No. 18-398

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 ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Alliance of Automobile Manufacturers, Inc. (the "Alliance") is a nonprofit trade association whose aim is to identify and implement constructive public policy solutions to promote sustainable access to mobility, while advancing progress in vehicle safety, responsible energy usage, and environmental protection. The Alliance's members are the BMW Group; FCA US LLC; Ford Motor Company; General Motors Company; Jaguar Land Rover; Mazda North American Operations; Mercedes-Benz USA; Mitsubishi Motors North America, Inc.; Porsche Cars North America, Inc.; Toyota; Volkswagen Group of America, Inc.; and Volvo Cars USA, LLC.

The Alliance has a significant interest in the Article III standing and class certification issues presented here because its members face class actions asserting only speculative harm or a speculative risk of future harm. Such lawsuits based on hypothetical injuries have no place in federal court. For example, here, plaintiffs alleged that their vehicles were prone to being hacked, yet there is no evidence that any of the plaintiffs' vehicles—or, indeed, *any* class member's vehicle—has ever been hacked. And plaintiffs' speculation is all the more implausible because it flies in the face of a comprehensive recall supervised by the National Highway Traffic Safety Administration (NHTSA), which provided a free remedy to consumers

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

that eliminated the only vulnerability ever actually exploited (in a controlled setting).

Nonetheless, the district court certified a class seeking $440 million in damages for "overpayment" based on this entirely theoretical concern with the affected vehicles. If, despite Article III's mandate and the already robust regulatory regime for addressing potential vehicle defects, district courts are permitted to erroneously certify damages class actions like this one, manufacturers like the Alliance's members will be mired in wasteful lawsuits unconnected to any actual harm or real risk of future harm.

Given the increasing prevalence of the use of wireless technologies in vehicles, the Alliance's members have a strong and growing interest in ensuring that lower federal courts adhere to the requirements of Article III, which allow federal courts to consider lawsuits addressing real harms but close them to lawsuits that merely seek to coerce costly settlements rather than redress concrete harms.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners explain why this Court should grant review here. The Alliance writes to underscore one of the manifest errors underlying the class certification order: the district court's lax approach to Article III standing in certifying a class of more than 220,000 vehicle owners or lessees despite the absence of any actual harm or risk of harm stemming from the allegations in this case.

Motor vehicles in the United States are increasingly equipped with wireless technologies that offer consumers safety, security, and convenience services. The plaintiffs in this case allege, based on a July 2015

article in *Wired* magazine involving a controlled experiment by cybersecurity researchers, that there is a purported design flaw in the "Uconnect" computerized infotainment system found in certain FCA vehicles that supposedly makes the vehicles vulnerable to hacking.

But the experiment reported in *Wired* is the *only* hack of the Uconnect system ever reported. Moreover, two days after publication of the article—and well before this lawsuit was filed—petitioner FCA announced a voluntary recall, under the supervision of NHTSA, that NHTSA determined was successful in "eliminat[ing] vulnerabilities that might allow a remote actor to impact vehicle control systems." NHTSA, ODI Resume, RQ 15-004, bit.ly/2QZEDh5.

Put simply, no consumer has ever reported that his or her Uconnect system was hacked. The district court nevertheless concluded that the plaintiffs' claims satisfied Article III's injury-in-fact requirement, and chose to certify a class of hundreds of thousands of individuals based on that conclusion. Those decisions cannot be squared with this Court's precedents—most prominently *Clapper* v. *Amnesty International USA*, 568 U.S. 398 (2013)—holding that a risk of potential future harm does not satisfy Article III's injury-in-fact requirement unless the threatened harm is "*certainly impending*." *Id.* at 401 (emphasis added).

The district court recognized that, under *Clapper*, plaintiffs lacked standing based on an alleged risk of future personal injury due to hacking. But it went on to circumvent *Clapper*'s holding by concluding that plaintiffs had satisfied Article III by alleging that they had overpaid for their vehicles at the time of purchase or lease. See Pet. App. 10a-16a.

