No.

IN THE

Supreme Court of the United States

FCA US LLC AND HARMAN INTERNATIONAL INDUSTRIES, INCORPORATED,

Petitioners,

v.

BRIAN FLYNN, GEORGE & KELLY BROWN, AND MICHAEL KEITH, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

KATHY A. WISNIEWSKI
THOMPSON COBURN LLP
One U.S. Bank Plaza
St. Louis, MO 63101
(314) 552-6000

MICHAEL D. LEFFEL
FOLEY & LARDNER LLP
150 East Gilman Street
Madison, WI 53703
(608) 257-5035

THOMAS H. DUPREE JR.
Counsel of Record
T. ELLIOT GAISER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Petitioners

QUESTIONS PRESENTED

Plaintiffs brought a purported class action claiming that they bought or leased FCA-manufactured vehicles that were "excessively vulnerable" to being hacked. Even though no class member's vehicle had ever actually been hacked, the district court held that plaintiffs had Article III standing and certified three statewide classes containing more than 220,000 consumers claiming $440 million in damages. In a series of three rulings, the Seventh Circuit allowed this class action to proceed.

The questions presented are:

1. Whether Federal Rule of Civil Procedure 23(f) allows a court of appeals to grant interlocutory review of a class-certification decision based solely on manifest error.

2. Whether the class-certification decision is manifestly erroneous because plaintiffs lack Article III standing; because the district court failed to conduct a rigorous predominance analysis; and because class treatment is not the superior method of adjudication where there is no common question uniting the three statewide classes.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel states that:

FCA US LLC is a wholly owned subsidiary of FCA North America Holdings LLC, formerly known as Fiat North America LLC, a Delaware limited liability company with its principal place of business in New York, New York. FCA North America Holdings LLC is wholly owned by Fiat Chrysler Automobiles N.V., a Dutch company whose equity is publicly traded on the New York Stock Exchange.

Harman International Industries, Incorporated is directly or indirectly a wholly-owned subsidiary of Samsung Electronics Co., Ltd., which owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

FCA US LLC and Harman International Industries, Incorporated respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The Seventh Circuit's orders (Pet. App. 1a, 3a, 4a) are not reported. The orders and opinions of the district court (Pet. App. 7a, 36a, 38a, 45a) are not reported, although the order denying petitioners' motion to dismiss is available at 2016 WL 5341749, and the class-certification order is available at 2018 WL 3303267.

JURISDICTION

The Seventh Circuit entered its judgment denying petitioners' request for an interlocutory appeal of a certified order on Article III standing on May 4, 2018, and denied their timely petition for rehearing on June 29, 2018. The Seventh Circuit entered its judgment denying petitioners' request for interlocutory review of the district court's class-certification order on August 8, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23(f) provides:

> A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the

district court unless the district judge or the court of appeals so orders.

INTRODUCTION

This case squarely presents a question that has split the circuits: whether, under Federal Rule of Civil Procedure 23(f), a court of appeals may grant interlocutory review of a class-certification decision based solely on "manifest error." The Seventh Circuit, along with the First and Second Circuits, does *not* recognize manifest error as a permissible basis for interlocutory review. The Third, Fourth, Ninth, Tenth, and D.C. Circuits, on the other hand, have squarely held that manifest error *is* a permissible basis for interlocutory review.

Rule 23(f), which empowers courts of appeals to allow interlocutory review of class-certification decisions, was designed for cases like this one. The district court certified three statewide classes of buyers or lessees of FCA motor vehicles who claimed they "overpaid" for their vehicles on the theory that the vehicles were "exceedingly hackable." According to plaintiffs, a criminal could hack into the vehicle's infotainment system and seize control of the vehicle's operations, including its steering and braking functions, potentially causing an accident.

The obvious flaw in plaintiffs' claims is that they lack Article III standing because they have never been injured. It is undisputed that plaintiffs' vehicles have never been hacked. In fact, it is undisputed that none of the more than 220,000 class members' vehicles have ever been hacked. In fact, there is no evidence that *any* person anywhere in the world has ever been injured by the hack of any FCA vehicle. Plaintiffs' entire case is based on a purported risk of injury arising from a hypothetical future hack that itself

depends on the speculative possibility of criminal actions by a third party. The decision to certify a class of hundreds of thousands of uninjured persons is manifestly erroneous under *Clapper v. Amnesty International USA*, 568 U.S. 398, 401 (2013), which holds that injury must be "certainly impending" to satisfy Article III.

Two other aspects of the class-certification ruling are clearly and manifestly erroneous. First, the district court's "analysis" of predominance consisted of a single cursory paragraph that utterly failed to address, let alone engage, the vast amount of record evidence establishing that common issues do *not* predominate—including plaintiffs' acknowledgment that a vehicle's level of "vulnerability" to hacking differs by vehicle make and model, making it impossible to render a uniform assessment as to whether there is a "defect" at all, let alone whether class members overpaid for each of the 150 different configurations of FCA vehicles at issue. Second, the court certified three separate statewide classes without identifying a single common question uniting the classes, thus making abundantly clear that class treatment could not possibly be the superior method of adjudication, particularly when it will result in an Illinois court resolving claims that have no connection whatsoever to Illinois.

Despite these manifest errors, the Seventh Circuit denied petitioners' request for interlocutory review under Rule 23(f), forcing FCA and Harman to now face a multi-state class-action trial with total potential damages (in plaintiffs' estimation) exceeding $440 million. In denying interlocutory review, the Seventh Circuit applied its longtime standard, first recognized in *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832

(7th Cir. 1999), and adhered to ever since, that does *not* recognize "manifest error" as a basis for granting Rule 23(f) review. Other circuits have adopted the same approach. *See Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000); *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001).

