

14-1078

No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

NATIONAL MILK PRODUCERS FEDERATION, ET AL.,

Petitioners,

V.

MATTHEW EDWARDS, ET AL., 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**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In disregard of this Court's holdings in *Wal-Mart Stores, Inc. v. Dukes*, and *Comcast Corp. v. Behrend*, the Ninth Circuit continues to permit district courts to certify class actions (in this case, a class of over 100 million consumers of various dairy products) without resolving pertinent Rule 23 factual issues, rigorously analyzing evidence submitted by the plaintiff class, or considering a defendant's contrary evidence. The circuit courts also remain divided over the standard for evaluating expert testimony at the class certification stage.

The questions presented are:

1. Whether a court may certify a class action without fully determining whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to finding injury and damages on a class-wide basis.
2. Whether a court's express refusal to resolve factual issues relevant to certification and to consider defendants' evidence challenging the plaintiff class' ability to prove injury and damages on a class-wide basis contravenes this Court's decisions in *Wal-Mart* and *Comcast*.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

National Milk Producers Federation, Dairy Farmers of America, Inc., Land O'Lakes, Inc., Dairy Lea Cooperative Inc., and Agri-Mark, Inc. are defendants in the district court, *Edwards v. National Milk Producers Federation*, N.D. Cal. Case No. 11-4766, were petitioners-appellants in Ninth Circuit Case No. 14-80137, and are petitioners in this Court. Matthew Edwards, Danell Tomasella, Jeffrey Robb, Boys and Girls Club of the East Valley, Mary Anderson, Jennifer Clites, Scott Cook, Julie Ewald, John Murray, Kory Pentland, Jonathan Rizzo, Scott Weber, Paul Thacker, Lori Curtis, Sheila Jackson, John Peychal, and Kathleen Davis are named representatives for the plaintiffs in the district court, were respondent-appellees in Ninth Circuit Case No. 14-80137, and are respondents in this Court. Brandon Steele is a named representative for the plaintiffs in the district court and is a respondent in this Court.

Pursuant to Rule 29.6 of this Court, undersigned counsel state as follows:

Petitioner National Milk Producers Federation hereby states that it has no parent corporation and that there is no publicly held company that owns 10% or more of its stock.

Petitioner Dairy Farmers of America, Inc. ("DFA"), hereby states that it has no parent corporation and that there is no publicly held company that owns 10% or more of its stock. DFA further states that Defendant-Petitioner Dairy Lea Cooperative Inc. ("Dairy Lea") was an agricultural cooperative that had no corporate parent and no capital stock. Dairy Lea

merged with DFA on April 1, 2014, with DFA as the surviving entity.

Petitioner Land O'Lakes, Inc. hereby states that it has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

Petitioner Agri-Mark, Inc. hereby states that it has no parent corporation, and that there is no publicly held company that owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

National Milk Producers Federation, Dairy Farmers of America, Inc., Land O'Lakes, Inc., DairyIea Cooperative Inc., and Agri-Mark, Inc. (the "Defendants") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) and the district court's class certification order (App. 2a-20a) are unreported. The Ninth Circuit denied the Defendants' timely petition under Federal Rule of Civil Procedure 23(f) for permission to appeal the district court's certification order.

JURISDICTION

The Ninth Circuit's judgment denying permission to appeal was entered on December 3, 2014. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES

Federal Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Federal Rule of Civil Procedure 23 is reproduced at App. 25a-32a.

INTRODUCTION

This case presents the Court with an opportunity to answer the important, recurring question it sought to address in *Comcast Corp. v. Behrend* but could not: “Whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.” 133 S. Ct. 1426, 1431 n.4 (2013). The Court was prevented from answering that question because the petitioner never moved to exclude the expert testimony in the district court. *See id.* As a result, courts of appeals and district courts throughout the country remain divided over whether the proponent of certification must submit admissible evidence to satisfy his burden, as well as over the appropriate standard to apply in evaluating the admissibility of that evidence. This case illustrates the perils of leaving those questions unanswered.

This case involves an alleged unlawful supply management program funded by dairy cooperatives and dairy farmers that purportedly increased the small, unregulated portion of the price of raw milk sold to dairy processors (the “over-order price”) across the country. The district court certified a class of over 100 million retail consumers—anyone who purchased milk, half and half, cream, yogurt, sour cream, or cream cheese between 2003 and the present—in fifteen states and the District of Columbia, seeking almost \$4 billion in damages under state in-

direct purchaser antitrust statutes.¹ It did so without conducting a complete analysis of the admissibility of plaintiff class' expert testimony under Federal Rule of Evidence 702 on the subjects of injury and damages, which are central to class certification efforts in antitrust cases, even though the plaintiff class' expert report (a) did not even attempt to isolate the effect caused by the alleged antitrust violation, (b) was not based on sufficient facts or data, and (c) suffered from severe methodological flaws rendering the testimony unreliable and unhelpful. The district court thus followed Ninth Circuit precedent set forth by Judge Pregerson in the first *Dukes* case, see *Dukes v. Wal-Mart, Inc.* ("*Dukes I*"), 509 F.3d 1168, 1179 (9th Cir. 2007); see also *Dukes v. Wal-Mart Stores, Inc.* ("*Dukes II*"), 603 F.3d 571, 602 n.22 (9th Cir. 2010) (en banc), *rev'd on other grounds sub nom. Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and subsequently reaffirmed by other district courts, along with similar precedent of the Third and Eighth Circuits, in admitting expert testimony for certification purposes without first resolving whether the ev-

¹ This Court called *Wal-Mart Stores, Inc. v. Dukes*, which involved a class of approximately 1.5 million current and former employees of a single company working in 3,400 stores, "one of the most expansive class actions ever." 131 S. Ct. 2541, 2547 (2011). The class certified in this case involves an estimated 109 million people who purchased various dairy products from different grocery stores, superstores, and convenience stores in sixteen different jurisdictions over the course of more than a decade. The district court divided the class into sixteen classes under each state's law, but plaintiffs purport to prove impact and damages to the sixteen classes as a single unit. Throughout this petition, Defendants refer to the certified classes (essential subclasses) as a "class."

idence meets the full standards of Federal Rule of Evidence 702 as explained in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Ninth Circuit's position, as reflected in this decision, is in direct conflict with holdings of the Seventh and Eleventh Circuit requiring such an inquiry at the class certification stage.

