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

REPLY BRIEF FOR PETITIONERS

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

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

Respondents deny what many courts and commentators have expressly recognized: the circuits are split over whether Federal Rule of Civil Procedure 23(f) allows interlocutory review of class-certification orders for manifest error. The Seventh Circuit—in direct conflict with five other circuits—holds that Rule 23(f) does *not* allow review on the basis that a class-certification decision is manifestly erroneous.

Rule 23(f) was designed for cases like this one. The district court's decision to certify three separate statewide classes of hundreds of thousands of persons who claim their vehicles are "excessively vulnerable" to cyberattack is manifestly erroneous and should have been summarily reversed. Respondents do not allege that a single FCA vehicle has *ever* been hacked in the real world. Their claimed injury is not "certainly impending" and thus they lack Article III standing under *Clapper v. Amnesty International USA*, 568 U.S. 398, 401 (2013). The class-certification order's one-paragraph analysis of predominance, and its holding that superiority is automatically established once the Rule 23(a) factors are met, further demonstrate the manifestly erroneous nature of the decision below.

The amicus briefs supporting this petition underscore the importance of these issues and the urgent need for review. The National Association of Manufacturers and the American Tort Reform Association explain how the Seventh Circuit has "improperly limited" the "full range of interlocutory appeals" authorized under Rule 23(f) by declining to permit appeals based on manifest error. NAM Br. 7.

CTIA—The Wireless Association and other amici demonstrate that "a claimed vulnerability in a connected device, without more, cannot constitute an injury cognizable under Article III." CTIA Br. 9. And the Alliance of Automobile Manufacturers describes how motor vehicles are increasingly equipped with wireless technology, and how the decision below opens the door to abusive lawsuits alleging nothing more than "cybersecurity vulnerability." Alliance Br. 2, 5.

ARGUMENT

I. This Court Should Grant Review To Resolve The Circuit Split Over Rule 23(f).

The circuit split over whether manifest error is a permissible basis for Rule 23(f) review is widely recognized and squarely presented by this case.

A. The Circuits Are Undeniably Split On This Important And Recurring Issue.

The circuits have split over whether Rule 23(f) allows review of class-certification decisions for manifest error. The Seventh Circuit, along with the First and Second Circuits, does *not* permit manifest-error review. The Third, Fourth, Ninth, Tenth, and D.C. Circuits *do* permit manifest-error review. *See* Pet. 12-16.

Respondents deny that a split exists. They contend that the Seventh Circuit "has never stated that manifest error is not a basis for granting a Rule 23(f) petition." Opp. 10. But the circuit split has been recognized by the Ninth Circuit, *see Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005), by the D.C. Circuit, *see In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d

98, 105 (D.C. Cir. 2002), by the leading treatise on federal civil procedure, *see* 7B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1802.2 (3d ed.), and by numerous commentators. *See* Pet. 17-18. Respondents' brief ignores all of this authority and scholarship, and makes no effort to explain how all of these courts and commentators could be mistaken in noting the obvious and undeniable point that the circuits have split.

Respondents are wrong in claiming that, by eschewing what it calls a "'bright-line approach,'" the Seventh Circuit actually *does* allow for manifest-error review. Opp. 10 (quoting *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 833-34 (7th Cir. 1999)). That court has made very clear, in case after case, that Rule 23(f) review is unavailable if the case does not fall within one of the three categories the court enumerated in *Blair*: 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;" or where an immediate appeal "may facilitate the development of the law." 181 F.3d at 834-35. For example, in *Howard v. Pollard*, 814 F.3d 476, 478 (7th Cir. 2015), the court treated the *Blair* factors as exclusive, holding that "[w]e 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." Indeed, the Chief Judge of the Seventh Circuit has explained that, under the court's governing *Blair* standard, Rule 23(f) is available "to clarify class action law issues" rather than resolve "some underlying merits issue." *See FTC Workshop—Protecting Consumer Interests*

In Class Actions, 18 Geo. J. Legal Ethics 1197, 1213 (2005).

