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 OTHERS SIMILARLY SITUATED,

Respondents.

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

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI REDACTED

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INTRODUCTION

Petitioners ask this Court to second guess the Seventh Circuit's discretionary refusal to second guess the district court's order certifying three classes of consumers ("Order") that was based on an exceptionally voluminous record. There is no reason to do so.

Petitioners attempt to fabricate a split among the circuits where none exists. As shown below—and contrary to Petitioners' suggestion—the Seventh Circuit has never stated that manifest error does not support the acceptance of a Rule 23(f) appeal. Rather than being split, the circuits are consistent in their refusals to adopt a bright-line test to govern the acceptance or rejection of a 23(f) petition. Further, even if there were a circuit split, this case would not be a proper vehicle for considering it because the Seventh Circuit's Order consisted of a total of twelve words summarily declining to accept the petition. There is no indication which of the many possible reasons the Seventh Circuit had served as the basis for the Seventh Circuit's denial of Petitioners' interlocutory appeal. Petitioners' claim that the denial was due to a refusal to review petitions claiming manifest error is created from whole cloth.

Nor was district court's certification order manifestly erroneous. The district court was correct in ruling—consistent with nationwide precedent—that Respondents had standing to pursue their claims for economic loss suffered when they purchased or leased the vehicles at issue. The district court was also undoubtedly correct in finding that common issues

predominate and that a class action is the superior method of adjudication. Petitioners' arguments to the contrary are based on unsupported and pervasive mischaracterizations of the voluminous, often highly technical, district court record. The Court should decline Petitioners' invitation to wade into that record, as would be required to determine whether the district court abused its discretion.

The Petition ("Pet.") sets forth no proper basis for certiorari. It should be denied.

STATEMENT OF THE CASE

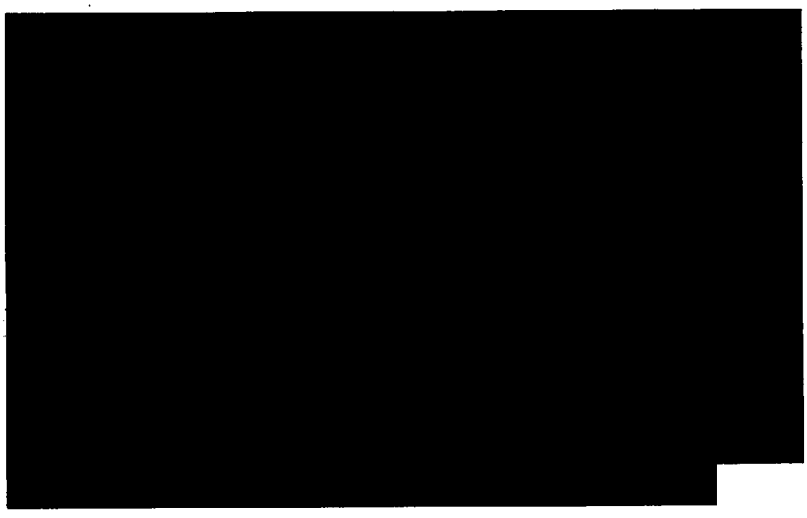
This case involves various model year 2013 to 2015 Chrysler cars and trucks ("Affected Vehicles") that all share the same severe defects in their internal communication Control Area Networks ("CANs") and "Uconnect" infotainment systems. These shared defects render each of the Affected Vehicles critically and exceptionally vulnerable to cybersecurity hacks whereby attackers—whether they gain access to the vehicle through the Uconnect or from another of the Affected Vehicles' vulnerable components—are able to remotely control the vehicles' primary operational and safety functions, including steering, braking, throttle, and ignition.

The basic aspects of vehicle cybersecurity are as follows.[1] Every function of the Affected Vehicles is controlled by an "electronic control unit" or "ECU." Each ECU includes a microprocessor, which receives operational commands over the vehicle's CAN network. Fundamental cybersecurity design demands that the ECUs of critical vehicle functions be separated or "segmented" from components that are vulnerable to being hacked so that, if a hack is successful, the attacker cannot access and control the critical ECUs. No. 15-cv-0855, Docket Entry ("Dkt.") 283 (S.D. Ill. Nov. 8, 2017), Ex. 1 (Rogers Report) at 12-13 [redacted] The segmentation is implemented by designing the vehicles' CAN system such that critical ECUs are placed on CAN networks separate from the components that present the greatest cybersecurity risk, and then by including cybersecurity devices on the CAN bus systems such as *secure gateways* and *trust anchors*, which authenticate and examine all commands coming from the risky components, and prevent any potentially false or dangerous commands from passing through to the critical ECUs. Dkt. 283, Ex. 1 (Rogers Report) at 12 [redacted]

[1] Respondents cite to the district court class certification record. Defendants have designated virtually all documents confidential and have insisted that they not be disclosed or publicly filed. Citations are to the exhibits to the parties' class certification briefs.

From a cybersecurity perspective, the most vulnerable component in any connected vehicle is usually the "infotainment" system—the central dashboard unit that controls radio, Wi-Fi, and other functions—because it receives a number of different types of signals from the outside world (Wi-Fi, navigation, Bluetooth, radio, etc.) that can be used by hackers to attack the vehicles. Dkt. 283, Ex. 1 (Rogers Report) at 44 [redacted] The Affected Vehicles' infotainment systems are the "Uconnects" manufactured by Petitioner Harman.