The Seventh Circuit's approach directly conflicts with the test applied in the Third, Fourth, Ninth, Tenth, and D.C. Circuits, all of which *do* recognize "manifest error" as a basis for granting Rule 23(f) review. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 259 F.3d 154 (3d Cir. 2001); *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138 (4th Cir. 2001); *Chamberlan v. Ford Motor Co*., 402 F.3d 952 (9th Cir. 2005); *Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002).

Many courts and commentators have recognized the circuit split. *See, e.g*., *Chamberlan*, 402 F.3d at 959 (stating that it was breaking with the Seventh and First Circuits by holding that Rule 23(f) review "is warranted when the district court's decision is manifestly erroneous"); *In re Lorazepam*, 289 F.3d at 105 (similarly noting that, in allowing review for "manifest error," it was adopting a test at odds with the one applied by the Seventh and First Circuits).

The availability of Rule 23(f) review is a critical protection for class-action defendants. Indeed, given that class actions frequently settle once a class is certified, Rule 23(f) review is often the *only* opportunity a defendant has to challenge a manifestly erroneous class-certification order like the one in this case. Yet the Seventh Circuit has adopted a rule that eliminates the discretion of any given panel to review

class-certification decisions for manifest error. Whether Rule 23(f) allows review of class-certification decisions based solely on manifest error is an important and recurring question that has split the Circuits and warrants resolution by this Court.

STATEMENT

The district court certified three separate single-state classes encompassing more than 220,000 consumers and 150 different configurations of FCA vehicles that plaintiffs alleged were "exceedingly hackable" through the in-vehicle infotainment system. The class-certification decision contravenes this Court's precedent and opens the door to class-action litigation by plaintiffs who claim that they bought a product that did not have "enough" cybersecurity (in the judgment of their lawyers, or their expert), and who then threaten manufacturers with demands for massive judgments despite the fact that not a single class member has experienced a breach. Because no connected product can be designed to be totally impervious to hacking, all connected products are potentially "vulnerable" to hacking. Thus, any consumer could allege that he overpaid for a product that in his view did not have "adequate" cybersecurity, even when that consumer had never been subject to a hack—and even when, as in this case, no consumer anywhere in the world had ever been subject to a hack.[1]

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[1] After the district court's class-certification decision, plaintiffs' counsel publicly stated at a conference that the ruling in this case would unleash a "tidal wave" of similar cases alleging cybersecurity flaws in consumer products. *See* Ben Kochman, *A Deluge Of Suits Over Connected Devices Could Be Coming*, Law360 (Aug. 24, 2018) (statement of plaintiffs' counsel that trial

A. Background

Respondents own or lease vehicles manufactured by petitioner FCA. The vehicles are equipped with a computerized infotainment system called "Uconnect." Petitioner Harman supplies FCA with the hardware and software used in the Uconnect system. No. 15-cv-08555, Docket entry ("Dkt.") #246 at 1 (S.D. Ill. Sept. 21, 2017); Pet. App. 64a.

In the summer of 2015, two cybersecurity researchers conducted an experiment on the Uconnect system installed in their 2014 Jeep Cherokee Limited. As reported in a July 21, 2015 article in *Wired* magazine, the researchers were able to remotely access the system and control vehicle operations. Dkt. #246.

On July 23, 2015, FCA announced a voluntary recall, under the supervision of the National Highway Traffic Safety Administration (NHTSA), that included software fixes. In addition, the network provider closed the open port that had allowed the researchers to access the system. NHTSA examined the fixes and determined that they successfully "eliminated vulnerabilities that might allow a remote actor to impact vehicle control systems." Dkt. #317-1, ¶¶ 117–18.

Aside from the hack conducted in a controlled environment described in the 2015 *Wired* article, there has never been a hack of the Uconnect infotainment system. No hacker has ever remotely accessed the system; no hacker has ever seized control of a vehicle's operations; and no consumer has ever

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lawyers are "salivating over this" and "inevitably there will be more lawsuits" because "[p]eople love this stuff").

been injured. This was true before the 2015 recall and it remains true today. *See* Dkt. #317-1, ¶¶ 5, 129.

B. Proceedings Below

1. Plaintiffs filed a purported class action in the Southern District of Illinois. Plaintiffs did not allege that the Uconnect systems in their vehicles have ever been hacked, nor did they allege that any Uconnect system anywhere in the world has ever been hacked under real-world conditions. As the district court found, "Plaintiffs do not allege their vehicles have actually been hacked nor do they claim they are aware of any hacked vehicle outside of controlled environments." Pet. App. 39a; *see also id.* at 13a (statement of the district court: "[I]n this case there is no allegation that a real world hacker has ever hacked the Uconnect system to cause injury.").

Plaintiffs' sole theory of injury was "overpayment." They alleged that the Uconnect system has vulnerabilities that make it susceptible to hacking, thus giving rise to the *possibility* that a criminal could remotely control certain vehicle functions such as steering and braking. According to plaintiffs, they would not have purchased or leased their vehicles—or would have paid less for them—if they had known the vehicles' Uconnect systems were "vulnerable" to hacking.

The district court held that plaintiffs had Article III standing to pursue their overpayment claims. Pet. App. 13a–16a. FCA and Harman moved for reconsideration after the Ninth Circuit decided *Cahen v. Toyota Motor Corp.*, 717 F. App'x 720 (9th Cir. 2017), where that court, on almost identical facts, held that plaintiffs did *not* have Article III standing to pursue "claim[s] that their vehicles are vulnerable to being hacked because their vehicles' computer

systems lack security." *Id*. at 723. The district court denied reconsideration. Pet. App. 36a. But it certified the standing question for interlocutory appeal under 28 U.S.C. § 1292(b), acknowledging that its decision conflicted with *Cahen*, which the court recognized arose on "allegations nearly identical to those made by Plaintiffs in this case." Pet. App. 40a.

