No. 25-874

IN THE
Supreme Court of the United States

JOHNSON & JOHNSON CONSUMER, INC.,

Petitioner,

v.

NARGUESS NOOHI, 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 Ninth Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[*]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts.

To that end, the Chamber regularly files *amicus* briefs in cases like this one that raise issues important to the nation's business community, including cases addressing expert testimony and Rule 23. The Chamber has participated as *amicus curiae* in many recent class-action cases in this Court, including cases from the Ninth Circuit. *E.g.*, *Lab'y Corp. of Am. Holdings v. Davis*, No. 24-304; *Nutramax Lab'ys, Inc. v. Lytle*, No. 24-576; *Meta Platforms, Inc. v. DZ Rsrv.*, No. 24-384; *TransUnion LLC v. Ramirez*, No. 20-297; *Microsoft v. Baker*, No. 15-457; *Campbell-Ewald Co. v.*

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[*] Under Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties were timely notified under Rule 37.2(a) of *amici curiae*'s intent to file this brief.

Gomez, No. 14-857; *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277.

The Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit professional association of corporate members representing a broad cross-section of product manufacturers. PLAC contributes to the improvement and reform of the law, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 1,200 amicus curiae briefs, including in this Court, on behalf of its members, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all fifty states and in every industrial sector. Manufacturing employs nearly 13 million people, contributes $2.9 trillion to the economy annually, has the largest economic impact of any

major sector, and accounts for over half of all private-sector research and development in the nation, fostering the innovation that is vital for this economic ecosystem to thrive. The NAM is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers, with a legacy dating back 150 years. APCIA's member companies represent 65% of the U.S. property-casualty insurance market. On issues of importance to the property and casualty insurance industry and marketplace, APCIA advocates sound public policies on behalf of its members and their policyholders in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in significant cases before federal courts, including this Court. Amicus filings allow APCIA to share its broad national perspective with the judiciary on matters that shape and develop the law.

Amici's members are frequently the targets of class action lawsuits, and the question presented here is of critical importance in many of those cases. Class certification has a tremendous in terrorem effect that

can force settlement of even non-meritorious cases, and the Ninth Circuit's approach here allows classes to be certified based on expert testimony that would be inadmissible at trial.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is a clear and widely-recognized circuit split over whether Federal Rule of Evidence 702 applies with full force to class-certification proceedings. Two circuits—the Eighth and Ninth—have refused to instruct district courts to apply Rule 702. Many other circuits, including recently the Sixth Circuit in an opinion written by Chief Judge Sutton, have explained that this is wrong, and why.

On a straightforward textual analysis of the Federal Rules of Evidence, Rule 702's standards governing expert testimony apply in full to class-certification proceedings. Rule 1101 specifies that the evidentiary rules apply to civil proceedings in federal courts with few exceptions, none of which involves class-certification proceedings.

Yet in this case, the Ninth Circuit refused to require a full Rule 702 reliability analysis. Instead, the District Court certified a class in reliance on a damages expert who had not fully developed his opinion *on damages*. Instead, that expert merely asserted that classwide economic damages *could* be determined *if* a damages model were prepared and verified, and that such a model in turn *could* show classwide injury to thousands of consumers who bought moisturizer. But no such model was designed and implemented. Without even knowing what questions the expert would theoretically ask, and without the expert himself even knowing the scope of

the class, the District Court certified the class and the Ninth Circuit affirmed.

Whether Rule 702 fully applies at the class-certification stage is important because that stage is most often the main event in putative class cases—cases that are certified overwhelmingly settle, and cases where certification is denied generally melt away. Studies show that although class certification is interlocutory, it is rarely revisited by the trial court. The appeal process outlined in Rule 23(f) itself acknowledges the importance of getting class certification right in the first instance, by allowing immediate appeals rather than forcing parties to await an eventual judgment.

The Ninth Circuit's decision improperly tips the balance in favor of plaintiffs. Under that decision, if a plaintiff's expert's model is not yet developed enough to withstand scrutiny under Rule 702, then it need not face that scrutiny before the court certifies the class. The road map for plaintiffs' counsel is clear: find an expert with a passable resume who can cite a type of analysis that courts have accepted before, and then seek class certification without the expert ever actually preparing a damages model and doing the necessary work to verify it would function. This approach cuts off a great many legitimate avenues for the defense to challenge the expert's (un-run) model. It rewards plaintiffs for doing the least to prepare their cases, and minimizes the effort and expense they must undertake to obtain class certification and bring their cases to the doorstep of settlement regardless of

their merit. This Court should grant certiorari to enforce Rule 702's essential safeguards.