Because of the risks, *other* manufacturers responsibly segment the infotainment system in their vehicles from the critical ECUs. [redacted]



The class certification record is replete with Defendants' internal, confidential documents that

All of the Affected Vehicles suffer from these same defects, with the same impacts, causing the same injuries—consumers' overpayment for defective vehicles.

Hackers discovered some of these defects in 2015. Their findings were publicized in an article in Wired Magazine in July 2015, https://www.wired.com/2015/07/

hackers-remotely-kill-jeep-highway/ (last visited Nov. 20, 2018), and in an associated video showing the hackers remotely taking control of one of Petitioner's Jeep Grand Cherokees as it was being driven on the interstate. *See* Andy Greenberg, *Hackers Remotely Kill a Jeep on the Highway—With Me In It* (Wired Magazine, 2015) (*available at* https://www.wired.com/2015/07/hackers-remotely-kill-jeep-highway/) (last visited Nov. 20, 2018). Its hand forced, two days after the Wired Magazine article, FCA issued a recall for 1.4 million vehicles sharing these defects, including the Affected Vehicles. FCA claimed that the Recall ensured the safety of the vehicles, but [redacted][2]

[2] The Petition and the *amici* suggest that the vehicles' vulnerabilities are isolated, discrete, and harmless. This characterization bears no semblance to the record or the actual defects at issue. *Amicus* CTIA—The Wireless Association® ("CTIA") contends that this litigation reflects nothing more than Respondents "dissatisfaction with common security practices," Brief for CTIA as *Amici Curiae* in No. 18-398 (submitted October 29, 2018) at 7, and that Respondents' claims "boil down to an assertion that because a vulnerability has been identified by researchers, their cars should have been better designed." (*Id.* at 8). Nothing could be further from the truth. The allegations and the record demonstrate that the cybersecurity in Defendants' products is recklessly defective. Just by way of example, amicus CTIA holds out the IEEE "best practices and procedures" as a model for sound IoT cybersecurity. (*Id.* at 26-27). The cybersecurity design of the

The district court has overseen this case since it was filed in 2015 and is familiar with the facts, Defendants' arguments, and the record, through consideration of Defendants' seven motions for summary judgment, thirteen motions to dismiss, and four *Daubert* motions. The district court considered extensive class certification briefing and exhibits totaling 1,316 pages. He granted class certification for three statewide classes, but rejected all other classes Respondents requested.

Contrary to Petitioners' description, this is not a case about future hacks. The district court recognized that this case is about economic injury that occurred at the moment of purchase. Consumers paid for vehicles that they believed to be designed safely, and received unsafely defective vehicles. The Class Members have thus already been injured in the amount of the difference between the price they paid and the actual value of the defective vehicles they received. No future hack of a vehicle is necessary for these damages to be realized.

In a twelve-word order, the Seventh Circuit summarily declined interlocutory review of the district court's certification order. The Petition thus can only speculate as to the rationale for the Seventh Circuit's order and, unsurprisingly, it incorrectly assumes that the district court erred in certifying the three classes. There is no basis for these presumptions, which

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Affected Vehicles violates almost every one of the eleven best practices set out in that document.

extensively mischaracterize the voluminous record before the district court.

REASONS TO DENY THE PETITION

I. THIS CASE CANNOT BE USED TO RESOLVE A "CIRCUIT SPLIT" REGARDING THE PROPER BASIS FOR ACCEPTING REVIEW OF A 23(F) PETITION BECAUSE THERE IS NO CIRCUIT SPLIT TO RESOLVE.

Petitioners state the Seventh Circuit differs from other circuits because it "does not recognize manifest error as a permissible basis for granting interlocutory review of a class-certification order under Rule 23(f)," citing *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 2000), (Pet. at 11). In making this argument, Petitioners mischaracterize as a clear "circuit split" what, in reality, amounts to the circuit courts' cautious exercise of the "unfettered" discretion afforded to them under Rule 23(f). Moreover, even should such a split exist, this is not the appropriate case for its resolution, given that the Seventh Circuit's twelve-word order provided no discussion of the basis for the court's decision.

A. The Circuits Are Not Split On The Question As To Whether Manifest Error Is A Permissible Basis for Review Under Rule 23(f).

As a general rule, "[n]o appeal as of right exists from a district court's class certification order unless that order dismisses the action or renders a decision on the merits." *Vallario v. Vandehey*, 554 F.3d 1259, 1261 (10th Cir. 2009). However, under Rule 23(f), "[a] court of appeals may permit an appeal from an order granting or denying class-action certification. . . ." The Committee Note accompanying Rule 23(f) states that in considering such interlocutory appeals, the courts of appeals are to enjoy "unfettered discretion . . . akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Fed. R. Civ. P. 23, Advisory Committee Notes to 1998 Amendments, Subdivision (f).

Petitioners' assertion that the Seventh Circuit diverges from other circuits by refusing to recognize "manifest error" as a basis for exercising discretion to accept a Rule 23(f) appeal is incorrect. With its opinion in *Blair*, the Seventh Circuit was the first circuit to consider Rule 23(f) following its adoption in 1998. In *Blair*, the Seventh Circuit articulated three circumstances where interlocutory appeal may be warranted: (1) so called "death knell" cases; (2) cases where the grant of class status "put[s] considerable pressure on the defendant to settle"; and (3) cases where an immediate appeal "may facilitate the development of the law." 181 F.3d at 833-35. However, in so doing, the

Court stressed this list was in no way meant to be exhaustive:

> Although Rule 10 of the Supreme Court's Rules identifies some of the considerations that inform the grant of certiorari, they are "neither controlling nor fully measuring the Court's discretion." Likewise it would be a mistake for us to draw up a list that determines how the power under Rule 23(f) will be exercised. Neither a bright-line approach nor a catalog of factors would serve well—especially at the outset, when courts necessarily must experiment with the new class of appeals.