In the Seventh Circuit, plaintiffs conceded that all of the interlocutory appeal factors were satisfied under 28 U.S.C. § 1292(b), with one exception. They argued that the Article III standing issue was not a "contestable question."

The Seventh Circuit denied the interlocutory appeal without explanation. Pet. App. 5a. FCA and Harman moved for rehearing, but the court denied the request, again without explanation. *Id*. at 3a.

2. The district court then granted plaintiffs' motion for class certification. Pet. App. 45a. The court certified three separate statewide classes, consisting of consumers from Illinois, Michigan and Missouri—the home states of the named plaintiffs Flynn (Illinois), George and Kelly Brown (Missouri), and Keith (Michigan). All three classes were certified against FCA; only the Michigan class was certified against Harman. *Id*. at 47a–49a, 81a. Each class was defined to include: "All persons who purchased or leased vehicles in [the applicable state] on or before July 5, 2018, that were manufactured by FCA and that are equipped with the Uconnect 8.4A or Uconnect 8.4AN systems that were subject to the July 23, 2015 NHTSA Safety Recall campaign number 15V461." *Id*. at 81a.

The court held that plaintiffs had satisfied Rule 23(b)(3)'s predominance requirement. The court stated that "Plaintiffs' predominance argument in

their opening brief is insufficient to satisfy the court that they have satisfied their burden," noting that predominance is similar to typicality and commonality but is "far more demanding," and that "Plaintiffs barely scratch the surface of what the Court must consider." Pet. App. 73a. Nonetheless, the court explained, plaintiffs "are saved from a ruling that they failed to establish predominance only by the time spent discussing relevant issues during the hearing on the motion to certify class." *Id*. Then, in a single paragraph, the court held that "Plaintiffs have met their burden as to predominance in the proposed state-wide class claims." *Id*. at 78a. The court did not address any of the extensive evidence in the class-certification record establishing that a vehicle's level of "vulnerability" to a hack differs by vehicle make and model year, rendering it impossible to provide a common answer to the question whether all of the 150 vehicle configurations included in the class definitions were defective, let alone whether each class member overpaid.

The court also held that a class action consisting of three separate and distinct statewide classes was the superior method of adjudication. *See* Pet. App. 78a–79a. The court did not view the superiority requirement as imposing any different or additional burden beyond those imposed by the commonality, typicality, and adequacy requirements. Thus, in the court's view, once the other requirements were satisfied, superiority was established. *See id*. at 79a ("Because common issues predominate and the named Plaintiffs are typical and adequate class representatives, as discussed above, the instant case meets [the superiority] requirement.").

Each of the three certified classes will be pursuing different types of claims under the respective laws of the three states in question. The Illinois class will be pursuing a claim for breach of the implied warranty of merchantability under Illinois common law. The Missouri class will be pursuing a claim for consumer fraud under the Missouri Merchandising Practices Act. And the Michigan class will be pursuing claims for breach of warranty and consumer fraud under the Michigan Consumer Protection Act. *See* Pet. App. 81a–82a, Dkt. #403 at 1–2.

FCA and Harman sought review under Rule 23(f), arguing that the class-certification order was plainly contrary to law, conflicted with decisions from this Court and the Seventh Circuit, and "threatens to usher in a new era of class-action litigation involving Internet-connected products that are increasingly common in modern American life." No. 18-8015, Docket entry ("ECF") #1, at 1 (7th Cir. July 19, 2018). FCA and Harman expressly presented the three manifest errors that warranted review under Rule 23(f):

- "[T]he district court erred by certifying three separate single-state classes containing tens of thousands of people who could not possibly have been injured."
- "[T]he district court erred in concluding, in a single paragraph bereft of any meaningful engagement with the evidence, that common questions predominate over individualized questions."
- "[T]he district court erred in certifying Michigan and Missouri classes, where the claims of those class members have no connection to Illinois."

ECF #1 at 4.

The Seventh Circuit denied the Rule 23(f) petition, once again offering no explanation. Pet. App. 2a.

REASONS FOR GRANTING THE PETITION

The circuits have split on the question whether "manifest error" is a permissible basis for granting review of a class-certification order under Rule 23(f). Many courts and commentators have recognized this split, which presents an undeniably important and recurring question of federal law. The current state of affairs—in which some Circuits will review manifestly erroneous class-certification orders under Rule 23(f) and others will not—is untenable, as the availability of appellate review should not vary by Circuit. In many cases, interlocutory review under Rule 23(f) is all that stands between a defendant and a coerced multimillion-dollar settlement arising from a flawed and erroneous class-certification order.

This case illustrates the problem: the district court's order is manifestly erroneous, yet the Seventh Circuit has declined to review it. FCA and Harman now face the imminent prospect of a class-action trial where plaintiffs are demanding $440 million in damages for "overpayment" by 220,000 consumers based on a purported defect that has never injured a single person. Under a straightforward application of *Clapper*, which holds that injury must be "certainly impending," plaintiffs clearly lack Article III standing—and the class-certification order should have been summarily reversed for that reason, or because the district court's conclusions as to predominance and superiority are also manifestly erroneous.

I. The Circuits Are Split Over Whether Manifest Error Is A Permissible Basis For Review Under Rule 23(f).

Federal Rule of Civil Procedure 23(f), promulgated in 1998, authorizes interlocutory review of class-certification decisions. It provides that "[a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered."

