case below and like the recently filed slavery "reparations" cases, in federal court in Brooklyn — against chemical companies alleging that their exposure to a herbicide manufactured by the defendants caused various health problems. *In re "Agent Orange" Product Liability Litig.*, 611 F. Supp. 1223, 1228 (E.D.N.Y. 1985). Over defendants' objections, the district court certified a multi-national class of persons. *Id*. at 1229. Faced with the risk that a jury could find for plaintiffs, defendants settled the case for $180 million. See *In re "Agent Orange" Product Liability Litig.*, 818 F.2d 145, 151 (2d Cir. 1987). Yet the plaintiffs' claims were so weak that the district court eventually granted summary judgment in favor of defendants on the claims of the plaintiffs who opted out of the class. See 611 F. Supp. at 1264.

Of course, the receipt of a large settlement for a meritless claim only encourages other plaintiffs, or plaintiffs' lawyers, with dubious claims to bring suit — and funds the same lawyers to pursue other class actions. "A lack of attention to the merits makes the class action an attractive vehicle for frivolous suits." Bone & Evans at 1303. Thus, not only does certification of a dubious class action generate a settlement that far exceeds the merits of the claim, but also the pattern of certification of these class actions increases the likelihood that additional groundless lawsuits will be filed and that the cycle will start over again. As one legal scholar has noted:

> It is surely a curious circumstance in a country committed to the rule of law to accept the propositions (1) that class certification alone creates negotiating power, (2) that that power leads to actual settlements, sometimes large dollar settlements, and simultaneously, (3) that this great negotiating power can be created without any judicial review of a

> claim on the merits and, in some cases, any merit to the claim.

George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 547 (1997).

C. Plaintiffs Would Suffer No Negative Consequences from a Refusal to Certify

The substantial burden to a defendant resulting from the erroneous certification of a class action is exacerbated by the fact that, in many cases, plaintiffs would not be hurt by a failure to certify the class. The riskiest cases for defendants, of course, are those with the highest potential liability. Quite often, the potential liability is so high because every plaintiff is entitled to substantial damages. But, because each plaintiff is entitled to a significant recovery, the plaintiff will not suffer by a refusal to grant certification. The plaintiff can simply maintain the action as an individual action.

Take this case. A denial of class certification certainly would not prohibit named plaintiff WalMart from pursuing its claims individually. As the dissent noted, "if named plaintiff WalMart Stores processed even 10% of its sales with credit and off-line debit, and if it established an (average) one-half percent overcharge on those transactions, its claim would reach a quarter billion dollars (with trebling and before attorneys' fees) for 1999 alone." Pet. App. 43a.[7] "When class members have enough at stake to justify litigating individual suits, an erroneous denial of certification does not prevent enforcement of substantive law." Bone & Evans at 1305.

Indeed, the widespread certification of tremendously complex class actions appears to go far beyond what was envisioned by the drafters of Rule 23(b)(3). "While the text of Rule

---

[7] It may be the case that certain smaller retailers do not have a sufficient financial interest to pursue their claims individually, and would need the benefit of a class action. That class, however, is not the class that plaintiffs sought to certify.

23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of the rights of people who individually would be without effective strength to bring their opponents into court at all." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 617 (1997). WalMart — the number-one company in the latest "Fortune 500" list — and four million other businesses hardly meet that description.[8]

In sum, in cases in which many, if not all, plaintiffs have a sufficient financial interest to litigate each claim individually, the circumstances by which defendants are coerced into settling can be avoided, with little cost to plaintiffs. But the Second Circuit has adopted a rule that ensures the opposite result.

III. CERTIFICATION WHERE IT IS NOT WARRANTED CREATES UNWANTED CONSEQUENCES BEYOND THE SPECIFIC LITIGATION AT ISSUE

The practice of loosely certifying class actions — a practice adopted *de jure*, not just *de facto*, by the Second Circuit's legal rules requiring acceptance of plaintiffs' expert testimony in almost all cases and allowing all serious inquiry into manageability to be deferred — has negative consequences far beyond any particular erroneous certification decision.