That ruling makes no sense. The only basis for plaintiffs' overpayment theory was the same type of entirely speculative and hypothetical risk of future intrusion that failed to satisfy *Clapper*. Indeed, in *Cahen* v. *Toyota Motor Corp.*, 717 F. App'x 720 (9th Cir. 2017), the Ninth Circuit dismissed similar allegations for lack of Article III standing, rejecting as "not credible," "conclusory," and "unsupported by any facts" the plaintiffs' theory that they overpaid for their vehicles based on the risk of future hacking. In doing so, the court observed that "[p]laintiffs do not allege that any of their vehicles have actually been hacked" or that any such vehicles "have been hacked outside of controlled environments." *Id*. at 723-24. The same reasoning should have applied here and led to the same result. In fact, because of the recall here that addressed any potential vulnerability to future intrusion, the lack of Article III standing in this case is even clearer than in *Cahen*, where there was no recall.[2]

Finally, the impermissibly overbroad approach to standing reflected in the decision below incentivizes plaintiffs' lawyers to seize on manufacturers' voluntary recalls, second-guess determinations by NHTSA that those recalls were effective, and file suits seeking

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[2] Because the named plaintiffs each lacked standing, this case does not involve the question whether a class may be certified containing numerous uninjured individuals where one or more named plaintiffs has standing. But the correct view, as the Chief Justice pointed out in a recent concurring opinion, is that "Article III does not give federal courts the power to order relief to *any* uninjured plaintiff, *class action or not*." *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (emphases added). And the certification here of a class that appears to be composed *entirely* of uninjured individuals highlights the severity of the district court's error.

damages in "overpayment" based on the mere allegation that a vehicle (or other product) contains a cybersecurity vulnerability. This abusive form of litigation—producing litigation costs and designed to extract settlement payments divorced from the underlying merits of the claim—imposes significant costs on vehicle manufacturers without benefiting anyone.

This Court's review is therefore warranted.

ARGUMENT

I. The District Court's Approach To Article III Standing Was Manifestly Erroneous.

The "'irreducible constitutional minimum'" of Article III standing is that "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). To establish Article III standing, a plaintiff therefore must "'[f]irst and foremost'" demonstrate that she suffered "an injury in fact" that is both "concrete and particularized." *Spokeo*, 136 S. Ct. at 1547-48 (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998)).

This Court also has articulated specific requirements to assure that allegations of a future threatened injury are sufficiently concrete. In *Clapper*, this Court reiterated its "well established requirement that threatened injury must be 'certainly impending'" to establish Article III standing. 568 U.S. at 401 (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)); see also *Spokeo*, 136 S. Ct. at 1549. Under that requirement, "'[a]llegations of *possible* future injury' are

not sufficient." *Clapper*, 568 U.S. at 409 (quoting *Whitmore*, 495 U.S. at 158).

As the petition details (at 20-25), the allegations in this case fall far short of what *Clapper* requires. We elaborate below on two particular shortcomings in the district court's approach to standing: (1) the court's conclusion that plaintiffs had alleged a concrete harm despite the NHTSA-supervised recall; and (2) the court's endorsement of an "overpayment" theory as a means of circumventing Article III's mandate that a threatened future injury be "certainly impending."

A. The NHTSA Recall Process Underscores The Absence Of Concrete Harm In This Case.

The district court acknowledged "that a recall occurred for the affected vehicles in this case," but brushed it aside by crediting plaintiffs' bare speculation that hackers might still "access their vehicles despite the recall." Pet. App. 15a-16a. The plaintiffs' conclusory speculation on that score does not cross the line of "plausibility" required by this Court's precedents. See *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). That is especially so in light of NHTSA's authority in general and the effectiveness of the recall remedy employed here.

1. The National Traffic and Motor Vehicle Safety Act ("Safety Act") provides for the regulation of motor vehicles and motor vehicle equipment by the Secretary of Transportation. 49 U.S.C. § 30111. The Secretary, in turn, has delegated the Safety Act authorities to the Administrator of NHTSA. 49 C.F.R. §§ 1.95(a); 501.2(a)(1).

Under the Safety Act and implementing regulations, a manufacturer of motor vehicles or motor vehicle equipment must notify NHTSA if the manufacturer learns or determines in good faith that there is a defect related to motor vehicle safety or noncompliance with an applicable Federal Motor Vehicle Safety Standard ("FMVSS"). 49 U.S.C. § 30118; 49 C.F.R. Part 573.

In addition to notifying NHTSA, a manufacturer has a duty to notify owners, purchasers, and dealers after the manufacturer determines that a motor vehicle or motor vehicle equipment contains a defect that relates to motor vehicle safety or a noncompliance with an applicable FMVSS. See 49 U.S.C. §§ 30118(c); 30119; 49 C.F.R. Part 577. In addition, NHTSA may require that manufacturers provide follow-up notifications to owners of vehicles or motor vehicle equipment that have safety defects. 49 C.F.R. § 577.10.

When a manufacturer learns that a motor vehicle or motor vehicle equipment contains a defect and decides in good faith that the defect relates to motor safety, the Safety Act imposes a duty to remedy the motor vehicle at no charge to the vehicle owner. See 49 U.S.C. § 30120; 49 C.F.R. Part 573. Typically, manufacturers opt to provide a free repair for safety-related defects.