Although courts have discretion in deciding whether to grant interlocutory review under Rule 23(f), *see Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1709 (2017), a clear circuit split has emerged over whether review is available based solely on the fact that a class-certification decision is manifestly erroneous.

A. The Seventh Circuit, As Well As The First And Second Circuits, Does Not Allow Review For Manifest Error.

"Manifest error" occurs when a district court fails to apply the correct legal standard, reaches a decision squarely foreclosed by precedent, or otherwise commits an error "that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." BLACK'S LAW DICTIONARY 660 (10th ed. 2014).

The Seventh Circuit does not recognize manifest error as a permissible basis for granting interlocutory review of a class-certification order under Rule 23(f). In *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999), the court identified three circumstances where interlocutory appeal may be

warranted: where "the denial of class status sounds the death knell of the litigation"; where the grant of class status "put[s] considerable pressure on the defendant to settle;" and where an immediate appeal "may facilitate the development of the law." *Id*. at 834–35.

The Seventh Circuit evaluates Rule 23(f) petitions under the *Blair* standard, and has denied them when the class-certification order does not raise a novel issue or signal the death knell of the litigation. For example, in *Howard v. Pollard*, 814 F.3d 476 (7th Cir. 2015), the court stated: "We deny the Rule 23(f) petition because it does not raise a novel issue of class-certification law and because the petitioners do not establish that the denial of class certification signals the death knell of their action." *Id.* at 478 *(*citing *Blair*, 181 F.3d at 834–35*); see also McMahon v. LVNV Funding, LLC*, 807 F.3d 872, 875 (7th Cir. 2015) (same); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658–59 (7th Cir. 2015) (same).

Other Circuits take the same approach. The First Circuit has largely adopted *Blair*, finding its "taxonomy" to be "structurally sound." *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000). That court has adopted *Blair*'s first two categories (death knell for plaintiff, death knell for defendant), and a narrower version of the third category (resolution of an important legal issue that also is likely to evade review on final judgment). *See id*. The First Circuit does not recognize manifest error as a basis for review.

Nor does the Second Circuit. In *In re Sumitomo Copper Litigation*, 262 F.3d 134 (2d Cir. 2001), the court adopted the First Circuit's approach. The court held that Rule 23(f) appeals were permissible when

"the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable," or "the certification order implicates a legal question about which there is a compelling need for immediate resolution." *Id*. at 139. Like the Seventh and First Circuits, the Second Circuit does not recognize manifest error as a basis for review.

B. The Third, Fourth, Ninth, Tenth, and D.C. Circuits Hold That Manifest Error *Is* An Independent And Sufficient Basis For Review.

Many circuits take a different approach. They hold that manifest error *is* a permissible basis for interlocutory review under Rule 23(f).

The Third Circuit holds that error in a class-certification ruling is an independently sufficient basis for granting review. In *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 259 F.3d 154, 164 (3d Cir. 2001), the court recognized the three *Blair* categories, but then stated that "interlocutory review is not cabined by these circumstances." The court explained that "an error in the class certification decision that does not implicate novel or unsettled legal questions may still merit interlocutory review given the consequences likely to ensue." *Id*. Thus, "if the appellant demonstrates that the ruling on class certification is likely erroneous, . . . interlocutory review may be proper." *Id*.

The Fourth Circuit takes the same approach. In *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138 (4th Cir. 2001), the court granted Rule 23(f) review and reversed the district court's certification decision for manifest error. "Where a district court's certification decision is manifestly erroneous and virtually certain

to be reversed on appeal, the issues involved need not be of general importance, nor must the certification decision constitute a 'death knell' for the litigation." *Id*. at 145. The court added that "[s]uch a rule would waste, rather than conserve, judicial resources, because self-evidently defective classes would proceed through trial to final judgment, only to face certain decertification on appeal and a requirement that the process begin again from square one." *Id*.

The Ninth Circuit similarly holds that manifest error is a sufficient basis for interlocutory review. In *Chamberlan v. Ford Motor Co*., 402 F.3d 952, 958 (9th Cir. 2005), the court emphasized that "the development of a fourth category of cases in which review is warranted"—"when the district court's decision is manifestly erroneous"—has been a "notable modification of the *Blair* trilogy." The court then adopted manifest error as a basis for review, openly acknowledging that in doing so, it was breaking with the Seventh and First Circuits:

> Unlike the courts in *Mowbray* and *Blair*, we view interlocutory review as warranted when the district court's decision is manifestly erroneous—even absent a showing of another factor. We see no reason for a party to endure the costs of litigation when a certification decision is erroneous and inevitably will be overturned.

Id. at 959.

The Tenth Circuit also allows Rule 23 appeals based on manifest error. In *Vallario v. Vandehey*, 554 F.3d 1259, 1263 (10th Cir. 2009), the court held that "[i]mmediate review of a district court's class certification ruling may also be fitting when that decision is manifestly erroneous." The court

explained that "where the deficiencies of a certification order are both significant and readily ascertainable, taking into account the district court's discretion in matters of class certification, interlocutory review is appropriate to save the parties from a long and costly trial that is potentially for naught." *Id*. at 1264.

Finally, the D.C. Circuit holds that Rule 23 review is warranted "when the district court's class certification decision is manifestly erroneous." *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002). In that case, the court acknowledged that its holding was at odds with the test applied in the First and Seventh Circuits. "But we conclude, unlike [the First Circuit in] *Mowbray* and [the Seventh Circuit in] *Blair*, that error in certifying a class" can provide an independent basis for interlocutory review. 289 F.3d at 105. "Where a district court class certification decision is manifestly erroneous . . . Rule 23(f) review would be warranted even in the absence of a death-knell situation if for no other reason than to avoid a lengthy and costly trial that is for naught once the final judgment is appealed." *Id*.[2]

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[2] Two Circuits apply a flexible approach in which the merits of the class-certification decision are assessed holistically under a totality-of-the-circumstances approach. *See In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002) (the merits of a class-certification decision "may be of greater or lesser significance, depending on other factors in the case"); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000) ("a court should consider whether the petitioner has shown a *substantial* weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion").