Id. at 833-34.

Accordingly, in *Blair*, the Seventh Circuit expressly recognized and approved of the exercise of the full scope of the circuit court's Rule 23(f) discretion. Following *Blair*, the Seventh Circuit has remained faithful to this principle and has continued to expressly refuse to adopt a "bright-line test," *see Reliable Money Order, Inc. v. McKnight Sales Co., Inc.*, 704 F.3d 489, 497 (7th Cir. 2013), and has never stated that manifest error is not a basis for granting a Rule 23(f) petition. To the contrary, on at least two occasions the Seventh Circuit has referred to the lower court's error when granting a 23(f) petition, *see Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 814 (7th Cir. 2010) ("Since this is the type of question that Rule 23(f) was designed to address, and because the district court's analysis was incomplete, we accept the appeal."); *Allen*

v. Int'l Truck & Engine Corp., 358 F.3d 469, 470 (7th Cir. 2004) (noting that the parties' submissions show that immediate review would promote the development of law and also that the district court committed an error best handled by swift remand).

Petitioners' argument is premised on the assertion that the Seventh Circuit refuses to recognize manifest error as a basis for granting a Rule 23(f) interlocutory appeal. That premise is false. There is no circuit split to resolve.

B. Even If A Circuit Split On The Issue Existed, This Is Not The Appropriate Case For Its Resolution As The Seventh Circuit Merely Issued An Order Denying Appeal Without Opinion.

Even if the Seventh Circuit, as a rule, refused to grant Rule 23(f) petitions based on manifest error, this is not the proper case on which to resolve any conflict with other circuits. The Seventh Circuit's Order did not state it was denying Petitioners' petition on that basis. In its entirety, the Seventh Circuit's Order states "IT IS ORDERED that the petition for permission to appeal is DENIED." *See* Pet. Appendix ("Pet. App.") A at 2a. It included no language or analysis indicating the reason for the denial; thus, Petitioners' request for a writ of certiorari must fail. *Cf. Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014) (granting certiorari on denial of rehearing *en banc* where Circuit Court record contained a dissent from

the denial of rehearing on which this Court could glean the basis for the denial).

There are several reasons the Seventh Circuit could have denied Petitioners' 23(f) petition to appeal, and this Court has no reason to assume it was for the reason proffered by Petitioners. This is especially true given that interlocutory appeal under Rule 23(f) is "rare" and intended "to be the exception rather than the rule" because such appeals are "disruptive, time consuming, and expensive." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 104 (D.C. Cir. 2002); *Mowbray v. Waste Mgmt. Holdings*, 208 F.3d 288, 294 (1st Cir. 2000). Further, granting a petition for interlocutory appeal "add[s] to the heavy workload of the appellate courts, require[s] consideration of issues that may become moot, and undermine[s] the district court's ability to manage the class action." *Chamberlan*, 402 F.3d at 959. Accordingly, there is a "reluctance" for courts to "depart from the traditional procedure" of waiting until "end-of-the-case review." *Id.*

If this Court were to take this case to resolve the mythical circuit split asserted by Petitioners, it would have to read into the Seventh Circuit opinion that the court rejected Petitioners' Rule 23(f) petition on the grounds that it, as a rule, rejects petitions asserting manifest error by the trial court. The Court would have to likewise assume there was no other basis on which the Seventh Circuit could have rejected the opinion. Because the one-line order offers no indication of the basis for the Seventh Circuit's action, this Court would

not only be basing the appeal on Petitioners' unsubstantiated assumption, it would be forced to work through the issue without any Seventh Circuit record or analysis. There are too many assumptions and obstacles for this to be the proper case for the resolution of any alleged circuit split.

II. PETITIONERS' STANDING ARGUMENTS ARE MERITLESS.

Contrary to Petitioners' argument, Respondents clearly have standing under well-established law. Petitioners contend that Respondents lack Article III standing under *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), and other standing jurisprudence. Pet. at 20-25. Petitioners have made this argument repeatedly and unsuccessfully before both the district court and the court of appeals. As Petitioners acknowledge, manifest error is an exceptionally high bar: "'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.'" Pet. at 12. The orders of this experienced district judge finding standing are squarely consistent with cases throughout the country. The orders are correct. They do not rise to the level of manifest error.

A. *Clapper* is Irrelevant.

Petitioners argue that Respondents lack standing because they are "uninjured" and have suffered no "certainly impending" harm. This argument is based on a mischaracterization of Respondents' injury and the evidence before the district court. Respondents allege that they were injured because they bargained for and were promised safe vehicles, but received vehicles with serious safety defects that Petitioners concealed from them, thus causing them to overpay and/or resulting in a diminution in their vehicles' values.

Respondents' injury does not depend on the possibility—or even probability—that some future malicious hacking will occur. Respondents' claims are not based on the likelihood or possibility of future injury, or indeed any future event or contingency. Respondents' injury is *overpayment*—financial injury *at the moment of purchase* of their defective vehicles.

Clapper does not cast any doubt on Respondents' standing. *Clapper* addressed whether allegations of "threatened," "possible future" injury are enough to confer standing, holding that standing exists where such future injury is "certainly impending." *Clapper*, 568 U.S. at 409-10. But, unlike *Clapper*, this is not a case of future injury. Here, every Class Member has already been injured—at the moment of purchase, by overpaying for their defective Affected Vehicles. The question of what kind of threatened future injury suffices for standing is not implicated.