ARGUMENT

I. Circuits are split over whether Rule 702 fully applies at class certification.

The circuit split on the question presented is clear. The Third, Fifth, Sixth, Seventh, and Eleventh Circuits have held that expert evidence must be admissible under Rule 702 to be considered at class certification. *See In re Blood Reagents Antitrust Litig.*, 783 F.3d 183 (3d Cir. 2015); *Prantil v. Arkema Inc.*, 986 F.3d 570 (5th Cir. 2021); *In re Nissan N. Am., Inc. Litig.*, 122 F.4th 239 (6th Cir. 2024); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010); *Sher v. Raytheon Co.*, 419 F. App'x 887, 891 (11th Cir. 2011) (unpublished); *see also Loc. 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1258 (11th Cir. 2014). By contrast, a minority of other circuits, especially the Eighth and Ninth Circuits, have disagreed. *See In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011); *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996 (9th Cir. 2018). There is no sign of the Eighth or Ninth Circuits reconsidering their rulings en banc. Indeed, the Ninth Circuit recently declined an invitation to do so. *Lytle v. Nutramax Lab'ys, Inc.*, 114 F.4th 1011, 1018 (9th Cir. 2024) (denying petition for rehearing en banc), *cert. denied*, 145 S. Ct. 1308 (2025).

Circuit judges themselves have repeatedly acknowledged the split. *See, e.g.*, *Sali v. Corona Reg'l Med. Ctr.,* 907 F.3d 1185 (9th Cir. 2018) (Bea, J., joined by Bybee, Callahan, Ikuta, and Bennett) (dissenting from denial of en banc review) ("The panel's opinion . . . puts us on the short side of a lopsided circuit split."); *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890, 907 (3d Cir. 2022) (Porter, J., concurring) ("Evidence used to certify a class must be admissible . . . . [the] Eighth and Ninth Circuits overlook Federal Rule of Evidence 1101 and the rigorous analysis required by precedent."); *In re Zurn Pex*, 644 F.3d at 627 (Gruender, J., dissenting) (rejecting the Eighth Circuit's holding that *Daubert* need not apply and agreeing instead with "two of our sister circuits"). Most recently, the Sixth Circuit has joined "the majority view" by holding that "if challenged expert testimony is material to a class certification motion, the district court must demonstrate the expert's credibility under *Daubert*." *In re Nissan*, 122 F.4th at 253 (Sutton, C.J.) (noting that the Eighth and Ninth Circuits "perform a more limited *Daubert* analysis" and disagreeing with them).

Even the Ninth Circuit's recent decision in *Lytle v. Nutramax Laboratories, Inc.* acknowledges different approaches in the circuit courts. 114 F.4th 1011. *Lytle* concedes that applying Rule 702 at class certification is "an unsettled question," and that "there is at least some divergence among the Circuits on this question." *Id.* at 1030 (citing 3 Newberg & Rubenstein on Class Actions, § 7:24 (6th ed. 2022)). It adds that the Ninth Circuit itself has "somewhat oscillated" but has "cited

with approval" the Eighth Circuit's decision "endorsing a more limited *Daubert* inquiry." *Id.*

In this case, the Ninth Circuit heavily relied on its erroneous test set forth in *Lytle*, under which Rule 702's standards need not be applied if the plaintiff's evidence at class certification is not yet developed enough to withstand it. *Id.* at 1031 (calling the district court's "limited *Daubert* analysis . . . sufficient for the immediate purposes"); *see* App.12a ("the ultimate inquiry" when applying a limited *Daubert* assessment is "whether a proposed model is likely to provide common answers at trial.").

This view squarely and irreconcilably conflicts with the law as announced correctly by several other circuits. *E.g.*, *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005) ("[W]e hold that a careful certification inquiry is required and findings must be made based on adequate admissible evidence to justify class certification.").

II. The question presented is important, and the Ninth Circuit's decision creates both perverse incentives for plaintiffs and unfairness for defendants.

The question presented is hugely important because class certification carries enormous stakes. In "reality . . . the class certification process is the major, significant litigation event in class litigation, with serious, outcome-determinative effects for everyone. It is the main event." Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class*

Certification, 82 Geo. Wash. L. Rev. 606, 631 (2014). Class certification is a substantive and pivotal stage in any litigation.