Although respondents note that in two cases the Seventh Circuit "has referred to the lower court's error when granting a 23(f) petition," Opp. 10, in both cases the court relied on the third *Blair* factor to grant review. In *American Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010), the court explained that "[g]iven the uncertainty surrounding the propriety of conducting a *Daubert* analysis at the class certification stage, and the frequency with which this issue arises, we find the question to be one appropriate for resolution under Rule 23(f)." *Id*. at 815 (citing *Blair*, 181 F.3d at 835). Likewise, in *Allen v. International Truck & Engine Corp*., 358 F.3d 469 (7th Cir. 2004), the court concluded that the third *Blair* factor was met—that "immediate review would promote the development of the law governing questions that have escaped resolution on appeal from final decisions," before adding that the district court likely erred. *Id*. at 470. In neither case did the court suggest that manifest error alone could have justified Rule 23(f) review.[1]

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[1] In maintaining that manifest error alone is insufficient, the Seventh Circuit breaks with many other circuits, some of which have expressly distinguished the Seventh Circuit's approach in *Blair*. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001) ("interlocutory review is not cabined by these circumstances [identified by *Blair*]"); *Lienhart v. Dryvit Sys.*, 255 F.3d 138, 145 (4th Cir. 2001) ("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."); *Chamberlan v. Ford Motor Co*., 402 F.3d 952, 959 (9th Cir. 2005) ("Unlike the court[ ] . . . in *Blair*, we view

Respondents point to the statement in the Advisory Committee Notes that the drafters intended Rule 23(f) to give the courts of appeals "unfettered discretion" in deciding when interlocutory review is warranted. But that just underscores the Seventh Circuit's error: the court has improperly *fettered* its discretion by deeming manifest-error cases categorically excluded from review under Rule 23(f).

Perhaps the most powerful evidence that the Seventh Circuit has split with other Circuits on this question is respondents' failure to identify a single case where the Seventh Circuit has granted Rule 23(f) review based on a showing of manifest error. Indeed, respondents do not identify any case where the Seventh Circuit has granted Rule 23(f) review based on a factor that was not enumerated in *Blair*.

B. This Case Is An Appropriate Vehicle For Deciding The Question Presented.

Respondents' attempt to manufacture vehicle problems falls short. Opp. 11-13. Although respondents emphasize that the Seventh Circuit did not give a reason for denying Rule 23(f) review, there

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[Footnote continued from previous page]

interlocutory review as warranted when the district court's decision is manifestly erroneous—even absent a showing of another factor."); *Vallario v. Vandehey*, 554 F.3d 1259, 1263 (10th Cir. 2009) ("Immediate review of a district court's class certification ruling may also be fitting when that decision is manifestly erroneous."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002) ("we conclude, unlike . . . *Blair*, that . . . [w]here a district court class certification decision is manifestly erroneous, for example, Rule 23(f) review would be warranted").

can be no doubt that the court denied review because it determined that petitioners' appeal did not fall into one of the three enumerated *Blair* categories. This conclusion is inescapable because *Blair* is the Seventh Circuit's well-settled standard for evaluating requests for interlocutory review under Rule 23(f). Just as in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014), where this Court granted certiorari even though the Tenth Circuit had not explained its reasoning, there is no doubt about the legal rule that the court of appeals necessarily applied in declining to grant review.

Respondents suggest that this Court should await a detailed published opinion from the Seventh Circuit on this issue. Opp. 12. But the Seventh Circuit, like all circuits, rarely publishes its Rule 23(f) rulings. *See FTC Workshop*, 18 Geo. J. Legal Ethics at 1213 ("The vast majority of our rulings on 23(f) motions are not published.").

II. The Class-Certification Order Is Manifestly Erroneous.

Respondents cannot defend the three fundamental errors the district court committed in certifying three statewide classes of more than 220,000 persons with little in common aside from the fact that none of them have been injured.