Petitioners ignore that such extant, economic injury has consistently been held to confer Article III standing. The Seventh Circuit faced this exact issue in *In re Aqua Dots Products Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011), which involved a toy containing a chemical that was harmful to small children if ingested. *Id.* at 749-50. The plaintiffs were purchasers of the toy whose children were *not* harmed. *Id.* at 750. The defendants challenged standing. The Seventh Circuit ruled that the plaintiffs had standing because, even though they suffered no physical injury, "it does not mean that they were uninjured. The plaintiffs' loss is financial: they paid more for the toys than they would have, had they known of the risks the beads posed to children. A financial injury creates standing." *Id.* at 750-51. Just as in *Aqua Dots*, the injury at issue here—and the basis for standing—is Respondents' overpayment for a dangerously defective product.

The Fifth Circuit addressed this issue in *Cole v. General Motors Corp.*, 484 F.3d 717 (5th Cir. 2007), which involved a class action alleging a defect that caused airbags in some Cadillac DeVilles to deploy inadvertently. General Motors argued that plaintiffs whose airbags had never improperly deployed had alleged, at most, a speculative future injury, and so lacked standing. The Fifth Circuit disagreed, explaining that those plaintiffs had suffered economic injury in the form of overpayment or diminution of value (the "difference between what they contracted for and what they actually received"), and emphasized that, because the defect existed in all of the affected cars (though

latent in most), the injury was suffered "at the moment [a plaintiff] purchased a DeVille because each DeVille was defective." *Id.* at 722-23.

As the Seventh Circuit observed in *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015), "[d]istrict courts have applied this approach to comparable situations," particularly "cases involv[ing] products liability claims against defective or dangerous products." *Id.* at 695.[3] For example, the plaintiff in *Lipton v. Chattem, Inc.*, 2012 WL 1192083, at *3 (N.D. Ill. Apr. 10, 2012), purchased a dietary supplement which, unknown to her at the time of purchase, contained harmful hexavalent chromium. Even though the plaintiff had not developed any illness or injury, the Northern District of Illinois found standing on the grounds that the plaintiff had suffered a "financial" injury in that "she purchased a product worth less than what she paid for it, and also that she would not have purchased the product had she known it contained hexavalent chromium." *Id.* at *3; *see also Muir v. Playtex Prod., LLC*, 983 F. Supp. 2d 980, 986-87 (N.D. Ill. 2013) (finding standing when "[the defendant's] product was worth less than what [plaintiff] paid").

This rule is widely and consistently followed. *See, e.g., Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91,

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[3] *See also Lewert v. P.F. Chang's China Bistro*, 819 F.3d 963, 968 (7th Cir. 2016) (noting that arguments that a consumer would not have purchased a product, or would not have paid as much had she known of the product's "poor data security" "have been adopted by courts . . . where the product itself was defective or dangerous").

113 (1979) (a drop in home values confers Article III standing); *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972) ("[P]alpable economic injuries have long been recognized as sufficient to lay the basis for standing."); *Maya v. Centex Corp.*, 658 F.3d 1060, 1069-71 (9th Cir. 2011) (overpayment injury "is a quintessential injury-in-fact"); *Cole*, 484 F.3d at 722-23 ("Plaintiffs seek[ing] recovery for their actual economic harm (e.g., overpayment, loss in value, or loss of usefulness) emanating from the loss of their benefit of the bargain" is "sufficient for standing purposes. . . ."); *Chicago Faucet Shoppe, Inc. v. Nestle Waters N. Am. Inc.*, 24 F. Supp. 3d 750, 756 (N.D. Ill. 2014) ("The injury, which was financial in nature, was complete at the time of purchase, because—as a result of [defendant's] deceptive conduct—[plaintiff] allegedly paid more than it otherwise would have. . . . These allegations suffice to allege an injury and causation for purposes of Article III standing."); *Gustavson v. Wrigley Sales Co.*, 961 F. Supp. 2d 1100, 1129-30 (N.D. Cal. 2013) (overpayment injury is "a quintessential injury-in-fact"); *Askin v. Quaker Oats Co.*, 818 F. Supp. 2d 1081, 1084 (N.D. Ill. 2011) (overpayment "price differential represents a concrete injury-in-fact"); *Gonzalez v. Pepsico, Inc.*, 489 F. Supp. 2d 1233, 1240 (D. Kan. 2007) ("[T]he complaint alleges that plaintiffs suffered economic damages resulting from the difference between the purchase price of the beverage products as warranted and their actual value considering the potential presence of benzene in those products. Generally, economic injury is a paradigmatic form of injury in fact.").

The principle articulated by these cases is particularly appropriate in cases involving products—such as cars and trucks—where safety is one of the most important considerations in a consumer's purchasing decision. As reflected in ubiquitous vehicle advertisements, one aspect of vehicles that consumers expect and pay for is safety for themselves and their families. There can be little doubt that consumers would pay less for unsafely defective vehicles than for safe vehicles, or would not buy them at all. Petitioners surely recognized as much when they chose to conceal the extensive safety defects they had known about for years. Just as in *Aqua Dots*, *Cole*, *Lipton*, *Muir*, and many other, similar cases, Respondents here "paid more . . . than they would have, had they known of the [defects]." *In re Aqua Dots*, 654 F.3d at 751.