First, the grant or denial of class certification immediately transforms the entire litigation dynamic for both sides. For the defense side, the multiplying effect of certification creates a risk of "devastating loss" that in turn leads to "in terrorem" class settlements even for "questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims."). By contrast, when certification is denied, many putative class actions simply melt away.

Thus, the decision whether to certify a class "is typically a game-changer, often the whole ballgame." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012). Civil Rule 23's many requirements, including the right to seek an immediate appeal under Rule 23(f), recognize the importance of the certification step. As the Advisory Committee noted when it added subsection (f) to Rule 23, "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f), 1998 Amendment, committee notes.

Second, and relatedly, class certification is not actually "preliminary" or "tentative" or "conditional." While in theory a district court may reconsider its class-certification decision (as it may revisit most interlocutory orders), as a practical matter this rarely occurs. "In all but exceptional cases," courts have long recognized, "an order certifying a class will be the trial court's final word on the matter." *Ollie's Bargain Outlet*, 37 F.4th at 908 (Porter, J., concurring); *see also Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) ("[A]n order certifying a class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises (and, if the case is settled, there could not be such an examination even if the judge viewed the certification as provisional)"). Class certification is thus not "preliminary or conditional in the sense that a judge is going to go back and reconsider his or her class certification order." Mullenix, 82 Geo. Wash. L. Rev. at 636. "Although a judge subsequently may revise a class certification order, this practice has become extremely rare." *Id.* at 637. "There are not a lot of do-overs in the class certification realm." *Id.* at 631.

For this reason, it is essential to get class certification right in the first instance. When district courts grant certification, most cases track toward settlement—not trial. And when districts courts deny it, the cases most often melt away. In other words, the class-certification stage is often the sole chance that the district court has to assess the evidence, including expert testimony, that supports class certification. And of course, even imagining that certifications were regularly reconsidered, it would be grossly wasteful of

the parties' and courts' resources to proceed with expensive notice, classwide discovery, and pretrial procedures, only to have it all erased later.

Ultimately, if the district court fails to ensure that expert testimony satisfies Rule 702 at class certification, it will likely never make that determination at all. Under the Ninth Circuit's approach, the case pivots on the certification decision, then ends—either with a bang or whimper—without the key class evidence ever facing the proper evidentiary test. That is wrong. Class certification is not a space in which to invent unwritten exceptions to applying the Federal Rules of Evidence. *See In re Nissan*, 122 F.4th at 254 ("Evidence Rule 702 does not distinguish between jury and bench trials" and "*Daubert* ensures the reliability and relevancy of expert testimony, a touchstone of a careful analysis of evidentiary proof") (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)).

In addition to these problems, the Ninth Circuit's decision in particular invites abuse by plaintiffs and concomitant unfairness to defendants. The Ninth Circuit held that the more developed a plaintiffs' expert model is, the more open to challenge it is at the class-certification stage. App.12a (describing a "full-blown *Daubert* assessment" as "premature" if an expert's "unexecuted damages model at class certification" has yet to be fully developed) (quoting *Lytle*, 114 F.4th at 1031). This is circular and makes little sense. If the model were fully developed, a Rule 702 assessment would not be "premature." It also invites plaintiffs to simply find a credentialed expert

who has done analyses before, and have that expert assert that a similar model for the current case can be created and applied later, thus showing the necessary classwide injury and damages by common proof. If that is sufficient, it is a comparatively easy standard for plaintiffs to meet and unfairly hard for defendants to challenge. As one scholar described it, "lack of evidentiary rules at class certification . . . enables class action proponents to engage in a kind of smoke-and-mirrors performance during class certification proceedings." Mullenix, 82 Geo. Wash. L. Rev. at 626.

Why would class plaintiffs ever want to actually run their model if they can obtain class certification simply by finding an expert who can assert that in theory it could be done? And if the models are not actually run, defense experts' ability to test, challenge, and poke holes in the model is greatly constrained. The decision below invites plaintiffs to avoid rigorous scrutiny with broad-brush assertions about models that could have been, but have not been, actually created.

This case is a good example of the problem. The Ninth Circuit granted class certification because the plaintiff found a "qualified expert" who designed a model that "*could* reliably measure [classwide] damages." App.19a–20a. As the Ninth Circuit admitted, the expert "had not yet finally worded the questions or executed the survey." App.13a. It then reasoned that, if that model "fall[s] short" by inducing bias or failing to standardize testing conditions, then the defendant can challenge "that failure at summary judgment, in a renewed *Daubert* motion, or during

cross-examination at trial." App.19a. Class certification under Civil Rule 23 should not be based on this sort of lax analysis and "kick-the-can-down-the-road" approach.