---

[8] It is not unusual to see Fortune 100 companies — with their attractive "deep pockets" — named as class-action *defendants*. But in this case, three of the nation's 50 largest businesses as categorized by *Fortune* are named *plaintiffs*: WalMart (#1), Sears Roebuck (#32), and Safeway (#45). Whether such a gargantuan industry-versus-industry lawsuit has anything to do with the purposes of Rule 23 at all is open to question, but certainly at a minimum such a lawsuit called for especially careful scrutiny from the Second Circuit and calls for especially careful scrutiny from this Court. But instead the Second Circuit insisted that certification was proper as long as the plaintiffs have "'a reasonable probability'" or a "'colorable method'" or a method that is not "'so insubstantial as to amount to no method at all'" for establishing their claims by common proof. Pet. App. 11a-12a.

Widespread certification of class actions, without regard to whether these cases are appropriate for class treatment, has led to the (accurate) perception that class actions are out of control. A 1999 study based on a survey of Fortune 500 companies estimated that, in the decade between 1988 and 1998, the number of class actions rose by 338 percent in federal courts and by more than 1000 percent in state courts. *High Flyers*, Editorial, WALL ST. J., June 26, 2000, at A46. The dramatic increase in the number of class actions filed derives from all kinds of class action litigation, from mass torts to securities fraud to consumer fraud. See Michael A. Pope, *Mass Tort Cases Are Swamping Courts*, NAT'L L.J., Oct. 11, 1999, at B14 (mass torts); Tamara Loomis, *Securities Fraud: Lawyers Seek Review of a Key Class Action Ruling*, N.Y.L.J., Oct. 26, 2000, at 5 (securities fraud); Richard B. Schmitt, *Stronger Role Is Urged for Judges In Class Actions*, WALL ST. J., Nov. 1, 1999, at B5 (consumer fraud). This explosion has negative consequences for the courts, for business, and for consumers.

1. An increase in the number of class actions filed increases the burden on the courts. For the most part, class actions are extremely complex. Particularly with regard to mass tort and antitrust class actions where the damages calculation varies greatly from plaintiff to plaintiff, the court's workload is dramatically increased. Here, for example, rather than preside over the proof of damages claimed by a handful of plaintiffs, the court will be forced to preside over the individualized damages evidence of thousands, or even millions, of plaintiffs. Pet. App. 40a-41a; see also *id.* at 39a ("[E]ven if each merchant's claim took no more than a half a day to sort out, the damages phase of trial would last as long as the whole course of Western civilization from Ur."). The only way out is settlement, but settlement "will be coerced by abuses that Rule 23(f) was specifically designed to correct," Pet. App. 55a, and lucrative settlements invite the filing of more massive class actions. Courts, therefore, are the first victim of the proliferation of class actions.

2. Businesses operating in the United States (whether headquartered here or abroad) also suffer adverse consequences from the proliferation of class actions. Of course, a business that is named as a defendant in a class action incurs all of the many attendant burdens: risk of liability, coerced settlement, drop in stock price, and injury to reputation. Even more fundamentally, however, businesses must deal with the risk of being named in a class action. With regard to many goods sold abroad, U.S.-made products are necessarily more expensive than foreign-made products because firms operating in the United States must build the cost of liability insurance and risk into the product, costs not shared by foreign competitors. PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 229-230 (1st ed. 1990). Moreover, even with regard to many goods sold in the United States, American companies bear U.S. liability costs on their start-up development and production. On the other hand, "[f]oreign companies can * * * move into the U.S. market at the margin, when the product is mature enough to make exact warnings possible and insurance affordable." *Id* at 230. By bearing the costs of the *risk* of being sued, even if they are never named in a class action, companies (including non-U.S. companies) doing business in the United States become victims of the class action boom.