However, "[i]f a manufacturer decides to repair a defective or noncomplying motor vehicle * * * and the repair is not done adequately within a reasonable time," the manufacturer is required to "replace the vehicle * * * without charge," or "for a vehicle, refund the purchase price, less a reasonable allowance for depreciation." 49 U.S.C. § 30120(c)(1). This statutory provision, by itself, affords strong incentives for manufacturers to provide adequate repair remedies.

But that is not all. NHTSA has statutory authority to ensure the adequacy of the manufacturer's remedy. 49 U.S.C. § 30120(c). NHTSA's Recall Management Division—an arm of NHTSA's Office of Defects Investigation ("ODI")—not only reviews proposed remedies before they are implemented, but monitors recalls to ensure the timeliness of the provision of remedies and the adequacy of the remedies. See, *e.g.*, NHTSA, Motor Vehicle Safety Defects and Recalls: What Every Vehicle Owner Should Know 9, bit.ly/2jXHRoF.

If the adequacy of a recall comes into question, NHTSA may open an investigation known as a "Recall Query" or "RQ" to determine whether the scope of the recall should be expanded or an adjustment of the remedy is required. See, *e.g.,* NHTSA, Monthly Defect Investigation Reports, https://bit.ly/2QY6huV. And NHTSA exercises that authority in practice: The most recent NHTSA monthly investigations report (for September 2018) lists six open RQ investigations. bit.ly/2QY6huV.

Finally, a violation of the notification or remedy requirements outlined above exposes the manufacturer to substantial civil penalties—potentially tens of millions of dollars at the time of the events here. 49 U.S.C. § 30165(a)(1); 49 C.F.R. § 578(6)(a); Pub. L. No. 112-141, 126 Stat. 405, 758, § 31203(a)(1)(A)(ii) (July 6, 2012).

2. Consistent with the recall regime described above, the NHTSA recall docket shows that FCA provided free remedies to its customers by making a software update available for downloading and providing for free installation of software by vehicle dealers. In addition, the cellular provider (Sprint) provided an

over-the-air software patch that remotely closed a previously open port on the radio, eliminating the risk of long-range, illegal and unauthorized remote hacking.

NHTSA also conducted a Recall Query investigation to determine the adequacy of the remedy. See ODI Resume, *supra*. When NHTSA closed that investigation, it concluded that it had not found any "confirmed incidents of hacking in any of the records reviewed by ODI." *Id.* at 2. In addition, NHTSA concluded that "[t]he remedies completed by Sprint and FCA appear to have eliminated vulnerabilities that might allow a remote actor to impact vehicle control systems." *Ibid.*

Especially in light of NHTSA's careful review of the recall and remedies provided to potentially affected vehicles, it is clear that plaintiffs did not plausibly allege a "certainly impending" risk of future harm.

B. Litigants And Courts May Not Circumvent *Clapper* By Recasting Speculative Allegations Of Future Harm As Allegations Of Overpayment.

In *Clapper*, this Court squarely held that a "threatened injury must be 'certainly impending'" to establish Article III standing. 568 U.S. at 401 (quoting *Whitmore*, 495 U.S. at 158). The Court rejected the more lenient standard endorsed by the court of appeals in that case, which would have required only an "objectively reasonable likelihood" of future harm. *Id.* at 408. Instead, this Court made clear that "'allegations of *possible* future injury' are not sufficient." *Id.* at 409 (quoting *Whitmore*, 495 U.S. at 158). And the Court further held that allegations of future harm

cannot "rest on speculation about the decisions of independent actors" or on a "speculative chain of possibilities." *Id.* at 414.

The district court here conceded that plaintiffs' allegations that they were at risk of future injury from the hacking of their vehicles "have some standing problems in light of the Supreme Court's holding in *Clapper*." Pet. App. 11a. For good reason: not a single FCA vehicle has ever been hacked in the real world, now well more than three years after the publication of the *Wired* article. The lack of actual harm to anyone confirms that plaintiffs' fear of future hacking is entirely speculative.

The district court nonetheless permitted the plaintiffs to recast their speculation about future injury from hacking as allegations that they overpaid for their vehicles. But "conclusory allegations" by plaintiffs "that their cars are worth less" because of a speculative future harm cannot support an end-run around *Clapper*. *Cahen*, 717 F. App'x at 724. Such allegations are just as conjectural as the allegations of future harm that the district court rejected, and therefore the alleged "overpayment" injury is neither "concrete" nor "real." *Spokeo*, 136 S. Ct. at 1548.