The difference between the purchase price and the lesser value of the defective vehicles the Class Members received is not an exotic or unusual injury; it is widely and consistently recognized as the type of economic injury-in-fact sufficient for standing. This is particularly so here, where Respondents have supported their theory of injury with two damages experts—both of whom have submitted detailed expert reports, and both of whom already survived *Daubert* challenges, dispositive motions, and class certification oppositions—who will quantify the difference between what the Class Members paid for their defective vehicles and what the prices of the Affected Vehicles would have been had Defendants disclosed the defects.

Petitioners cite a recent decision from the Third Circuit, *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Liability Litigation*, 2018 WL 4292359 (3d Cir. Sept. 6, 2018), to claim that overpayment for defective products cannot confer standing. Pet. at 23. *Johnson & Johnson* is uninstructive for several reasons. First, as shown above, it is widely accepted that overpayment for defective products constitutes injury-in-fact and is enough for standing. Second, *Johnson & Johnson* is distinguishable—and its holding is explainable—purely on its facts. The *Johnson & Johnson* plaintiff's claims "d[id] not involve allegations of a defective product": the plaintiff made no allegation that the baby powder she had bought "failed to adequately perform" any of its marketed functions. *Johnson & Johnson*, 2018 WL 4292359, at *1. Respondents here are claiming the existence of numerous, severe safety defects in the Affected Vehicles, which Petitioners concealed. Third, unlike this case, *Johnson & Johnson* "d[id] not involve a durable product still in a plaintiff's possession. Instead, the complaint concerns a nondurable product that has already been consumed in its entirety." *Id.* Fourth, the allegations the *Johnson & Johnson* plaintiff pleaded in support of her claimed damages were woefully lacking: she failed to allege that she would pay less for the allegedly unsafe baby powder even now that she knows of its supposed dangers, and she never alleged that she herself was injured (or was at increased risk of injury) from exposure to the powder. *Id.* at *8-9. From these circumstances, the Third Circuit felt it could only conclude that she had received the benefit for which she

bargained. *Id.* at *9. The opposite is true here: Respondents allege that they would have paid less for the Affected Vehicles or would not have bought them at all had they known of their severe safety defects. *Johnson & Johnson* was decided on its facts and does nothing to overturn the reasoning or authority of the long and consistent line of cases in the Seventh Circuit and throughout the country that find standing based on overpayment for a defective product.[4]

The district court's standing decisions clearly were not manifestly erroneous. Rather than "fai[ing] to apply the correct legal standard" or being in "complete disregard of the controlling law" (Pet. at 12), the district court's decision applies the correct standard and is perfectly consistent with controlling law.

B. The Data Breach Cases are Inapposite.

Petitioners ignore the applicable authority discussed above and instead rely on a handful of inapposite "data breach" cases, which involve theft or misuse of computer data. As one would expect considering such *data breach* cases generally involve different claims, different facts, and different injuries from the

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[4] The Third Circuit's holding makes this clear and shows that its decision does not do the work that Petitioners claim it does in this case: "Today, we therefore explicitly hold what might heretofore have been obvious: a plaintiff does not have Article III standing when she pleads economic injury from the purchase of a product, *but fails to allege that the purchase provided her with an economic benefit worth less than the economic benefit for which she bargained.*" *Id.* at *9 (emphasis added).

product defect and consumer protection case at bar, the data breach cases on which Petitioners rely are inapt for several reasons.

As an initial matter, a number of the data breach cases cited by Petitioners *found standing*. *See In re Zappos.com, Inc.*, 888 F.3d 1020, 1027-28 (9th Cir. 2018); *Lewert*, 819 F.3d at 966-68; *Remijas*, 794 F.3d at 692-93.

More fundamentally, data breach cases—including all of those cited by Petitioners—are distinguishable in that they allege potential future harm, *Zappos*, 888 F.3d at 1027-28; *Lewert*, 819 F.3d at 967; *Remijas*, 794 F.3d at 692-93; *Katz v. Pershing, LLC*, 672 F.3d 64, 79-80 (1st Cir. 2012); *Reilly v. Ceridian Corp.*, 664 F.3d 38, 45 (3d Cir. 2011), rather than harm that has already been suffered, as here. In *Zappos*, *Lewert*, *Remijas*, and *Reilly*, computer systems storing the plaintiffs' sensitive personal information data were compromised, and the plaintiffs' data were potentially stolen by hackers, but it was unclear whether the plaintiffs' data had actually been misused or would later be misused. *See Zappos*, 888 F.3d at 1028-29; *Lewert*, 819 F.3d at 967; *Remijas*, 794 F.3d at 693-94; *Reilly*, 664 F.3d at 43. In *Katz*, there was not even a breach—the plaintiff merely alleged increased risk of potential future harm from possible future unauthorized accessing of her data. *Katz*, 672 F.3d at 78-79.

This is not a data breach case. It is a consumer protection and product liability case premised on extensive safety design defects. Petitioners seek to

misapply the data breach cases here simply because both the data breach cases and this case relate generally to cybersecurity. But that approach misunderstands the facts and analysis of the data breach cases, and the significant differences between the claims and injuries in those cases, and the claims and injuries in this one. That the safety defects in this case relate to cybersecurity is irrelevant. There are not and should not be any special rules simply because the safety defects are the result of defective cybersecurity design rather than mechanical defects. There is no analytical difference between this case and cases like *Aqua Dots* and *Cole*, which find standing based on overpayment for dangerous or defective products, even if the defect is unmanifested. Even the data breach cases on which Petitioners rely recognize as much. *See Remijas*, at 695; *Lewert*, at 968; *Reilly*, at 45 (explaining that in cases involving defective implanted medical devices there is standing even where no physical harm has yet manifested because "in those cases, an injury has undoubtedly [already] occurred").