C. The Question Presented Is Important, Recurring, And Worthy Of This Court's Review.

This Court should grant review and hold that Rule 23(f) allows interlocutory review of manifestly erroneous class certification decisions. A key purpose of the Rule is to prevent wasteful litigation arising from class-certification decisions that will almost certainly be reversed on appeal. As the Fourth Circuit explained in *Lienhart*, "[i]n addition to addressing 'death knell' situations and promoting the resolution of legal questions of general importance, a careful and sparing use of Rule 23(f) may promote judicial economy by enabling the correction of certain manifestly flawed class certifications prior to trial and final judgment." 255 F.3d at 145. It makes no sense to interpret the Rule, as the Seventh Circuit does, to bar review of manifestly erroneous class-certification decisions unless they fit into one of *Blair*'s three boxes (*i.e.*, death knell for plaintiff, death knell for defendant, facilitating development of the law). By adopting a rule that eliminates the discretion of any given panel to reverse manifestly erroneous class-certification decisions, the Seventh Circuit has undercut the very reason why Rule 23(f) exists.

Many courts and commentators have recognized the circuit split on this critically important and recurring question. *See, e.g.*, *Chamberlan*, 402 F.3d at 959; *In re Lorazepam*, 289 F.3d at 105 (D.C. Cir. 2002); 7B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1802.2 (3d ed.) (discussing the Circuits' "difference in approach" over whether Rule 23(f) allows "review solely on the basis of the possibility of an erroneous ruling"); Theane Evangelis et al., *Interlocutory Appeals,* in *A*

Practitioner's Guide to Class Actions 105, 111 (Marcy Hogan Greer ed., 2017) (explaining that "important differences between the circuits' [Rule 23] standards have emerged," including over whether to consider if "the district court's decision was manifestly erroneous"); Tanner Franklin, *Rule 23(f): On the Way to Achieving Laudable Goals, Despite Multiple Interpretations*, 67 Baylor L. Rev. 412, 430 (2015) (canvassing the conflicting approaches to manifest-error review and concluding that "the circuits are split in regard to whether or not to hear a 23(f) appeal").

The disparity in Rule 23(f) standards penalizes litigants in the First, Second, and Seventh Circuits, who cannot obtain interlocutory review of manifestly erroneous class-certification orders, and may even encourage forum shopping. As one commentator has urged, "if the disparate Rule 23(f) standards among circuits remain, sophisticated litigants should expect to evaluate Rule 23(f) appealability as part of strategic forum shopping during class action litigation." Charles R. Flores, *Appealing Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f)*, 4 Seton Hall Circuit Rev. 27, 57 (2007).

It is no answer to overlook the circuit split on the theory that conflicting Rule 23(f) standards are tolerable because the Rule gives the courts of appeals broad discretion in deciding whether to grant review. Where, as here, some Circuits have erroneously interpreted the Rule to foreclose an entire category of cases from appellate review as a matter of law, this Court's intervention is warranted. As the Court has stated, "the matter is one which, though concededly 'procedural,' may be of as great importance to litigants as many a 'substantive' doctrine, and which arises in

a field of federal jurisdiction where nationwide uniformity has traditionally always been highly esteemed." *Miner v. Atlass*, 363 U.S. 641, 649–50 (1960). This Court has previously granted certiorari to resolve circuit splits over the permissible timing of Rule 23(f) petitions. *See Baker*, 137 S. Ct. 1702; *Nutraceutical Corp. v. Lambert*, No. 17-1094 (cert. granted June 25, 2018). Certiorari is warranted here to resolve the circuit split over whether it is permissible for a court of appeals to prohibit panels from granting Rule 23(f) review based solely on manifest error.

This Court has made clear that its jurisdiction extends to court of appeals decisions denying permission to appeal. *See* 28 U.S.C. § 1254(1) (certiorari jurisdiction extends to "any civil or criminal case" that is "in the court of appeals"); *Hohn v. United States*, 524 U.S. 236, 238–41 (1998); *United States v. Nixon*, 418 U.S. 690, 692 (1974). The Court also has jurisdiction to review the merits of the district court's certification order. In fact, that is precisely what the Court did in *Standard Fire Insurance Co. v. Knowles*, 568 U.S. 588 (2013), an analogous case in which petitioners sought review of a remand decision arising under the Class Action Fairness Act. Though the court of appeals in *Standard Fire* declined to review the district court's order, the Court granted review over the plaintiff's objection, reviewed the district court's reasoning, and reversed. *Id.* at 591; *see also Dart Cherokee Basin Operating Co. v. Owens*, 134 S. Ct. 547 (2014). The Court should do the same here.

II. The Class-Certification Order Is Manifestly Erroneous.

The class-certification order should have been summarily reversed because it is manifestly erroneous in at least three respects: plaintiffs are uninjured and lack Article III standing; common issues do not predominate; and certifying three separate and distinct statewide classes is not the superior method of adjudication. If the Seventh Circuit recognized manifest error as a basis for a Rule 23(f) appeal, it would have granted review and reversed.