That is why the Ninth Circuit in *Cahen* rejected the argument, identical to the one made by the plaintiffs here, that the vehicle owners "suffered an injury because they either would not have purchased their vehicles or would have paid less for them had they known about these hacking risks." 717 F. App'x at 723. Similarly, the Third Circuit recently dismissed for lack of standing overpayment claims by a plaintiff who alleged that she would not have purchased a product had she known of its purported risks, holding that "a plaintiff must do more than offer conclusory

assertions of economic injury in order to establish standing." *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Liab. Litig.*, 903 F.3d 278, 285 (3d Cir. 2018).

Cahen also confirms why plaintiffs' allegation that their vehicles have suffered a "diminution in value" (Pet. App. 13a) is equally unavailing. Like the vehicle owners in *Cahen*, plaintiffs here have not "alleged a demonstrable effect on the market for their specific vehicles," such as by pointing to "declining Kelley Bluebook values." *Cahen*, 717 F. App'x at 723.

The fact of the recall cannot support plaintiffs' overpayment theory either. The free repair at issue here—akin to a software patch (see pages 8-9, *supra*)—does not reduce the value of the vehicles or mean that the vehicles were worth less at the time of purchase, just as a smartphone or computer does not decrease in value or become improperly priced after its operating system is updated.

The lax approach to overpayment allegations endorsed by the lower court in this case would render *Clapper* a nullity in any case involving a transaction for a good or service. As *Clapper* itself makes clear, allowing plaintiffs to allege "*present* costs and burdens" (like the "overpayment" theory advanced here) based on "*fears of hypothetical future harm* that is not certainly impending" "improperly waters down the fundamental requirements of Article III." 568 U.S. at 416 (emphases added). And while *Clapper* involved a challenge to alleged government surveillance, the Court has confirmed that *Clapper*'s articulation of Article III's requirements applies in consumer class actions as well—pointing to *Clapper* in such a case in explaining that a "risk of real harm" in the future may

"satisfy the requirement of concreteness." *Spokeo*, 136 S. Ct. at 1549 (citing *Clapper*, 568 U.S. 398).

Finally, as the petition explains, the approach to Article III standing in this case resembles the erroneous reading of *Clapper* by the Seventh and Ninth Circuits (and three other circuits) in the data breach context, and it directly implicates the existing circuit split on that question that this Court has been asked to review. See Pet. 23-25 (citing, *e.g.*, *In re Zappos.com, Inc.*, 888 F.3d 1020 (9th Cir. 2018), *pet. filed sub nom. Zappos.com Inc.* v. *Stevens*, No. 18-225 (S. Ct.)). If this Court grants review in *Zappos* and holds—as it should—that the mere allegation that a data breach has occurred does not satisfy Article III and this Court's decision in *Clapper*, then *a fortiori* there is no standing here, where there has not been any hack or breach *at all*.

II. No-Injury Class Actions Impose Unjustified Costs On Vehicle Manufacturers.

The overbroad approach to standing reflected in the decision below does not just conflict with this Court's precedents. It will, if permitted to stand, have troubling consequences for both motor vehicle manufacturers and the federal courts.

Permitting suits of this kind to go forward when consumers have not experienced any actual injury (or a risk of a "certainly impending" real harm) opens the door to abusive lawsuits, filed to extract a settlement regardless of the underlying merits of the claim.

Indeed, plaintiffs' lawyers filing these suits bank on the fact that putative class actions are virtually never litigated on the merits once a class is certified, because the high stakes exert powerful "pressure on the defendant to settle even unmeritorious claims."

Shady Grove Orthopedic Assocs., P.A. v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting); see also, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011) (recognizing "the risk of 'in terrorem' settlements that class actions entail"); Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial.").

While no-injury class actions of this kind impose substantial costs on manufacturers, they are not necessary to ensure that manufacturers take adequate care to address cybersecurity issues.

As illustrated above, NHTSA extensively regulates motor vehicle safety issues and manufacturers' remedies for those issues. The NHTSA-supervised recall here comprehensively addressed the potential cybersecurity risks in these vehicles, given NHTSA's determination that it was effective in eliminating any potential vulnerability to hacking. Yet under decisions like the one below, these recalls—which are necessarily widely publicized—will instead serve as a magnet that attracts wasteful and abusive litigation from the class-action plaintiffs' bar. And, again, NHTSA has ample authority if it has any doubts about the effectiveness of a manufacturer remedy. See pages 8-9, *supra*. The use of private class actions to second guess the efficacy of that remedy in the absence of any actual harm or certainly impending future harm serves no legitimate purpose.

Finally, enforcing Article III's injury-in-fact requirement does nothing to foreclose plaintiffs who have actually been harmed or placed at substantial

risk of future harm from bringing lawsuits in federal court. Rather, it forecloses only abusive lawsuits like this one that seek hundreds of millions of dollars in damages in the absence of any actual harm that has occurred or risk that real harm will take place.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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