A. Respondents Lack Article III Standing.

The class-certification order is manifestly erroneous in that respondents are uninjured and lack Article III standing under *Clapper*, 568 U.S. at 401 (injury must be "certainly impending"). Respondents do not dispute that the allegedly defective vehicles have never been hacked in the real

world. As the district court acknowledged, "[t]here's no allegation in the complaint that the plaintiffs' vehicles were hacked at all or that their vehicles were actually meddled with in a way that could cause real injury." Pet. App. 11a.

Respondents deem *Clapper* "[i]rrelevant." Opp. 14. They argue that *Clapper* concerns possible *future* injury, whereas respondents insist that they have suffered a *current* injury by overpaying for vehicles that did not, in their view, have adequate cybersecurity. But *Clapper* cannot be so easily circumvented. A claim of injury from overpaying for an allegedly defective product cannot support Article III standing when the claim rests on a theoretical danger that is so speculative and uncertain that it has never materialized—even though hundreds of thousands of people have been using the product on a daily basis for years without issue. That the danger could only materialize as a result of the illegal intentional conduct of third-party cybercriminals further undercuts any claim to standing. *See Clapper*, 568 U.S. at 414 n.5.

Respondents cite several lower court cases to suggest that the district court's approach to standing was correct. Opp. 15-16. But those cases predate *Clapper*—and in those cases, unlike this one, the alleged defect had actually manifested. *See In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 750 (7th Cir. 2011) (noting that children had become seriously ill after swallowing toy beads); *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 719 (5th Cir. 2007) (noting hundreds of reports of inadvertent airbag deployment).

Respondents fail to distinguish *Cahen v. Toyota Motor Corp.*, 717 F. App'x 720 (9th Cir. 2017), where

the Ninth Circuit held that plaintiffs lacked Article III standing to pursue "overpayment" claims based on allegedly inadequate cybersecurity in their Toyota vehicles. Inexplicably relying on the *district court* decision in *Cahen*, respondents insist that *Cahen* turned on a standing requirement "unique to the Northern District of California." Opp. 22. It did not. Nor do respondents dispute that *Cahen* involved overpayment claims that, as the district court in this case recognized, are "nearly identical to those made by Plaintiffs in this case." Pet. App. 40a.

Respondents contend that data breach cases are irrelevant because those cases involve potential future harm, rather than "harm that has already been suffered." Opp. 21. That claim is mistaken for the reasons noted above: there can be no harm arising from a purely speculative "defect" that has never manifested and is entirely dependent on future criminal conduct by a third party. Moreover, respondents ignore the larger point: the Seventh Circuit continues to apply an erroneous test for standing that conflicts with *Clapper*. Whereas *Clapper* holds that future injury must be "certainly impending" to establish Article III standing, *see* 568 U.S. at 410, the Seventh Circuit asks merely whether there is "an objectively reasonable likelihood" of future harm. *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 693 (7th Cir. 2015); *see also Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 966-67 (7th Cir. 2016) (same). The Seventh Circuit has joined the Ninth Circuit, among others, in failing to properly apply *Clapper* in the hacking and data breach context. *See In re Zappos.com, Inc.*, 888 F.3d 1020 (9th Cir. 2018), pet. for cert. pending (No. 18-225).

Respondents attack as "fearmongering" the concern that the decision below will open the door to "increased vulnerability to hacking" lawsuits challenging all types of consumer products that connect to the Internet. Opp. 23. But that is exactly what respondents' counsel has publicly proclaimed—that the ruling in this case will spawn a "tidal wave" of similar lawsuits, that trial lawyers are "salivating over this," and that "inevitably there will be more lawsuits" in the wake of this case. *See* Ben Kochman, *A Deluge Of Suits Over Connected Devices Could Be Coming*, Law360 (Aug. 24, 2018).

B. The Predominance Analysis Is Deficient On Its Face.

The district court did not perform a "rigorous analysis" of predominance. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). That is a manifest error apparent from the face of the opinion, and one that should have resulted in summary reversal. Respondents' statement that the district court's "predominance discussion spans six pages," Opp. 26, is misleading. Virtually the entirety of that discussion concerned predominance as to putative classes that were *not* certified. The *relevant* discussion—that is, the predominance discussion supporting the class-certification decision that is the subject of this petition—is one paragraph. *See* Pet. App. 77a-78a.