A. Plaintiffs Lack Article III Standing Under *Clapper*.

1. In *Clapper v. Amnesty International USA*, 568 U.S. 398, 401 (2013), the Court held that injury must be "certainly impending" to satisfy Article III. The Court rejected the plaintiffs' attempt to challenge a provision of the Foreign Intelligence Surveillance Act, concluding that their alleged future injury was speculative and uncertain. The Court explained that "allegations of *possible* future injury are not sufficient" to establish standing, and that the plaintiffs' "theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending." *Id*. at 409–10 (alteration and quotation marks omitted). The Court also pointed out that the plaintiffs' theory of standing improperly "rel[ied] on speculation about the unfettered choices made by independent actors not before the court." *Id*. at 414 n.5 (quotation marks omitted).

Plaintiffs lack Article III standing under a straightforward application of *Clapper*. Their alleged injury is not "certainly impending." They do not allege

that their vehicles have ever been hacked. Indeed, there is no evidence that any FCA vehicle has *ever* been hacked, aside from the controlled hack described in the 2015 *Wired* article. In light of the size of the certified classes in this case—involving more than 220,000 vehicles that have been driven for years—*the fact that not a single class member has ever experienced a hack* conclusively establishes that the likelihood of a future hack cannot possibly be "certainly impending." Moreover, the possibility of a hack depends on "speculation about the unfettered choices made by independent actors not before the court"—precisely what *Clapper* held is *insufficient* to establish standing. *Id*. at 414 n.5 (quotation marks omitted).

In today's increasingly interconnected world, "increased vulnerability to hacking" claims will arise with greater and greater frequency. Virtually any connected product could include additional security features (often at increased cost or decreased utility), and enterprising lawyers have latched on to "overpayment" allegations as a way to try to establish injury. Because in many cases, like this one, there has been no hack and no security breach, lawyers frame the claim as one of overpayment as a way of satisfying Article III, arguing that the plaintiffs would have paid less for the product had they known it could be hacked so easily. *See* Greg Herbers, *Data-Breach Plaintiffs' Lawyers Concoct New "Overpayment" Harm Theory, With Mixed Results,* Forbes (July 28, 2017). This Court should grant review to make clear that Article III cannot be circumvented in this way.

2. The manifestly erroneous nature of the class-certification order is further illustrated by the fact that many other Circuits have rejected standing

under similar circumstances. Indeed, the district court itself acknowledged that the Ninth Circuit rejected standing in a recent case arising under "nearly identical" circumstances. Pet. App. 40a. In *Cahen v. Toyota Motor Corp.*, 717 F. App'x 720, 723 (9th Cir. 2017), just as in this case, the plaintiffs claimed that "their vehicles are vulnerable to being hacked because their vehicles' computer systems lack security," but the plaintiffs did "not allege that any of their vehicles have actually been hacked" and did "not allege that they are aware of any vehicles that have been hacked outside of controlled environments." The Ninth Circuit—in direct conflict with the court here—held that "[p]laintiffs have failed to sufficiently allege an injury due to overpaying for their vehicles," and affirmed the dismissal of their complaint. *Id.*; *see also Birdsong v. Apple, Inc.*, 590 F.3d 955, 961 (9th Cir. 2009) (holding that plaintiffs' alleged overpayment theory "does not constitute a distinct and palpable injury that is actual or imminent because it rests on a hypothetical risk of . . . loss to other consumers who may or may not choose to use [the product] in a risky manner").

Similarly, in *Katz v. Pershing, LLC*, 672 F.3d 64, 80 (1st Cir. 2012), the First Circuit held that where a plaintiff cannot identify any incident in which her data has ever been accessed by an unauthorized person, she cannot satisfy Article III's requirement of "actual or impending injury." And in *Reilly v. Ceridian Corp.*, 664 F.3d 38, 45 (3d Cir. 2011), the Third Circuit held that "[i]n data breach cases where no misuse is alleged . . . there has been no injury—indeed, no change in the status quo" and "there is no quantifiable risk of damage in the future." Thus, "[a]ny damages that may occur . . . are entirely speculative and dependent on the skill and intent of

the hacker." *Id*. In fact, the Third Circuit recently dismissed, for lack of standing, an "overpayment" claim similar to the one alleged here. In *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Liability Litigation*, 2018 WL 4292359 (3d Cir. Sept. 6, 2018), the court held that the plaintiff had not pleaded facts sufficient to maintain an "economic injury" claim where she claimed she had purchased "unsafe" baby powder—even though she herself had not been injured. *See id*. at *1–2, 9.

3. The Seventh Circuit continues to apply an erroneous standing rule in the wake of *Clapper* by asking whether there is an "objectively reasonable likelihood" of future injury.

In *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688 (7th Cir. 2015), the defendants challenged the plaintiffs' standing, arguing that any injury that might arise from the hack of Neiman Marcus customer data was speculative, because there was no evidence it had yet been misused. The Seventh Circuit rejected the argument, holding that "the Neiman Marcus customers should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing, because there is an objectively reasonable likelihood that such an injury will occur." *Id*. at 693 (quotation marks omitted). The Seventh Circuit applied the same test in *Lewert v. P.F. Chang's China Bistro, Inc*., 819 F.3d 963, 967 (7th Cir. 2016). There too, the defendants argued consumers could not challenge a data breach when there was no evidence that their data had been misused. The court looked to whether "there is an objectively reasonable likelihood that [the feared] injury will occur." 819 F.3d at 966–67 (quotation marks omitted).

This Court, however, *rejected* the "objectively reasonable likelihood" standard in *Clapper*. There, the Second Circuit had held that plaintiffs had standing to challenge a provision of the Foreign Intelligence Surveillance Act because they showed an "objectively reasonable likelihood" that their communications would be intercepted at some point in the future. 568 U.S. at 407. This Court reversed, rejecting "the novel view of standing adopted by the Court of Appeals." *Id*. at 408. The Court held that "[t]he Second Circuit's 'objectively reasonable likelihood' standard is inconsistent with our requirement that threatened injury must be certainly impending to constitute injury in fact." *Id*. at 410 (quotation marks omitted). The Court went on to conclude that the plaintiffs' "theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending." *Id*.