C. Petitioners' Reliance on *Cahen* is Misplaced.

Cahen v. Toyota Motor Corp., 717 F. App'x 720, 723 (9th Cir. 2017), does not stand for the legal principle Petitioner's contend.

First, the *Cahen* court applied a standard unique to the Northern District of California: that to establish standing based on "a speculative risk of future harm,"

a plaintiff must plead "something more" than where standing is based on physical injury. *Cahen v. Toyota Motor Corp.*, 147 F. Supp. 3d 955, 970-71 (N.D. Cal. 2015). Specifically, the district court in *Cahen* required allegations of some certainty regarding the likelihood of the defect manifesting itself. *Id.* This standard has not been adopted in the Seventh Circuit (or anywhere else to Respondents' knowledge). In any event, even by its own terms this heightened requirement is inapplicable to this case where the injury is not based on "a speculative risk of future harm"; the injury has already been suffered by each Class Member.

Relatedly, the Ninth Circuit did not find that overpayment is not a viable basis for standing as Petitioners contend; it held that application of that theory of damages did not hold in that case because the allegations were "conclusory and unsupported by any facts." *Cahen*, 717 F. App'x at 723. The allegations here are considerably more detailed, and Respondents' comprehensive expert reports and other record evidence, consisting primarily of Petitioners' own documents and deposition testimony, demonstrates that the overpayment injury suffered by every Class Member is concrete and was suffered at the time of purchase.

D. Petitioners' Warnings About a Deluge of Litigation are False and Irrelevant.

The Court should ignore the fearmongering of Petitioners and the *amici* about a deluge of "increased vulnerability to hacking" litigation. Pet. at 21.

Petitioners falsely portray Respondents' claims as being based on nothing more than simple "increased vulnerability to hacking." As discussed above, the safety defects in the Affected Vehicles are far more than that; they reflect a series of reckless design failures that ignored decades of universally accepted cybersecurity principles. *See* Statement of the Case, *supra*. [redacted]

Yet the Affected Vehicles lack even the most basic cybersecurity protections against such inevitable attacks, and in so doing fall well below even the low industry norms. The exceptional nature of Defendants' conduct, and the error of Petitioners' and the *amici's* overwrought doomsaying, is further illustrated by the fact that *this is one of the only lawsuits* in the country relating to cybersecurity defects in connected vehicles or other Internet of Things products. This lawsuit was filed more than three years ago, and the district court's first order denying Petitioners' motion to dismiss for lack of standing was handed down in September, 2016, well over two years ago. The nightmare scenario of an avalanche of meritless lawsuits described by Petitioners and the *amici* has not materialized. This is not a case nitpicking imperfect cybersecurity. It is a case about exceptionally irresponsible cybersecurity design of two-ton consumer products that can travel 100 miles per hour, such that they can be hacked in a way that the safety and operational functions of the vehicles—including the braking, steering, throttle, and ignition—

can be controlled by hackers. There is no support for the suggestion that countless meritless lawsuits will unjustly overwhelm defendants who act responsibly.

III. THE DISTRICT COURT ORDER FINDING PREDOMINANCE AND SUPERIORITY WAS NOT MANIFESTLY ERRONEOUS.

Petitioners invite the Court to independently evaluate a voluminous record of highly technical documents in order to second guess the district court's findings of predominance. They do this without providing the Court with even a single page of the factual record, instead relying entirely on their *ipse dixit* regarding what the record supposedly shows. There is no need for the Court to engage in any such endeavor: Petitioners fall woefully short of demonstrating that the district court abused its discretion in finding predominance and superiority, and in certifying the three statewide classes. *See Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) (class certification "is committed in the first instance to the discretion of the district court"); *Reliable Money Order*, 704 F.3d at 498. "In the end, as long as the district court applies the proper Rule 23 standard, [the appellate court] will defer to [a district court's] class certification ruling provided that decision falls within the bounds of rationally available choices given the facts and law involved in the matter at hand." *CGC Holding Co., LLC v. Broad and Cassel*, 773 F.3d 1076, 1086 (10th Cir. 2014). Petitioners fail to show that this standard is met, instead offering only

unsupported disagreement with the district court's ruling.

A. The District Court Correctly Found Predominance.

The district court's predominance decision involves no novel class certification issues. It applies the correct legal standards. It thoroughly addresses the facts necessary to reach its conclusion. Petitioners have not shown any abuse of discretion by the district court.

The Petition for Certiorari—which is in great measure a verbatim regurgitation of Petitioners' denied Rule 23(f) Petition—asserts that the predominance discussion was set out in "a single paragraph." Pet. at 25. This is incorrect. The district court's predominance discussion spans six pages (*see* Pet. App. at 73a-79a) and focuses on the central issues raised by Petitioners in their oppositions to class certification: damages and nationwide or multi-state classes.

Petitioners falsely assert that the district court "ignored [Petitioners'] arguments and evidence [and] took Plaintiffs at their word that common issues predominated. . . ." Pet. at 26. Petitioners provide no authority showing that the district court abdicated its judicial responsibility. Over the course of this litigation, the district court has ruled on more than twenty substantive motions. The class certification record included 63 exhibits totaling 1,316 pages, virtually all of which were Petitioners' internal documents or

deposition testimony of Petitioners' employees discussing the uniformity of the defects and Petitioners' knowledge of those defects—two of the critical sets of common and predominating issues.