3. So are the U.S. capital markets. Class action litigation is, for the most part, a U.S. phenomenon. See, *e.g.*, *Laptop Illogic*, Editorial, ASIAN WALL ST. J., Nov. 4, 1999, at 12 ("America's reputation as the land of lawsuits just got a lot worse."). Not surprisingly, many non-U.S. companies are wary of doing business in a jurisdiction with such a substantial risk of liability. "The initial reaction of the foreign businessman or lawyer to the threat of US jurisdiction is to throw up his hands in horror." Richard Wiseman, *What to Tell Your Foreign Client*, INT'L COM. LITIG., May 1, 1999, at 33.

Many non-U.S. companies therefore look for ways to avoid facing the liability associated with U.S. class actions. Foreign issuers are "deter[red] from raising capital or listing securities

in the United States" because they do not want to "subject themselves to broader civil liability under the antifraud provisions of the securities acts and other U.S. class action suits." Michael A. Schneider, *Foreign Listings and the Preeminence of the U.S. Securities Exchanges: Should the SEC Recognize Foreign Accounting Standards?*, 3 MINN. J. GLOBAL TRADE 301, 315-316 (1994). According to one international practitioner, an in-house lawyer at Shell UK Limited, "The best advised corporations will arrange their affairs to ensure either that they * * * conduct their business through a truly autonomous affiliate whose business arrangements both on paper and in practice avoid its becoming the alter ego of a deep-pocketed parent or sister company." Wiseman at 33. Or "[t]here is an alternative strategy for foreign defendants. That is to ensure that they have no assets in the US * * *." *Ibid*. In other words, some foreign companies are being advised — and are no doubt following this advice — to keep their assets out of the United States to avoid paying big-dollar judgments. This hurts the U.S. capital markets, which may be deprived of substantial foreign investment, and the free flow of international trade.

4. Finally, the U.S. consumer bears the cost of the proliferation of class actions. Certainly, as a class member, a consumer may get some benefit from a particular class action. But cf. *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 338 (1980) (noting frequency with which class actions do not provide real benefits to clients). But consumers lose the benefit of new technologies and products that class action liability deters.

The threat of large liability will deter a company from marketing a new product. The story of the prescription drug Bendectin proves this point. Bendectin was once marketed for the treatment of the side effects of pregnancy. Although Bendectin was never proven to cause medical defects, lawsuit after lawsuit was filed alleging that it did. The drug's manufacturer eventually "decided to set a limit on its liability by removing Bendectin from the market." Louis Lasagna, *Chilling Effect of Product Liability*, in THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW

ON SAFETY AND INNOVATION 334, 340 (Peter W. Huber & Robert E. Litan eds., 1st ed., 1991). The result: "It seems safe to predict that never again will a manufacturer petition the FDA to approve for marketing a new prescription drug" for the side effects of pregnancy. *Id*. at 341. Companies "adjust[] to the threat of liability by doing less. *Not* innovating is a remarkably easy thing to do." HUBER at 155 (emphasis in original).

The risk of companies refusing to innovate for fear of liability has been recognized in the class action context:

> Because potential liability of a class action is so enormous and unpredictable under the current system, most defendants are willing to settle regardless of merit. The cost is then passed off to the American consumer in the form of higher prices for goods and services.

Sensenbrenner Statement, *supra*. Ironically, class actions — often brought in the name of the American consumer — end up harming one of the constituencies they are intended to protect.

In short, erroneous certification of class actions, and the resulting explosion of class action litigation, harms both litigants and non-litigants. By ensuring that class actions are being erroneously certified, the Second Circuit's opinion contributes to this enormous problem.

This Court has a particular responsibility to resolve mature and important circuit conflicts over interpretation of the Federal Rules, because the Court shares responsibility with Congress for such rules. The present case presents such a conflict over an issue whose implications are important, in the setting of a case that is itself highly consequential, high-stakes litigation. The Court should not let pass this opportunity to bring order and rationality to an area that, *amici* submit, is spiraling out of control.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROY T. ENGLERT, JR.
Counsel of Record
KATHRYN S. ZECCA
SHERRI LYNN WOLSON
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4503

Counsel for Amici Curiae

MAY 2002