Many courts have noted that the Seventh Circuit continues to apply an erroneous test for standing that conflicts with *Clapper*. *See Galaria v. Nationwide Mut. Ins. Co*., 663 F. App'x 384, 389 n.2 (6th Cir. 2016) (noting conflict); *Alonso v. Blue Sky Resorts, LLC*, 179 F. Supp. 3d 857, 864 (S.D. Ind. 2016) (explaining that the Seventh Circuit's "standard is at odds with binding Supreme Court precedent governing standing").

In failing to properly apply *Clapper* in the hacking context, the Seventh Circuit has joined other Circuits that erroneously recognize Article III standing even where no tangible harm has resulted from a data breach. *See, e.g*., *In re Zappos.com, Inc*., 888 F.3d 1020 (9th Cir. 2018). This case, which similarly involves claims of alleged future harm, directly

implicates the existing circuit split on this question, although the claim here is even weaker because there has not been any hack or breach. This is not a case where there was an actual hack but no misuse of the stolen data. Rather, this is a case where there was no hack at all.

B. The One-Paragraph Discussion Of Predominance Is Neither "Rigorous" Nor Correct.

The district court certified three separate statewide classes, each encompassing tens of thousands of vehicles. It did so without any meaningful analysis of whether plaintiffs satisfied their burden of establishing predominance—and despite numerous individual questions that overwhelm any common issues. *See* Pet. App. 77a–78a.

1. Before certifying a class, a district court must conduct a "rigorous analysis" of whether plaintiffs established that issues common to the class predominate over issues that differ among the individual class members. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Indeed, a district court has a "*duty* to take a close look at whether common questions predominate over individual ones." *Id*. at 34 (emphasis added and quotation marks omitted). To this end, "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and "[s]uch an analysis will frequently entail "overlap with the merits of the plaintiff's underlying claim." *Id*. at 33–34 (quotation marks omitted). "That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues

comprising the plaintiff's cause of action." *Id*. (quotation marks omitted).

The district court's predominance discussion fell well short of this demanding standard. Instead of conducting the requisite rigorous analysis and resolving the factual disputes, the court reduced the predominance inquiry to a single paragraph that ignored FCA's and Harman's arguments and evidence, took plaintiffs at their word that common issues predominated, and failed to explore any of the numerous individual issues that preclude class certification here. Pet. App. 77a–78a. In fact, elsewhere in its order, the court recognized that "Plaintiffs' predominance argument in their opening brief is insufficient to satisfy the Court that they have satisfied their burden," noting that predominance is "far more demanding" than other aspects of Rule 23, "and Plaintiffs barely scratch the surface of what the Court must consider." *Id*. at 73a. The court should have stopped there and denied certification.

Instead, the court concluded that plaintiffs were "saved from a ruling that they failed to establish predominance only by the time spent discussing relevant issues during the hearing," Pet. App. 73a, and certified plaintiffs' proposed state classes with no explanation for, acknowledgement of, or attempt to engage with the arguments and evidence FCA and Harman put forward demonstrating that individual issues predominate. The court did not even identify what plaintiffs said at the hearing that cured their failure to establish predominance through the evidence and arguments in their written submissions. If the district court's single-paragraph discussion of predominance satisfies the "rigorous analysis" standard, then that standard is all but meaningless.

2. Had the district court performed a rigorous analysis, it would have concluded that plaintiffs failed to establish predominance. For example, the classes consist of purchasers and lessees of dozens of different vehicle models and model years, creating countless individual liability determinations that defeat predominance. FCA and Harman introduced evidence showing that the extent of a vehicle's vulnerability to hacking depends on a variety of vehicle-specific factors that Plaintiffs admitted affect its susceptibility to a hack, *see* Dkt. #283 at 2–4. These include, among other things, different permutations of software security and computer-operated controls. *Id*. Thus, the vulnerability of a vehicle containing a Uconnect system cannot be determined solely by examining the "installation" of the Uconnect itself, Pet. App. 52a–53a, 59a, but would require analyzing each of the different vehicle models and configurations at issue, across each of the three model years at issue. For that reason, a jury determination that one vehicle in the class was "too vulnerable" to hacking would not provide a common answer to the question whether each one of the more than 220,000 vehicles at issue was "too vulnerable." The district court failed to acknowledge, let alone engage, this critical question.

The district court also ignored NHTSA's determination that FCA's recall fixed the alleged vulnerability in the Uconnect. *See* Dkt. #317-1, ¶¶ 117–18. NHTSA's determination makes it impossible to provide a common answer to whether all class vehicles are vulnerable to hacking, because a jury determination that a pre-recall vehicle with an earlier software version was "vulnerable" cannot automatically extend to a vehicle with a post-recall version of the software.

The manifold differences among the class members—who include purchasers of new and used vehicles, and buyers as well as lessees—raise many additional individualized questions that preclude a finding of predominance. Because the alleged injury is overpayment, it is impossible to determine the existence and extent of liability without considering class members' individual circumstances, including, for example, whether an individual purchased or leased their vehicle, and whether an individual purchased it at a discount.

Here, even the named plaintiffs differ significantly. Michael Keith leased three vehicles in Michigan pursuant to an employee discount program and thus did not factor price into his decision. Dkt. #317-5 at 6–11. George and Kelly Brown, on the other hand, purchased a new vehicle in Missouri at a discounted price through an Employee Advantage Family Program. Dkt. #317-3 at 7–9, 12–15. And Brian Flynn purchased his vehicle in Illinois without "haggling" on the price. Dkt. #317-2 at 11–12.