The district court's consideration of Petitioners' arguments is further demonstrated by the fact that, other than the three individual state classes, it denied every other class requested by Respondents (*i.e.*, a nationwide class or, in the alternative, various multi-state classes).

For the claims that were certified, the predominance decision follows from the findings that the Class Vehicles share common defects and Petitioners' conduct toward all Class Members was uniform. The Illinois and Michigan warranty claims hinge on whether the goods were unmerchantable (which will be decided based on the common defects) and whether consumers were harmed (every Class Member suffered the same type of harm). *See Baldwin v. Star Scientific, Inc.*, 78 F. Supp. 3d 724, 741 (N.D. Ill. 2015); Mich. Comp. Laws Ann. § 440.2314. Common issues will also predominate for the state consumer protection claims, which, as with the warranty claims, will focus primarily on the Affected Vehicles' defects, as well as Petitioners' common and uniform failure to disclose those defects. *See* Mich. Comp. Laws Ann. § 445.903; *Dix v. Am. Bankers Life Assur. Co. of Fl.*, 415 N.W.2d 206, 209 (Mich. 1987) (proof of individual reliance is not required under the MCPA); *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 83 (Mo. App. 2011) (certifying class of vehicle owners because MMPA claims could be determined based solely

on defendant's conduct); *Plubell v. Merck & Co., Inc.*, 289 S.W.3d 707, 714 (Mo. App. 2009) (same).

1. All Class Vehicles have the same defects.

Petitioners assert that the district court was required to consider every difference in "configuration" of Class Vehicles to determine whether liability issues predominate. But the predominance analysis is not concerned with every potential difference among products or Class Members no matter how insignificant; differences only matter if they are material to the litigation of the claims and defenses. *See, e.g.*, *In re Checking Account Overdraft Litig.*, 2012 WL 12877717, at *11 (S.D. Fla. July 19, 2012) (immaterial differences did not affect predominance); *Yarger v. ING Bank, fsb*, 285 F.R.D. 308, 326 (D. Del. 2012) (differences in communications were not material and did not defeat predominance). Whether a vehicle is blue or red, or has heated seats, or even if it has immaterial differences in "software security" (Pet. at 27), is irrelevant to the predominance analysis.

Stated otherwise, Petitioners' contention that the question of whether each Affected Vehicle is "too vulnerable" defeats predominance (*id.*) both misses the point and is incorrect. *Every* Affected Vehicle suffers from the *same defects*. [redacted] Every Affected Vehicle's CAN bus lacks the

same critical cybersecurity defenses. Every Affected Vehicle's Uconnect is the same. [redacted][5] [redacted] Each of these sets of defects renders the Affected Vehicles defective. Collectively, they render the Affected Vehicles dangerously unsafe. There are no differences across the Affected Vehicles that change the determination of whether any one of them is or is not defective. The answer will be common to all.[6]

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[5] Although there have been a number of versions of the Uconnect software, in 2017 FCA activated "over the air" software updating, so that today virtually every Affected Vehicle has the most recent version. Although there may be slight differences from model to model, the cybersecurity characteristics of the Uconnect software for every Affected Vehicle are equivalent.

[6] The extensive district court record—virtually all of which has been designated confidential by Petitioners—is absolutely clear on these issues. To the extent the evidence at trial demonstrates otherwise, the district court retains the authority to modify the class definitions or apply subclasses. *See In re Motorola Sec. Litig.*, 644 F.3d 511, 518 (7th Cir. 2011) ("[A] district court has the authority to modify a class definition at different stages in litigation. . . ."); *Gates v. Towery*, 456 F. Supp. 2d 953, 966 (N.D. Ill. 2006) ("Suffice it to say, after certifying a class, the Court retains broad power to modify the definition of the class if it believes the class definition is inadequate.").

2. Respondents' damages methodology accounts for any differences across Class Members.

The Petition raises several related issues regarding vehicle usage and class damages. Petitioners imply that damages must apply uniformly to the entire class, stating as support the notion that damages must be measured "on a class-wide basis through use of a common methodology." *Comcast Corp. v. Behrend*, 569 U.S. 27, 30 (2013) (internal quotation omitted). But courts universally recognize that if liability issues are common, then class certification is appropriate even if individualized damages determinations are required. As the district court's class certification order notes, "[i]ndividualized questions regarding damages do not prevent certification." Pet. App. at 74a; *see also Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801-02 (7th Cir. 2013); *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014).

Regardless, extensive individual findings as to the damages for each Class Member will not be required here. The issues Petitioners raise are all squarely addressed by Respondents' expert's discrete choice experiment ("DCE") damages methodology. DCE is a sophisticated version of "conjoint analysis," which has been approved in many class actions. *See* Pet. App. at 74a; *see also Sanchez-Knutson v. Ford Motor Co.*, 310 F.R.D 529, 538-39 (S.D. Fla. 2015); *In re MyFord Touch Consumer Litig.*, 2016 WL 7734558 at **5, 15-16 (N.D. Cal. Sept. 13, 2016); *In re Dial Complete Mktg. and Sales Prac. Litig.*, 320 F.R.D. 326, 334-37 (D.N.H. 2017).