Moreover, the district court held, without any analysis of the evidence, that the class could try impact and damages as common issues using only inferences that purported increases to nationwide average over-order prices of farm milk paid by processors would have been passed through uniformly to retailers and then uniformly to consumers of retail dairy products. The court reached this conclusion without considering Defendants' uncontroverted evidence showing that this method was incapable of demonstrating either the fact or the amount of any overcharge that any specific named plaintiff or class member would have suffered.

Far from conducting the "rigorous analysis" demanded by *Wal-Mart*, 131 S. Ct. at 2552, the district court accepted the class expert's impact and damages model without any scrutiny, did not consider at all whether the model was capable of showing pass through of farm milk over-order price increases to downstream consumers of various retail dairy products, and expressly refused to engage or resolve the factual issues pertinent to certification or to address any of the Defendants' arguments or evidence. Instead, in direct contravention of this Court's holding in *Comcast*, 133 S. Ct. at 1432-33, the district court held that it would not and need not consider any of the Defendants' uncontroverted evidence showing

that injury and damages were not susceptible to common proof, *because those challenges went to “the weight” of plaintiffs’ evidence* on the merits issues of impact and damages. App. 16a (emphasis added).

The result is the certification of a class of over 100 million consumers—almost one-third of the population of the United States—in disparate markets, involving various dairy products made from farm milk produced and sold under individually negotiated contracts in varying geographic areas and competitive circumstances. That class was certified without any evidence capable even of measuring the impact of the allegedly illegal conduct on the over-order portion of farm milk prices, much less of establishing whether or to what extent any impact on that over-order price was passed through a complex distribution chain into the retail prices of various dairy products sold at the tens of thousands of stores patronized by class members.

The Ninth Circuit denied the Defendants’ petition for permission to appeal the district court’s decision under Federal Rule of Civil Procedure 23(f), despite Ninth Circuit precedent holding that permission to appeal *should* be granted upon a showing of manifest error. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) (per curiam). Under *Chamberlan*, the Ninth Circuit’s denial can only have been based on a conclusion that the district court’s failure to fully analyze the admissibility of plaintiffs’ evidence and express refusal to resolve factual issues relevant to certification were not manifestly erroneous, and review of the district court’s decision thus is appropriate under *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554-58 (2014). The

Ninth Circuit's abdication of its supervisory responsibility also sanctions the district court's approach and signifies a willingness to leave unchecked even the most blatant of departures from this Court's precedents. This was a clear abuse of discretion warranting this Court's review.

The refusal of many lower courts to adhere to this Court's precedents or to apply normal evidentiary rules to class certification proceedings has resulted in the continuing certification of sprawling, heterogeneous classes on the basis of little more than a promise that the class can introduce common evidence of core elements of their case. Now before this Court are two petitions for certiorari that illustrate the problems caused by this poor oversight. *See* Pet. for a Writ of Cert., *Allstate Ins. Co. v. Jimenez*, No. 14-910 (U.S. filed Jan. 27, 2015); Amicus Br. of The Dow Chem. Co., *Carpenter Co. v. Ace Foam, Inc.*, No. 14-577 (U.S. filed Dec. 19, 2014) (discussing Dow's forthcoming petition).

When a district court improperly certifies a class that lacks predominantly common legal and factual issues, a host of subsequent problems arise. The lack of commonality creates manageability difficulties, which can tempt a court to rely on improper shortcuts, such as averaging, that presume commonality where none exists. These shortcuts can abridge the rights of plaintiffs to have a factual determination of their actual damages and of defendants to insist on proof of each plaintiff's actual entitlement to recovery. The certiorari petitions filed by Allstate and Dow present the issue of whether evidence of average impact to the class as a whole can be used as a substitute for individual evidence of the fact and

amount of injury, when those averages mask actual differences among class members' entitlement to recovery. This case raises the same issue, as the district court declined to address Defendants' arguments regarding the unsuitability of such averaging—just as it did not address any of Defendants' arguments.

The Court should grant certiorari to resolve the conflict in the lower courts over the proper standard of admissibility to apply to evidence, including expert testimony, introduced in class certification proceedings and to clarify the meaning of the “rigorous analysis” of evidence required to satisfy the standards of Rule 23.

Alternatively, Defendants request that the Court hold this petition until it has resolved the petitions for certiorari filed by Allstate and Dow. The plaintiffs in this case have staked their ability to prove impact and damages as common issues on the sort of averaging challenged in those cases. If the Court decides to grant those petitions, it should hold this case until it reaches a decision in those related cases and then remand this case for reconsideration.

STATEMENT OF THE CASE

1. a. The Cooperatives Working Together Program. Since 2003, Defendant National Milk Producers Federation, an association of dairy farmers and cooperatives, has administered a program called Cooperatives Working Together (“CWT”). 9th Cir. 14-80137, ECF No. 1-2, at 11. CWT is a voluntary, publicly announced program started by and for dairy farmers as a way to lawfully strengthen and

stabilize raw milk prices consistent with the anti-trust exemptions afforded agricultural producers under the Capper-Volstead Act, 7 U.S.C. §§ 291-292, and similar state laws. 9th Cir. 14-80137, ECF No. 1-2, at 11.