Respondents assert that all class vehicles share "the same defect," Opp. 28, but the evidence before the district court showed that a vehicle's level of cyber-vulnerability depends on a variety of vehicle-specific factors, thus making it impossible for a jury to make any uniform finding on the ultimate "defect"

issue, or to provide a uniform answer to whether consumers overpaid. Among other things:

• The *Wired* hackers controlled braking through an advanced cruise control feature that not all the class vehicles have. D.Ct. Dkt. #317-1, ¶¶31-35, 49.

• Some purchasers bought class vehicles before there were automatic software updates available; others bought them after. D.Ct. Dkt. #317-1, ¶¶102-03, 132.

• Some class vehicles have hydraulic steering, while others have power steering, which affects "vulnerability." D.Ct. Dkt. #317-1, ¶¶33, 74; Dkt. #317-8, 88-89.

Moreover, whereas respondents contend that the NHTSA-supervised recall did not fix *all* the alleged vulnerabilities, they admit that it fixed the vulnerability identified in the *Wired* article. *See* Opp. 6, 32. Thus, the level of "vulnerability" differs as between pre-recall and post-recall vehicles—yet another reason why there can be no uniform answers to whether the vehicles were defective and whether class members overpaid.

Respondents do not dispute that there are many individualized differences among class members—*e.g.*, buyers vs. lessees, new-vehicle buyers vs. used-vehicle buyers, buyers who haggled or bought at a discount vs. buyers who paid sticker price—but breezily proclaim that "[t]he issues Petitioners raise are all squarely addressed by Respondents' expert's discrete choice experiment ('DCE') damages methodology." Opp. 30. Respondents are wrong because many of these differences go to liability, not damages. For example, a buyer who bought a new vehicle in 2013, and sold it in 2014 before the *Wired*

article appeared in 2015 could not have suffered any injury as a matter of law.

Respondents admit that their damages experts "have not yet completed their work," but contend that is no obstacle to class certification. Opp. 31. To say the experts have not completed their work is an understatement: they have not even designed the consumer survey that supposedly will account for the many individualized differences they acknowledge exist. The district court, in approving this damages model (again in a single paragraph, *see* Pet. App. 75a), erred by approving the concept of "discrete choice analysis," without any examination of whether that concept could be reliably applied in this case. Respondents' assertion that their methodology "has been approved in many class actions," Opp. 30, does not establish its reliability in *this* case.

C. Class Treatment Is Not Superior.

The district court manifestly erred in deeming it superior to certify three separate statewide classes, despite the confusion resulting from a jury simultaneously trying to apply four different causes of action to hundreds of thousands of different class members under the laws of three different states.

Respondents make no effort to defend the district court's clearly erroneous conclusion that because Rule 23(a)'s commonality, typicality, and adequacy factors were met, superiority was *automatically* established. *See* Pet. App. 79a. Although respondents contend the district court found common questions on merchantability and defectiveness, Opp. 33, the district court's determination concerned common questions within each of the three separate classes; the district court was *not* suggesting that these were common questions shared by all three

classes. Indeed, as the court acknowledged, *see* Pet. App. 76a-77a, the differences in state law *precluded* certification of a class encompassing more than one state.

Respondents assert that "[t]he Southern District of Illinois is as good a district as any to hear this case." Opp. 33. But resolving the claims of Michigan and Missouri consumers infringes on the rights of the Michigan and Missouri courts to adjudicate claims by their citizens arising under the laws of their own states—not to mention the rights of the absent class members denied the chance to litigate in their home states.

Finally, although respondents downplay the manageability problems arising from this sprawling multi-state class action, Opp. 34-35, they do not meaningfully dispute that the district court failed to engage this issue. *See* Pet. App. 79a.

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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