Again, this yet-to-be-run model is the key to the cohesiveness of this class. It is the only reason plaintiffs offer to think that thousands of consumers were all uniformly injured by the label on a moisturizer. Yet the parties are not debating the merits and methodology of the produced model or whether its results support class certification. They are stuck on a needless preliminary issue: how much preparatory work has been done toward the eventual work of running the model.

Even the Ninth Circuit seemed to intuitively understand the resulting unfairness. The court took pains to clarify that at some later time, before or during trial, the defendant must get a chance to challenge the actual model and the results once it has been run. App.43a.

But testing experts at trial or at *de*-certification, rather than initial class certification, makes little sense. Decertification is rare. And when a court does seriously consider or grant a decertification motion, the inefficiency and burden on the defendant and the courts is extreme.

For instance, the Northern District of California recently granted a defendant's Rule 702 motion and, "as a result," decertified that class. *In re Apple iPhone Antitrust Litig.*, 2025 WL 3124160, at *1 (N.D. Cal.

Oct. 27, 2025) (holding the plaintiffs' expert conducted "an error-ridden" analysis) (on appeal, *see* 9th Cir. No. 25-7930). But in the intervening *two years* between certification and decertification, the defendant litigated in the shadow of certification. During that time, the parties engaged in discovery and extensive discovery disputes, requiring frequent court intervention. *See, e.g.*, *In re Apple iPhone Antitrust Litig.*, ECF Nos. 833, 834, 837, 859, 919, 949, No. 4:11-cv-6714 (N.D. Cal.). In fact, the court held at least nine hearings, largely concerning discovery matters, during that period. *Id.* at ECF Nos. 796, 822, 835, 887, 896, 911, 966, 979, 1057. In all, the docket reveals nearly 300 docket entries between certification, *id.* at ECF No. 789, and decertification, *id.* at ECF No. 1069.

In re Apple is not alone. *See, e.g.*, *Wallace v. Countrywide Home Loans Inc.*, 2013 WL 12642019, at *1, *5 (C.D. Cal. Feb. 12, 2013) (decertifying a damages class after granting a Rule 702 motion); *see also Werdebaugh v. Blue Diamond Growers*, 2014 WL 7148923, at *14 (N.D. Cal. Dec. 15, 2014) (decertifying a class and denying defendant's Rule 702 motion as moot after finding plaintiff's expert's methodology flawed). But even these supposed success-stories involve months or years of wasted judicial and party effort. In *Wallace*, the district court approved class notice, ECF No. 63, No. 8:08-cv-01463 (C.D. Cal.), considered discovery disputes, *see, e.g.*, *id.* at ECF No. 107, and ruled on several partial summary judgment motions, *id.* at ECF Nos. 145, 192, 332, in the *four years* between certification and partial decertification. The *Werdebaugh* court likewise ruled on discovery disputes, ECF Nos. 140, 144, No. 5:12-cv-02724 (N.D.

Cal.), and the parties fully briefed summary judgment between certification and decertification, *id.* at ECF Nos. 166, 187, 196.

As time and experience has shown, the Ninth Circuit's "certify now, ask questions later" method is neither fair nor workable.

III. The Ninth Circuit is wrong: Rule 702's standards governing expert testimony fully apply at class certification.

Not only is the Ninth Circuit's method impracticable, but it is also inconsistent with Civil Rule 23, the Rules of Evidence, and this Court's precedents. Under a proper analysis, Rule 702 applies in full at the class-certification stage.

The Federal Rules of Evidence "are a legislative enactment," and so the court construes the rules as statutes. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988) (applying "traditional tools of statutory construction" to the rules of evidence) (quoting *INS v. Cardoza–Fonseca*, 480 U.S. 421, 446 (1987)).

First, Rule 101 states that "these rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101." Fed. R. Evid. 101(a). Rule 1101, in turn, specifies that the rules apply in "United States district courts," and in "civil cases and proceedings." Fed. R. Evid. 1101(a), (b). Class certification under Civil Rule 23 is

indisputably a "proceeding" in a "civil case" in a federal district court.