To administer CWT's various programs, National Milk raised funds from participating dairy cooperatives and farmers, including the other Defendants in this case. *Id.* at 12. One program that CWT administered between 2003 and 2010 was called the "herd retirement program," which is the focus of this case. *Id.* The herd retirement program provided a subsidy to individual dairy farmers who chose to convert their herds from milk production to beef production by selling their herds to slaughterhouses. Only a limited number of farmers participated in the retirements, and the program did not involve an agreement by participating cooperatives to limit or otherwise reduce their total milk production. *Id.* Farmers and their dairy cooperatives producing approximately 70% of raw milk in the United States contributed financially to fund CWT's programs. N.D. Cal. 11-cv-04766, ECF No. 291, at ¶ 65.

b. Milk pricing. Prices paid by purchasers of raw farm milk to dairy farmers are highly regulated, and in most parts of the country, federal or state regulators issue marketing orders setting minimum prices that processors must pay for raw farm milk (called the "order price"). *Id.*, ECF No. 210-4, at 2. The applicable government order price is classified based on the end use of the milk. *See id.* at 2-3. The minimum order price comprises approximately 91% of the total price paid by processors for the milk used

to make the retail dairy products at issue in this case. *Id.*, ECF No. 211-5, at 10.

The remainder of the total price above the minimum order price is called the “over-order price.” *Id.* at 6. Farmer cooperatives generally haul, deliver, and market their members’ milk and provide other services associated with the assembly, testing, and delivery of milk to processing plants. Cooperatives attempt to recoup these costs from the processors to whom they sell by adding certain service charges and premiums on top of the minimum order price. *See id.* at 10. The composition of over-order prices varies based on local practices and circumstances and the services demanded by local customers. Depending on the region, the over-order price that farmers seek to charge processors is set by individual cooperatives or by marketing agencies in common, which can include all or almost all of the dairy farmers in a given geographic area. The over-order prices that each processor agrees to pay, however, are determined through individual negotiation and can be set by short- or long-term contracts. *See id.* (citing evidence).

The over-order price typically is composed of several different charges and credits, such as a base premium, a fuel surcharge, a charge and a credit relating to the use of certain weighing and testing procedures, and a charge and a credit relating to the uniformity and regularity of purchases. *Id.*, ECF No. 210-4, at 4-5. Beginning in 2006 and accelerating in 2008 because of customer demand, many cooperatives and marketing agencies began charging an additional premium for milk produced without the use of synthetic growth hormones (known as “rBST-free milk”). *Id.*, ECF No. 210-2, at 7-9. Although some

customers insist on purchasing synthetic hormone-free milk, other customers do not, and those customers often do not pay the additional premium or receive a credit to offset it. *Id.*, ECF No. 210-4, at 6. A few of the components of the over-order price fluctuate on a monthly basis, but most are fixed for longer terms and rarely change. *Id.* at 4-5. In fact, the size of these “rBST-free” premiums has been, in most places around the country, far greater than any other change in premiums that occurred during the period in question. *See id.*, ECF No. 211-5, at 10.

2. District Court Proceedings. Plaintiffs, retail consumers of dairy products in fifteen states and the District of Columbia, filed suit in September 2011, invoking jurisdiction under 28 U.S.C. § 1332(d). N.D. Cal. 11-cv-04766, ECF No. 1. They alleged that the herd retirement program constituted a *per se* illegal agreement in restraint of trade under state antitrust laws and that the program was not immune under the Capper-Volstead Act and similar state laws because it involved decisions about output rather than about pricing. *See* App. 3a-4a.² Plaintiffs allege that the program reduced milk supply nationwide, which in turn increased the price of all milk sold by all dairy farmers (including non-Defendants) to processors. *Id.* at 4a. This increase, plaintiffs contend, was passed along the distribution chain to retailers and caused retail purchasers such as plaintiffs to pay more for milk, cream, half & half, yogurt, cottage cheese, cream cheese, and sour cream. *See id.*

² Defendants dispute plaintiffs’ argument and believe that the program is immune under the Capper-Volstead Act.

Plaintiffs concede that the “filed-rate doctrine” precludes them from recovering damages based on changes in the regulated price of milk, and they limit their claims to recovery for the effect, if any, that the herd retirement program had upon premiums above the minimum order price. *See id.* at 4a-5a.

In their motion for class certification, plaintiffs attempted to show that they could prove antitrust impact and damages with common evidence by submitting a report from their expert, Dr. John Connor. N.D. Cal. 11-cv-04766, ECF No. 186-3. In this case, because there is no dispute that Defendants participated in CWT, other than the legal and possibly factual issue of whether the herd retirement program violates the antitrust laws, impact and damages will comprise nearly all further proceedings.

Although the defendant cooperatives each had produced data regarding their milk sales, Dr. Connor used a single cooperative’s data to construct an average, nationwide over-order premium. 9th Cir. 14-80137, ECF No. 1-2, at 13. He measured the increase in that average after 2003, when the herd retirement program began, made some allowance for inflation using the Producer Price Index, and then labeled his entire after-inflation increase as an “overcharge” caused by the herd retirement program. *Id.* Dr. Connor admittedly did not make any attempt, through regression analysis or otherwise, to isolate the impact of changes to milk supply or prices caused by the herd retirement program from changes caused by other market conditions or events, by CWT’s other, unchallenged programs, or by separate, unchallenged cooperative price-setting activities. *Id.* at 18.

Dr. Connor further opined that the rate at which his calculated average premium overcharge had been passed through to retail consumers, such as plaintiffs, could be shown with common proof. *Id.* at 13. Based on a calculation of total milk prices (including the order price, which he did not attempt to disaggregate), Dr. Connor inferred a nationwide pass-through average of the overcharge and calculated damages to the class of between \$806 million and \$1.33 billion, before trebling. *Id.* at 13-14.

Defendants opposed the motion for certification and moved, separately and in their opposition, to exclude Dr. Connor's opinion testimony under Federal Rule of Evidence 702. *Id.* at 14. In addition, Defendants submitted a plethora of declarations and other uncontroverted evidence, including a detailed expert report, establishing that factors independent of the herd retirement program had influenced premiums and retail prices in the years after 2003 and casting serious doubt on the ability of Dr. Connor's model to accurately measure the impact or damages caused by the herd retirement program. *See id.* at 14-15.