The foregoing are just some of the more glaring examples of the individualized questions that were extensively addressed in the class-certification briefing—and established by extensive evidence—but were simply ignored in the district court's one-paragraph discussion of predominance. The district court disregarded many other important ways in which individual questions predominate:

• The court expressly found that a class member's knowledge at the time of purchase or lease is a question of fact that is highly relevant to the Michigan consumer-deception claims, Pet. App. 61a–62a, but it ignored the undeniable truth that determining class members' knowledge is an individualized inquiry that

will vary depending on when the class member purchased or leased the vehicle—before or after the 2015 *Wired* article was published, before or after the public recall was announced, and before or after this lawsuit was filed. It simply cannot be the case, as the district court necessarily assumed, that the knowledge of all car buyers or lessees from 2012 through 2018 can be determined on a class-wide basis without resort to individualized inquiries.

• The court recognized the need for individualized privity inquiries, which the court acknowledged are "fact-intensive" and required for Illinois implied warranty claims, Pet. App. 55a, but then inexplicably failed to address in its predominance discussion the need to establish privity, or what evidence could possibly establish privity on a class-wide basis for all purchasers and lessees of both new and used vehicles.

• The court did not explain how a jury could consider class members' vehicle usage on a class-wide basis, which would encompass those who used their vehicles until the end of their useful lives, as well as those who used their vehicles without incident and then resold them without a loss. The court acknowledged earlier in its ruling that vehicle usage is a relevant and potentially dispositive factor in deciding merchantability, Pet. App. 54a, but then ignored its own conclusion when assessing predominance.

3. The district court also brushed aside plaintiffs' failure to establish a reliable, common method of determining damages on a class-wide basis. Class certification is permissible only if the plaintiff shows that damages can be measured "on a class-wide basis through use of a common methodology." *Behrend*, 569 U.S. at 30 (2013).

Notwithstanding this clear directive, and without citation to any authorities, the district court summarily concluded in a single paragraph that plaintiffs had met their burden simply by identifying a damages method known as "discrete choice analysis," which relies on consumer surveys to "attempt[] to measure the value of the class vehicles had consumers been aware of the allegedly withheld information about the lacking cybersecurity." Pet. App. 75a. But the court failed to mention that plaintiffs' experts *have not yet designed* the consumer survey and had no answer when asked how the model will accommodate key differences such as vehicle purchasers versus lessees, owners of new versus used vehicles, and differences between vehicle models and model years. *See* Dkt. #317-10 at 7–10; Dkt. #317-11 at 5–9, 15–23, 26–27. In fact, plaintiffs' expert admitted that the focus groups he convened established that some car buyers placed "zero" value on any additional level of cybersecurity—and that what constitutes an "adequate" level of cybersecurity varies by consumer and vehicle model. Dkt. #321 at 26–28, 29–32.

Identifying discrete choice analysis as a damages methodology, but without providing any detail to demonstrate that the method is a reliable way to calculate class-wide damages in this particular case, does not pass muster under Rule 23. The Seventh Circuit should have held that plaintiffs' failure to demonstrate a reliable method for measuring damages on a class-wide basis precludes certification.

C. Certifying Three Separate And Distinct Statewide Classes Is Not The Superior Method Of Adjudication.

The district court's cursory approach to Rule 23's superiority requirement was also manifestly erroneous. The court concluded that superiority was automatically satisfied because plaintiffs had already proven commonality, typicality, and adequacy, effectively nullifying the superiority requirement as an independent check on class certification. Pet. App. 78a–79a.

A proper analysis would have concluded that class treatment is *not* the superior method of adjudication. The district court intends to conduct a trial involving three separate statewide classes consisting of Illinois, Michigan, and Missouri consumers, all of which will be adjudicated under different and conflicting standards. The three classes are asserting *different* theories of liability (warranty in Illinois, consumer fraud in Missouri, and both warranty and consumer fraud in Michigan). The court did not identify a single question in common between the three sets of class members, and did not explain why the claims of Michigan and Missouri consumers should be adjudicated by an Illinois court when those claims have no connection to Illinois. Basic principles of due process, federalism, and comity require that the Illinois court not resolve claims that are properly determined by the courts of Michigan and Missouri.

Moreover, the district court failed to consider the "likely difficulties in managing" this multistate class action. Fed. R. Civ. P. 23(b)(3)(D). It simply declared in conclusory fashion, once again without any analysis and despite plaintiffs' failure to offer a trial plan, that "this case will be manageable as a class action." Pet.

App. 79a. Nowhere in its class-certification decision did the court discuss what a trial would look like, much less discuss how class-action treatment could possibly be the superior method of adjudication. The upcoming trial will involve alleged "overpayments" by 220,000 consumers who bought or leased one of 150 different vehicle configurations. Each consumer conducted individualized negotiations resulting in different purchase or lease prices. And each statewide class will be pursuing different liability theories under the laws of different states, requiring the jury to apply varying legal standards to the three statewide classes, and then make "vulnerability" and "overpayment" assessments over a five-year class period in which the publicity surrounding the issue—and the cyberthreat landscape—changes from year to year.

For all of these reasons, the district court committed manifest error in granting class certification.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KATHY A. WISNIEWSKI
THOMPSON COBURN LLP
One U.S. Bank Plaza
St. Louis, MO 63101
(314) 552-6000

MICHAEL D. LEFFEL
FOLEY & LARDNER LLP
150 East Gilman Street
Madison, WI 53703
(608) 257-5035

THOMAS H. DUPREE JR.
Counsel of Record
T. ELLIOT GAISER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

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