The Federal Rules of Evidence thus fully apply at class certification unless an exception under Rule 1101 applies. No such exception applies. Most of the exceptions are part of the criminal process—grand jury proceedings, extradition, rendition, issuing warrants, sentencing, bail, probation, and so on. Fed. R. Evid. 1101(d)(2)–(3). The only civil-case exception in Rule 1101 is for "the court's determination . . . on a preliminary question of fact governing admissibility." Fed. R. Evid. 1101(d)(1); *see* Fed. R. Evid. 104(a).

Unsurprisingly, no court appears to have ever ruled that any of the Rule 1101 exceptions apply to Civil Rule 23 proceedings. *See, e.g.*, *Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989) (en banc) (noting that "Fairness hearings conducted under [Rule 23(e)] are not among the proceedings excepted from the Rules of Evidence"); *Ollie's Bargain Outlet*, 37 F.4th at 905 (Porter, J., concurring) (finding the exceptions "irrelevant" to class certification).

Because the Federal Rules of Evidence apply, Rule 702 applies. Rule 702 expressly incorporates the reliability standards that this Court articulated in *Daubert*. Fed. R. Evid. 702, 2000 Amendments, committee notes ("Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and to the many cases applying *Daubert*"). The rule requires that the proponent of expert testimony "demonstrate[] to the court" that the proffered testimony "is based on sufficient facts or

data," is "the product of reliable principles and methods," and "reflects a reliable application of the principles and methods to the facts of the case." Fed. R. Evid. 702. In short, Rule 702 expressly recognizes judges' "responsibility of acting as gatekeepers to exclude unreliable expert testimony." Fed. R. Evid. 702, 2000 Amendments, committee notes. The 2023 amendments to the Rule "clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule." Fed. R. Evid. 702, 2023 Amendments, committee notes.

Fully applying Rule 702 to class-certification proceedings reflects the evidentiary burden putative class plaintiffs must carry at this stage under Civil Rule 23. Class certification is not "a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Plaintiffs "must be prepared to prove that . . . *in fact*" the Rule 23 standards are met, including that the alleged injury can be proven with common evidence. *Id.* at 350. That is, plaintiffs must produce "evidentiary proof" to satisfy Civil Rule 23. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 35 (2013) (reversing class certification when an expert's damages model was deficient and rejecting the view that "simply . . . provid[ing] a method to measure and quantify damages on a classwide basis" was sufficient, and holding instead that courts must "conduct a rigorous analysis" of such models' validity); *see also Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467, 483 (3d Cir. 2018) (noting that the 2003 "amendments to Rule 23 . . . reject tentative decisions on certification

and encourage development of a record sufficient for informed analysis") (citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (2008)). As Wright & Miller put it: "The party who is invoking Rule 23 has the burden of showing *by a preponderance of the evidence* that all the prerequisites to utilizing the class-action procedure have been satisfied." 7A Charles A. Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 1759 (4th ed. 2024) (emphasis added). At class certification, "courts should be open to *all* probative evidence . . . aided by a good dose of common sense." *Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 594 U.S. 113, 122 (2021). As Judge Gruender observed: "Requiring a full *Daubert* analysis is a natural extension of the concept that class certification should not be conditional and should be permitted only after a rigorous application of Rule 23's requirements." *In re Zurn Pex*, 644 F.3d at 628 (dissenting).

In close parallel, this Court has been clear that class certification is a matter of a "rigorous analysis" involving actual evidentiary proof. And proving anything with evidence in a civil case requires *admissible* evidence under the rules, including Rule 702. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 460 (2016) (citing Rule 702 in discussing whether an expert's statistical approach could prove classwide liability); *see also Behrend v. Comcast Corp.*, 655 F.3d 182, 215 n.18 (3d Cir. 2011), *rev'd*, 569 U.S. 27 (2013) (Jordan, J., dissenting) ("A court should be hard pressed to conclude that the elements of a claim are capable of proof through evidence common to a class if

the only evidence proffered would not be admissible as proof of anything.").

As Chief Judge Sutton explained, "if expert testimony is insufficiently reliable to satisfy *Daubert*, it cannot prove that the Rule 23(a) prerequisites have been met 'in fact' through acceptable evidentiary proof." *In re Nissan*, 122 F.4th at 253.

CONCLUSION

This Court should grant review to resolve the widely-acknowledged and extremely consequential circuit split over the question presented, and hold that Rule 702's standards governing the admissibility of expert testimony apply fully at the class-certification stage just as they would at any other critical stage of federal civil litigation.

Respectfully submitted,

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