On September 16, 2014, three days before the scheduled hearing on class certification, the district court entered an order granting plaintiffs' motion to certify the classes. App. 2a. In its order, the district court noted and purported to resolve the Defendants' challenge to the admissibility of Dr. Connor's opinion under Rule 702 and this Court's decision in *Daubert*, 509 U.S. 579, but it did not conduct a full *Daubert* analysis or evaluate Defendants' arguments or evidence showing that Dr. Connor's testimony was unreliable, irrelevant, and insufficient. *See* App. 5a-6a. Although the district court reproduced the *Daubert*

criteria in boilerplate preceding its holding, the court did not evaluate Dr. Connor's testimony under those criteria and instead applied (without analysis) a lesser, incomplete standard, holding in conclusory fashion that the testimony was admissible because it was not "so inherently unreliable as to merit exclusion." *Id.* at 6a.

The district court also found, without explanation, that Dr. Connor's testimony sufficed to show that antitrust impact and damages could be proven using common evidence. *Id.* at 16a. In so doing, the court again refused to evaluate or address any of Defendants' arguments or evidence, this time reasoning that, in certifying a class, it was unnecessary to consider challenges going to "the weight, as opposed to the admissibility," of Plaintiffs' proffered evidence. *Id.* Although the district court stated that its conclusions were based on a "rigorous analysis," *id.*, it set forth none of that analysis in its opinion, and the opinion's reasoning itself, which considered neither impact nor pass-through, suggests that the district court did not actually consider at all whether Plaintiffs had in fact showed that injury and damages could be tried as common issues. Based on this conclusion, the district court found that common issues predominated over individual one, and it certified the class under Rule 23(b)(3). *Id.* at 18a.

3. The Court of Appeals Decision. On September 30, 2014, Defendants filed a petition with the Ninth Circuit for permission to appeal pursuant to Federal Rule of Civil Procedure 23(f). 9th Cir. 14-80137, ECF No. 1-2. Defendants argued that the district court's admission of Dr. Connor's testimony without a full analysis caused the district court to

overlook serious issues with that testimony's reliability and fit. *See id.* at 10-11, 17-22. Defendants also argued that the district court applied an incorrect Rule 23 standard by refusing to consider challenges to the merits of Dr. Connor's testimony or to resolve factual disputes regarding the susceptibility of the case to common evidence of impact and damages. *See id.* at 9-11, 22-26. Pointing to Ninth Circuit precedent holding that "interlocutory review [is] *warranted* when the district court's decision is manifestly erroneous—even *absent a showing of another factor*," *Chamberlan*, 402 F.3d at 959 (emphases added), Defendants argued that the district court's incomplete review of the admissibility of Dr. Connor's testimony under Rule 702 was manifestly erroneous and that its refusal to resolve factual issues and statement that arguments going to the "weight" of the evidence need not be considered at certification were manifestly erroneous because they were plainly inconsistent with this Court's decision in *Wal-Mart* and *Comcast*. *See* 9th Cir. 14-80137, ECF No. 1-2, at 9, 16.³

In a two-sentence order, the Ninth Circuit denied permission to appeal. App. 1a. The Ninth Circuit stated only, "The court, in its discretion, denies the petition for permission to appeal the district court's September 16, 2014 order granting class action certification." *Id.* It cited *Chamberlan*, 402 F.3d 952, as supporting authority for its denial. App. 1a.

³ Defendants also argued that the almost \$4 billion in treble damages sought by the plaintiff class rendered this a "death-knell" situation justifying interlocutory review. 9th Cir. 14-80137, ECF No. 1-2, at 10.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Review to Resolve the Circuit Split over Whether *Daubert* Applies at Class Certification.

The petition should be granted as a vehicle to resolve the conflict among the circuits over the appropriate standard to apply when evaluating expert testimony introduced for purposes of deciding class certification. See S. Ct. Rule 10(a). As a result of that conflict, which divides the Seventh and Eleventh Circuits from the Third, Eighth, and Ninth Circuits, expert testimony often crucial to the decision to certify a class action is subject to widely varying treatment in different jurisdictions, making the certification decision in scores of high-stakes actions depend more on the forum of suit than on the qualities of the case. This division is intolerable.

Federal Rule of Civil Procedure 23 “does not set forth a mere pleading standard.” *Wal-Mart*, 131 S. Ct. at 2551. Instead, a “party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” *Id.*; see also *Comcast Corp.*, 133 S. Ct. at 1432 (“The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b).”).

The Federal Rules of Evidence apply to *all* “proceedings” before United States district courts unless an exception applies, see Fed. R. Evid. 101(a), 1101, and the rules do not make an exception for class certification proceedings or other situations in which

the court makes factual findings to resolve preliminary or threshold issues, such as venue or jurisdiction, *e.g.*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (Easterbrook, J.). As a matter of simple logic, therefore, when a party seeking class certification introduces opinion testimony designed to satisfy his burden of presenting “evidentiary proof,” *Comcast Corp.*, 133 S. Ct. at 1432, that the requirements of Rule 23 are “in fact” satisfied, *Wal-Mart*, 131 S. Ct. at 2551, Federal Rule of Evidence 702, as well as its attendant explication in cases such as *Daubert* and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), should apply. See Fed. R. Evid. 702 (providing that, “if scientific, technical, or other specialized knowledge will help *the trier of fact* to understand the evidence or *to determine a fact in issue*,” a witness “who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise”).

Despite this elementary logic, and despite this Court’s statement in *Wal-Mart* that it “doubt[ed]” that *Daubert* “[does] not apply to expert testimony at the certification stage of class-action proceedings,” 131 S. Ct. at 2554, the lower courts remain divided regarding the correct standard to apply. The Seventh and Eleventh Circuits correctly require expert testimony submitted at the class certification stage to satisfy the standards ordinarily applicable to expert testimony under *Daubert*. See *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010) (*per curiam*) (reversing class certification order for which the “expert’s report or testimony [was] critical” to certification because the district court failed to “per-

form a full *Daubert* analysis”); *Sher v. Raytheon Co.*, 419 F. App’x 887, 890 (11th Cir. 2011) (“The *American Honda* court found that, if the situation warrants, the district court must perform a full *Daubert* analysis before certifying the class. . . . We agree.”), *rev’g* 261 F.R.D. 651, 670 (M.D. Fla. 2009).