As explained in detail in Respondents' damages expert's report, the DCE methodology allows Respondents' expert to determine damages using evidence common to the class. *See Hale v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 4992504, at *10 (S.D. Ill. Sept. 16, 2016). This includes a single class-wide methodology for each of the issues mentioned by Petitioners, including determining damages for purchasers of both new and used cars, purchasers of different vehicle models, and Class Members who acquired their vehicles at a discount.

The Petition complains that Respondents' damages experts have not yet completed their work. Pet. at 30. But at the class certification stage Respondents are not required to develop their damages models to the degree of completeness Petitioners demand. A plaintiff need demonstrate at most (as noted above, individualized damages ordinarily will not defeat predominate) that its proposed methodology can be reliably applied such that individualized issues will not overwhelm predominance. At the class certification stage, expert testimony on damages need not "resolv[e] factual disputes or determin[e] the merits of the case." *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales Practices & Prod. Liab. Litig.*, 2012 WL 4904412, at **1, 3 (C.D. Cal. Sept. 20, 2012); *see also Kleen Prod. LLC v. Int'l Paper Co.*, 831 F.3d 919, 929 (7th Cir. 2016); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 413-14 (S.D.N.Y. 2015); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010). In the *Toyota* case, the very expert Respondents sponsor here survived a

Daubert challenge that levelled the same argument about incompleteness that Petitioners raise here. *In re Toyota Motor Corp.*, 2012 WL 4904412, at *4.

3. Class Members' knowledge of the defects is uniform.

The Petition contends the district court ignored potential differences in Class Members' knowledge of the defects with respect to the MCPA claims. Pet. at 28. While this assertion is not developed in the Petition, there is ample reason to believe that there is no material difference in what Class Members knew about the defects at the time of purchase. Petitioners uniformly concealed the defects from all Class Members, the defects are material, and any general awareness consumers may have had about the defects from the Wired Magazine article would have been quickly reversed when FCA issued the Recall Notice two days later, which falsely stated that the defects had been fixed.

4. Petitioners provide no reason to question the privity decision.

The Order concluded that under Illinois law consumers who purchased their vehicles through a dealership may be in privity with FCA. Pet. App. at 55a-56a. The privity question is thus whether FCA dealerships are FCA's agents. Petitioners argue that the issue is "fact-intensive," but presents no basis to believe that there are material differences across dealerships' relationships with FCA.

B. Separate Statewide Classes Are Clearly a Superior Method of Adjudication.

The Rule 23(b)(3) superiority inquiry requires the court to find that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *See Suchanek*, 764 F.3d at 759. Refusing to certify a class on manageability grounds alone should be a "last resort." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 664 (7th Cir. 2015). A district court's findings as to superiority are reviewed for abuse of discretion. *Id.* at 659.

A class action is clearly the superior method of adjudication here. There are no other "separate actions" about these issues. The Southern District of Illinois is as good a district as any to hear the case: one of the class representatives and many Class Members reside in the district, and the district has been the venue of the case for the three-plus years of its existence. There are only two types of claims, state consumer protection claims and breach of implied warranty claims. The central issues of the case are common. They include (i) whether the Affected Vehicles' and their Uconnects' cybersecurity is defective, (ii) what Petitioners knew about the defects and when, and (iii) Petitioners' deceptive omissions and misrepresentations. Contrary to Petitioners' incorrect suggestion that the district court did not find a single question in common between the classes (Pet. at 31), the district court's order found no difference with respect to proving the two most crucial questions in the case, the "merchantability and the defectiveness of the class vehicles." Pet. App. at 77a.

The difficulties in managing a class action are thus minimal "given the predominance of common issues." *Hale*, 2016 WL 4992504, at *10. In short, it does not make sense to split this litigation into over 220,000 individual claims, which would entail the same discovery and lead to resolution of the same issues. And, given the relatively small amount of damages for each individual Class Member (Respondents estimate it will be no more than a few thousand dollars each), the likely alternative to class treatment is not 220,000 claims, but none. The class action device exists to provide recourse for plaintiffs in situations exactly like this one. *See, e.g.*, *Butler*, 727 F.3d at 801 (stating that in the absence of class action, "defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits.").

Petitioners assert a purely theoretical argument that "different" and "conflicting" state laws make class treatment inferior to some other method of resolution. This argument may be relevant in a case where there are a large number of claims and multiple states' laws applicable to the same class, but it is hardly a concern here, where there are three separate classes consisting of the purchasers and lessees from each state, and only two types of claims (implied warranty and consumer protection). Petitioners do not explain how the state laws differ, how there could be any real concern of confusion given the individual state classes, or how these differences would materially affect a trial in this case.

The district court's decision on superiority was also appropriate even though the Order did not set out a specific "trial plan" or "discuss what a trial would look like." Pet. at 32. Regardless of Petitioners' particular preferences, there is no such requirement for any such plan. Ample cases have addressed superiority in the exact same manner as the district court did here. *See, e.g.*, *McCabe v. Crawford & Co.*, 210 F.R.D. 631, 645 (N.D. Ill. 2002) ("Only two classes—Class A and Class B—remain. As such, it would not be unmanageable to proceed as a class action suit. A class action is, in this case, the most efficient method of adjudicating the claims of Class members A & B."); *Balderrama-Baca v. Clarence Davids and Company*, 318 F.R.D. 603, 614 (N.D. Ill. 2017) ("Because common questions predominate for the reasons explained above, class certification is the most efficient method of adjudicating the class . . . claims.") (also collecting cases). The district court can readily manage the three state classes because virtually every issue is essentially identical across all Class Members. Petitioners' concerns about manageability and superiority are unsupported and lack merit.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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