Without directly addressing the question in terms of *Daubert*, the Second, Fifth, and D.C. Circuits have stated that careful scrutiny of evidence offered in support of class certification is a necessary component of the rigorous analysis required by Rule 23. See *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 255 (D.C. Cir. 2013) (stating that “Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it”); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) (“disavow[ing] the suggestion . . . that an expert’s testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed” and holding that a district court should “assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit”); *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005) (requiring satisfaction of rigorous analysis to be “based on adequate admissible evidence”); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 306 (5th Cir. 2003) (affirming denial of class certification because expert’s formula “in no way account[ed] for the vast differences among . . . class members,” and because “[a]ny reasonable approximation of the damages actually suffered by the

various class members” would require “individualized damages inquiries”).

Other courts, by contrast, hold that a lesser standard applies. The Eighth Circuit has held that a full *Daubert* analysis is not necessary at the class certification stage, and has instead sanctioned a district court’s use of a limited, “tailored *Daubert*” analysis. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011). In *Behrend v. Comcast Corp.*, the Third Circuit also applied a lesser standard, requiring only that expert testimony “could evolve to become admissible evidence,” an aspect of the decision that was not reached by this Court in *Comcast*. 655 F.3d 182, 204 n.13 (3d Cir. 2011), *rev’d on other grounds sub nom. Comcast Corp. v. Behrend*, 133 S. Ct. 1426; *see also id.* at 215-16 & n.18 (Jordan, J., dissenting) (criticizing the majority’s refusal to require expert testimony to be admissible under *Daubert*).

And the Ninth Circuit, as this Court noted in *Wal-Mart*, *see* 131 S. Ct. at 2553-54, has stated that *Daubert* does not apply with full force to evidence introduced for purposes of class certification. *See, e.g., Dukes I*, 474 F.3d at 1227 (setting forth a lesser standard for evaluating expert testimony); *Dukes II*, 603 F.3d at 602 n.22 (“We are not convinced by the dissent’s argument that *Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial.”); *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 495 (C.D. Cal. 2012) (holding that, in the Ninth Circuit, “district courts are not required to conduct a full *Daubert* analysis”); *McPhail v. First Command Fin. Planning, Inc.*, 247 F.R.D. 598, 604 (S.D. Cal. 2007)

(“At the class certification stage, courts employ ‘a lower *Daubert* standard’ to analyze the admissibility of expert testimony. Although this standard is more lenient, the Court must ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law.” (quoting *Dukes I*, 474 F.3d at 1227)).⁴

The conflict is thus clear and direct. One standard for evaluating expert testimony at the class certification stage applies to cases within the jurisdictions of the Seventh and Eleventh Circuits, while a different, much less demanding standard applies to expert testimony submitted in cases within the jurisdictions of the Third, Eighth, and Ninth Circuits.

This case presents an example of the practical consequences of the division among lower courts. Plaintiffs here obtained certification of one of the most expansive classes in history on the basis of expert testimony that would have been inadmissible for lack of reliability and fit in the Seventh and Eleventh Circuits. Dr. Connor conceded that his “correction” for inflation was not calculated until after he com-

⁴ Based on dictum in the Ninth Circuit’s decision in *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (“In its analysis of Costco’s motions to strike, the district court correctly applied the evidentiary standard set forth in *Daubert* . . .”), some courts have assumed that the Ninth Circuit has abandoned the lesser *Daubert* standard set forth in earlier decisions. See, e.g., *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 548 (C.D. Cal. 2014). Other courts, however, have noted that the *Ellis* dictum actually referred to the lesser standard invoked in cases like *Dukes I* and was not purporting to alter that standard. See *Tait*, 289 F.R.D. at 493-94.

pared average premiums before and after 2003 in nominal terms, so that he would find “damages” even if premiums grew at a rate less than the rate of inflation set out in the Producer Price Index. 9th Cir. 14-80137, ECF No. 1-2, at 18 & n.3. This is not a reliable methodology. Dr. Connor also conceded that he did not attempt to separate the effects of the herd retirement program from the effects of premiums increased by unchallenged cooperative price-setting activities. *Id.* at 18.⁵ And his comparison admittedly did not disaggregate portions of the premium set by competitive conditions from portions of the premium designed to account for service charges, such as fuel or the purchase of milk produced by cows that had not been treated with synthetic growth hormones, even though the change in average premiums that he calculated was largely explained by these other premiums. *See id.* at 20-21.

Nevertheless, Dr. Connor’s report was admitted as evidence capable of showing impact and damages merely because the district court, without providing

⁵ For example, CWT operates another program called the Export Assistance Program, which, according to plaintiffs, “subsidizes exportation of dairy products to remove them from the U.S. market.” N.D. Cal. 11-cv-04766, ECF No. 288, at 9 n.11. The Export Assistance Program began in 2003 and is ongoing today. In their complaint, plaintiffs allege that the Export Assistance Program has “reduce[d] supply, drive[n] up prices, and increase[d] producer revenues.” *Id.* Plaintiffs do not challenge the legality of this program, and they are not seeking damages caused by it. Dr. Connor acknowledged that this program also influenced prices, but he admittedly did not attempt to separate that influence from the purported overcharge due to the herd retirement program. *See id.*, ECF No. 207, at 26 n.36; *id.*, ECF No. 211-8, at 42-43.

any explanation, concluded that Dr. Connor's report was not "so inherently unreliable" as to merit exclusion. App. 6a. This standard is not a correct statement of the reliability inquiry set forth in *Daubert* and completely omits an analysis of the foundation or fit of the testimony. See *Daubert*, 509 U.S. at 592-95.⁶ The district court's conclusory assertion also stands in stark contrast to the analysis ordinarily applied by district courts in the Ninth Circuit when conducting a full evaluation of the admissibility of expert testimony, which provides at the very least a meaningful indication that the courts assessed and made findings regarding Rule 702's standards.⁷

⁶ The "inherently unreliable" standard has been offered or applied in cases evaluating whether the introduction of eyewitness or hearsay testimony violates due process because of circumstances indicating a lack of trustworthiness. See, e.g., *Dowling v. United States*, 493 U.S. 342, 353 (1990); *United States v. Gonzalez-Vazquez*, 219 F.3d 37, 46 (1st Cir. 2000); *United States v. Wilson*, 924 F.2d 1064 (9th Cir. 1991). It is not the standard applicable to ordinary Rule 702 inquiries, which are governed by *Daubert*. See 509 U.S. at 592-95. Instead, it appears to be a paraphrase of the "lower *Daubert* standard" applied at the class certification stage as articulated in *McPhail v. First Command Fin. Planning, Inc.*, 247 F.R.D. 598 (S.D. Cal. 2007), and other Ninth Circuit cases, under which "the Court must ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law." *Id.* at 604 (quoting *Sepulveda v. Wal-Mart Stores, Inc.*, 237 F.R.D. 229, 235 (C.D. Cal. 2006)).

⁷ The Ninth Circuit imposes a duty on judges to perform their gatekeeping function to "exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards." *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 55 (2014). When a district court admits or excludes testimony without "any indication that

The need for the Court to resolve the circuit split is acute. Expert testimony offered in support of class certification is routine in complex class actions, and the ability of plaintiffs to obtain certification without submitting admissible evidence is a widespread, recurring problem in cases of all sorts.⁸

Certification of a class, particularly one as large as that in the present case, can raise the stakes and extend the scope of litigation so significantly that a rational defendant would have little choice but to settle even weak claims. *See Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). As a practical matter, therefore, expert testimony not scrutinized at the certification stage may never be tested, *see, e.g., Szabo*, 249 F.3d at 676, with the result that many cases are certified even though the plaintiffs may not have introduced—and may not ever be able to introduce—admissible evidence of the purportedly common issues justifying class-wide treatment in the first place.

the district court assessed, or made findings regarding, the scientific validity or methodology” of the expert testimony, it has “failed to assume its role as a gatekeeper” and abused its discretion. *Id.* at 464; *see also Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 845 (9th Cir. 2001) (holding that admitting or excluding expert testimony on “wholly conclusory grounds” is an abuse of discretion).

⁸ *See* Br. of the Cato Inst. as *Amicus Curiae* in Supp. of the Pets., *Comcast Corp.*, No. 11-864, at 11 (“Even in the year since this Court issued its decision in *Dukes*, the issue of how the trial judge should approach the admissibility issue has arisen in numerous contexts in the lower courts, with standards varying from jurisdiction to jurisdiction.” (citing cases)).

Thus the question presented here is of major significance. For example, writing as an *amicus curiae* in *Comcast*, the Chamber of Commerce called this question “of enormous practical importance” to members of the business community in general. See Br. for the Chamber of Commerce of the U.S.A., Business Roundtable, and the Secs. Indus. & Fin. Mkts. Ass’n as Amici Curiae Supporting Pets., *Comcast Corp.*, No. 11-864, at 2; see also Br. of Retail Litig. Ctr., Inc. as *Amicus Curiae* in Supp. of Pets., *Comcast Corp.*, No. 11-864, at 1. Decisions subsequent to *Wal-Mart* and *Comcast* confirm that the conflict among the circuits on the proper standard to apply to expert testimony will not be resolved on its own. See *supra*. The confusion that this conflict engenders is untenable and should be resolved by this Court.

II. The Decision Below Conflicts with This Court’s Decisions in *Comcast* and *Wal-Mart*.

As shown above, certiorari is warranted in this case in light of the conflict among the circuits regarding the need for determining the admissibility of evidence introduced at the class certification stage. But certiorari is also warranted because the decision below, which refused to consider challenges to the merits of the class plaintiffs’ evidence or to resolve factual issues created by the Defendants’ submission of contrary evidence, clearly conflicts with two decisions of this Court, *Wal-Mart v. Dukes* and *Comcast Corp. v. Behrend*. See S. Ct. Rule 10(c).

In *Wal-Mart*, this Court held that district courts may not certify a class action without conducting a “rigorous analysis” of whether the requirements of Rule 23 are “in fact” satisfied, even if the analysis requires the district court to examine “the merits of the plaintiff’s underlying claim.” 131 S. Ct. at 2551. The Court reversed the Ninth Circuit’s decision affirming class certification because the plaintiffs had failed to present evidence sufficient to show that they could in fact prove Wal-Mart’s liability for discrimination as an issue common to the class. *See id.* at 2555-56.

In *Comcast*, the Court further elaborated upon the district court’s obligation at the certification stage, explaining that the Third Circuit erred “[b]y refusing to entertain arguments against [the plaintiffs] damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination.” 133 S. Ct. at 1432-33. The Court also held that the Third Circuit should not have ended its inquiry into the class plaintiffs’ damages model without determining “whether the methodology [was] a just and reasonable inference or speculative.” *Id.* at 1433. According to the Court, the Third Circuit’s approach was far too truncated, as “[u]nder that logic, at the class certification stage *any* method of measurement is acceptable so long as it can be applied class-wide, no matter how arbitrary the measurements may be.” *Id.*

Notwithstanding this Court’s clear statements, the district court in this case utterly failed to conduct a “rigorous analysis” of the evidence presented in support of class certification. Indeed, in direct con-

travention of *Comcast*, the court expressly refused to entertain arguments against plaintiffs' impact and damages model simply because those arguments were pertinent to the merits ("the weight") of that model. App. 16a. The district court's barren discussion provides no indication of how it concluded that plaintiffs' model was capable of measuring impact or damages on a class-wide basis.

Nor could the court have explained its conclusion had it tried. As discussed above, Dr. Connor's model did not attempt to "measure damages resulting from the particular antitrust injury on which [Defendants'] liability in this action is premised," *Comcast Corp.*, 133 S. Ct. at 1433—that is, the herd retirement program—as opposed to some other cause. See *id.* at 1433 ("If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).").

Among other things, the vast majority of the increase in average over-order prices observed by Dr. Connor came in the form of increases to the price of fuel and premiums for synthetic hormone-free milk that cooperatives and marketing agencies began to charge between 2007 and 2008. N.D. Cal. 11-cv-04766, ECF No. 211-5, at 20-21. Those agencies, which market milk on behalf of multiple cooperatives and dairy farmers, often set prices for the bulk of the milk marketed in a given geographic area and thus have substantial bargaining power, but their decisions to jointly create and fix premiums are permitted by the Capper-Volstead Act. Dr. Connor also acknowledged in his report that he did not even attempt to disaggregate the impact of CWT's export

assistance program, which he admitted would have affected supply and prices during this same period of time. *See id.*, ECF No. 207, at 26 n.36.

“In light of [Dr Connor’s] model’s inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to [the herd retirement program], Rule 23(b)(3) cannot authorize treating” all dairy product consumers “as members of a single class.” *Comcast Corp.*, 133 S. Ct. at 1435; *see also id.* (“Prices whose level above what an expert deems ‘competitive’ has been caused by factors unrelated to an accepted theory of antitrust harm are not ‘anticompetitive’ in any sense relevant here.”). Indeed, Dr. Connor’s data showed that premiums had actually begun to increase steadily in real terms *before* 2003; that is, before the alleged conspiracy began. N.D. Cal. 11-cv-04766, ECF No. 211-5, at 19; *id.*, ECF No. 211-8, at 42-43. Applying Dr. Connor’s technique to the pre-2003 period also yielded purported (but impossible) damages. *Id.* This false positive is, by itself, sufficient to require a hard look at Dr. Connor’s crude calculations. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 254-55.

Nor was its utter inability to identify impact on farm milk premiums the only problem with Dr. Connor’s model. As this Court explained in *Illinois Brick Co. v. Illinois*, calculating pass-through to indirect purchasers is an enormously complex task and cannot be evaded through simplifying shortcuts. *See* 431 U.S. 720, 741–43 & n.25 (1977). In addition, because they are constrained by the filed rate doctrine to recover damages only for changes to the over-order price, the plaintiffs must be able to show not only

that the herd retirement program had an impact on over-order premiums (as distinct from minimum order prices) charged for raw milk sold to processors; they also must show that those increases in over-order premiums were passed on through various distribution channels and had an impact on the final price of the finished retail products that they purchased.

To purport to accomplish this task, Dr. Connor's impact and damages model calculated a nationwide average premium increase, assumed an 89% pass-through rate to retail fluid milk, and applied that rate across the board to all purchases of all products in the case. Yet Defendants introduced abundant, uncontroverted evidence demonstrating that premiums are negotiated individually based on local conditions and that retail pass-through rates varied widely depending on geography and local competitive conditions. *See* 9th Cir. 14-80137, ECF No. 1-2, at 14-15, 23-25.

Because of these realities, simply assuming uniform impact based on a nationwide average does not provide an accurate measurement of impact, let alone of actual damages. Yogurt purchased in California may have been produced by a processor in New York, based on a local contract with a New York dairy cooperative. If that processor's premiums were not impacted by the herd retirement program, then the price of the yogurt it sold to California consumers could not have been impacted, even if average nationwide or California raw milk premiums increased. Sorting out both impact and damages for each plaintiff in this indirect purchaser antitrust case would require tracing sales from particular farmers, partic-

ular processors, and particular retail stores to the particular products purchased by each plaintiff.

Accordingly, calculating a single average price increase for one product and assuming it applies to all consumers of all products does not show the fact or the amount of injury suffered by anyone, much less by the entire class. The Clayton Act provides that “any person who shall be injured in *his* business or property by reason of anything forbidden in the anti-trust laws” can recover damages, 15 U.S.C. § 15(a), and the state antitrust laws under which plaintiffs are suing set the same standard for recovery. If the named plaintiffs had sued only in an individual capacity, presenting Dr. Connor’s model would not carry their burden of proof of showing that *they* were injured in *their* business or property by reason of the herd retirement program, or by how much. Uncontroverted evidence shows that, even assuming that the herd retirement program had an impact on premiums anywhere, it did not have an impact everywhere or in a uniform way at all, much less over thirteen years. See, e.g., 9th Cir. 14-80137, ECF No. 1-2, at 14-15.

The inadequacy of Dr. Connor’s model in this situation is not alleviated by treating impact and damages as common issues. As this Court has recognized, plaintiffs cannot mask individualized issues through the use of unwarranted averages, shortcuts, or “trials by formula” that abridge or modify the plaintiffs’ need to prove their claims under substantive law or that eliminate a defendant’s ability to challenge individualized liability determinations. See, e.g., *Wal-Mart*, 131 S. Ct. at 2561; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999).

Defendants raised a host of other challenges to plaintiffs' ability to use the model to measure impact and damages, *see, e.g.*, N.D. Cal. 11-cv-04766, ECF No. 211-5, at 6-8, 16-20, 23-28; *id.*, ECF No. 211-8 (report of Defendants' expert David Kaplan), but the district court ignored all of them.

The point of this discussion is not that the problems that Defendants identified with Dr. Connor's model necessarily required the district court to find that plaintiffs failed to prove that impact and damages could be measured on a class-wide basis (although that is true). The point is that, under this Court's precedents, the district court should have addressed those problems, actually engaging in a rigorous analysis, weighing the evidence, and making factual findings regarding disputed issues where necessary to reach its conclusions. *Comcast Corp.*, 133 S. Ct. at 1432-33; *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551.

The district court's obligation in this regard was not satisfied by its assurance that its hidden analysis was "rigorous." *See* App. 16a. As multiple courts of appeals have held, the court must actually conduct and explain its analysis in a manner that enables meaningful review. *See, e.g., EQT Product. Co. v. Adair*, 764 F.3d 347, 371 (4th Cir. 2014) (vacating certification order where district court "failed to discuss [certain] evidence entirely" and its "analysis lacked the requisite rigor to ensure the requirements of Rule 23 were satisfied"); *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1086 (7th Cir. 2014) ("The judge should have investigated the realism of the plaintiffs' injury and damage model in light of the defendants' counterarguments, and to that end should have tak-

en evidence.”); *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618, 630 (6th Cir. 2011) (finding that an “absence of analysis by the district court . . . resulted in reversible error” and explaining that the trial court must give “serious consideration” to Rule 23, not merely “mimic[] the language of the rule”).

III. The Ninth Circuit Abused Its Discretion in Denying Permission to Appeal.

This Court has jurisdiction to grant a writ of certiorari in “any civil or criminal case . . . in the court of appeals.” Under controlling precedent, this statutory grant of jurisdiction extends to decisions by courts of appeal denying permission to appeal an interlocutory or non-final order. See *Dart Cherokee Basin Operating Co.*, 135 S. Ct. 547; *Hohn v. United States*, 524 U.S. 236, 241 (1998).

As the Court recently made clear in *Dart Cherokee Basin*, certiorari review can encompass the underlying district court order where, as here, the decision of the court of appeals reveals that the denial of permission to appeal was based on a “legally erroneous premise.” 135 S. Ct. at 555. The Ninth Circuit’s decision in *Chamberlan*, which set forth the standard for granting or denying permission to appeal under Rule 23(f) in that Circuit, held that review is “*warranted* when the district court’s decision is manifestly erroneous—even absent a showing of another factor,” 402 F.3d at 959 (emphasis added), and it stated that a decision is manifestly erroneous where “the district court applies an incorrect Rule 23 standard or ignores a directly controlling case,” *id.* at 962.

Although the Ninth Circuit has left itself discretion to grant permission to appeal a class certification decision for other reasons, *see id.* at 960, *Chamberlan* stands for the proposition that the court *will* grant permission to appeal a class certification order upon a showing of manifest error. *See id.* at 959.

Because the district court here did not conduct a full *Daubert* analysis before admitting Dr. Connor's testimony over Defendants' objection, obviously used an incorrect Rule 23 standard, and ignored the dictates of *Wal-Mart* and *Comcast*, its decision was manifestly erroneous. The Ninth Circuit should have granted review under its own precedent unless it actually thought that a *Daubert* analysis was unnecessary at class certification (consistent with the holding in *Dukes I*, 474 F.3d at 1227) and that the district court's refusal to consider the weight of the evidence or to conduct a rigorous analysis was appropriate under Rule 23.

Moreover, the Ninth Circuit's denial of permission to appeal was a clear abuse of discretion.⁹ Unless the Ninth Circuit simply was abdicating its responsibility to supervise district courts entirely (which also would be an abuse of discretion), its refusal to grant review here, along with its citation to *Chamberlan*, App. 1a, implies that it believed the district court did not need to conduct a *Daubert* analysis and that the Court's pronouncements in *Wal-Mart* and *Comcast* did not obligate the district court to consider the evidence before it or to resolve

⁹ Whether the Ninth Circuit abused its discretion is a "subsidiary question fairly included," S. Ct. Rule 14(a), within the questions presented.

factual issues bearing on plaintiffs' ability to satisfy Rule 23. This error of law was an abuse of discretion. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 864 (2008) (stating that "a court 'by definition abuses its discretion when it makes an error of law'" and reversing where the court of appeals' opinion was legally erroneous (quoting *Koon v. United States*, 518 U.S. 81, 99–100 (1996))).

The D.C. Circuit's decision in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013), provides an instructive contrast with what the Ninth Circuit did here. In *Rail Freight*, although the district court set forth a thorough analysis of its findings in an opinion that spanned 74 pages of the Federal Rules Decisions, *see* 287 F.R.D. 1 (D.D.C. 2012), it failed to address and resolve the defendants' argument that the plaintiff class' damages model identified false positives—that is, it labeled as overcharges prices paid by customers who could not have been damaged because their prices were set by contract before the beginning of the alleged conspiracy. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 255. This evidence suggested that the model's attempt at isolating the impact of the conspiracy on prices was unsuccessful and could not serve as common evidence upon which to certify the class. Because the district court "never grappled with [this] argument" or resolved whether the flaw in the damages model affected the validity of the model's other conclusions, the D.C. Circuit granted interlocutory review and held that the district court had failed to satisfy the requirements of *Wal-Mart* and *Comcast*. *See In re Rail*

Freight Fuel Surcharge Antitrust Litig., 725 F.3d at 255.

Here, there is no conceivable way to reconcile this Court's precedents requiring a "rigorous analysis" of Rule 23 requirements with the district court's truncated inquiry and one-paragraph, *ipse dixit* conclusion. The district court not only ignored the numerous substantial problems with Dr. Connor's model (including a false positives problem, which by itself mandated reversal in *Rail Freight*), it actually stated that it was not required to look beyond the admissibility of plaintiffs' evidence and did not need to consider Defendants' contrary arguments and evidence. By explicitly refusing to conduct the analyses required of it, the district court committed a clear, manifest error directly contrary to this Court's instructions in *Wal-Mart* and *Comcast*. In the face of this clear error, the Ninth Circuit should have, at the very least, summarily vacated the district court's certification order and remanded for the proper inquiry. Its unexplained refusal to do so was an abuse of discretion. See *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 250 ("Discretionary does not mean arbitrary. Choosing whether to exercise jurisdiction over an interlocutory appeal from a certification decision turns on more than what we had for breakfast.").

In *Wal-Mart*, this Court intervened to correct the overly lax approach to class certification prevailing in courts in the Ninth Circuit. 131 S. Ct. at 2549-50. The Ninth Circuit's denial of permission to appeal here suggests that its lack of supervision is permitting district courts to ignore *Wal-Mart*'s attempt at correction. Such an obvious departure from guiding

precedent clearly warrants an exercise of this Court's review.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgments below reversed. Alternatively, if the Court decides to grant the petitions for certiorari filed by Allstate Insurance Company or the Dow Chemical Company related to the use of averages to create common issues out of individual questions of impact and damages, Defendants request that the Court hold this case until it reaches a decision in those related cases and then remand this case for reconsideration.

Respectfully submitted.

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APPENDIX