No. 22-8009

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SCOTT AND RHONDA BURNETT, *et al.*,

Plaintiffs-Respondents

v.

THE NATIONAL ASSOCIATION OF REALTORS, *et al.*,

Defendants-Petitioners.

On Petition for Permission to Appeal from the United States District Court for the Western District of Missouri, No. 19-CV-00332-SRB (Hon. Stephen R. Bough)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-PETITIONERS' RULE 23(f) PETITION

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has a 10% or greater ownership interest in the Chamber.

/s/ Anton Metlitsky
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INTEREST OF *AMICUS CURIAE*[1]

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 more than three 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 the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. Many of the Chamber's members are defendants in class actions, and the Chamber and the broader business community have a keen interest in ensuring that courts rigorously analyze the requirements for class certification before a class is certified.

INTRODUCTION

The petition raises important questions of law that will affect countless businesses within this Circuit. As explained more fully below, it concerns the district court's responsibility to conduct a rigorous analysis at the class-certification stage and to serve as a gatekeeper for expert evidence under *Daubert*.

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[1] No party opposes the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* confirms that no party or counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

The district court's failure to fulfill these responsibilities in a putative class action of this size is itself important, but its failure to do so in the broader context of recurring problems in this area cries out for review. Such systemic errors defy precedent and incentivize vexatious class action suits that impose significant costs on business and, in turn, on consumers.

The Supreme Court has consistently emphasized that class actions are an "exception to the usual rule" of individual adjudication, and that Rule 23 therefore requires courts to conduct a "rigorous analysis" to ensure that classwide adjudication of truly common issues creates efficiencies without sacrificing procedural fairness. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351, 367 (2011) (quotation omitted). Class litigation often rises or falls at the certification stage—beyond which defendants often face crushing pressure to settle—so the rules prevent a court from certifying a class on the belief that the claim *might* be amenable to classwide adjudication. Rather, Rule 23 requires the plaintiff to show at the certification stage "through evidentiary proof" that the class's claims "*in fact*" can be litigated on a classwide basis. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013). District courts have a corresponding "duty to take a close look" at whether putative class plaintiffs can *in fact* satisfy Rule 23's requirements. *Id.* at 34 (quotation omitted).

The district court here abdicated that duty. Plaintiffs sought certification on claims that required them to show they could prove classwide antitrust impact with common proof. Their argument hinged on testimony from their expert, Dr. Craig Schulman, that his "benchmark" method could show that *every* class member suffered antitrust injury, obviating the need for individualized proof. The district court failed to "rigorously analyze" the validity of Schulman's method, instead suggesting that was a dispute to resolve at trial. That was error twice over.

First, the district court thought that because Schulman *asserted* that he would use a common method and common evidence to show classwide injury, common issues predominated and the jury could weigh the competing expert testimony at trial. But the court neglected the dispositive question: whether Schulman's method could *in fact* show, as he claimed, that every class member suffered injury. Plaintiffs bore the burden of showing that this common method could actually show classwide injury, yet the district court did not hold them to that burden at the class-certification stage.

Second, the district court waved away defendants' challenge to Schulman's proffered opinion without conducting any meaningful admissibility analysis under *Daubert*. This Court held in *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604 (8th Cir. 2011), that a "focused" *Daubert* inquiry is necessary at the class-certification stage. *Id.* at 614. More recent Supreme Court

and appellate decisions likewise require robust inquiry into whether expert opinions are admissible under *Daubert*. Yet the district court did not engage in any such scrutiny. The petition thus offers an ideal vehicle for the Court to provide lower courts much-needed guidance on the standard for evaluating expert witnesses at the class-certification phase—and to make clear that rigorous analysis at the class-certification phase includes a close look at expert witnesses' claims.

It needs hardly to be reiterated that improperly certified class actions pose an enormous cost to our justice system and to our economy as a whole. Improperly certified class actions make it more difficult for defendants to vindicate their due process rights. They impose enormous settlement pressure on defendants, even when the underlying claims are non-meritorious. And when they lead to settlements, the costs of such settlements are passed along to employees in the form of lower wages and to consumers in the form of higher prices. Appellate scrutiny of class-certification decisions like the one at issue here is thus critically important to businesses and consumers alike. This Court should grant the petition.

ARGUMENT

I. RULE 23 REQUIRES A RIGOROUS ANALYSIS AT THE CLASS-CERTIFICATION STAGE

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 564 U.S. at 348 (quotation omitted). A class plaintiff bears the burden of showing that a departure

from the ordinary rule is appropriate, which it is only when the key questions can be resolved "in the same manner [as] to each member of the class." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). In such cases, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quotation omitted).

Rule 23's requirements make clear that only claims that embody these efficiencies can proceed as a class. When claims turn on individualized inquiries, in contrast, a putative class action cannot satisfy Rule 23's "demanding" predominance requirement and may not be certified. *See Comcast*, 569 U.S. at 34; Fed. R. Civ. P. 23(a)(2), (b)(3). Indeed, the attempt to avoid such inquiries through the use of a class action device would violate fundamental safeguards for defendants' rights.

To give effect to these fundamental safeguards, the Supreme Court has emphasized that "a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23" at the class-certification stage. *Comcast*, 569 U.S. at 33 (quoting *Dukes*, 564 U.S. at 350). Rule 23 permits certification only when a putative class plaintiff shows "through evidentiary proof" that the class's claims "*in fact*" can be litigated on a classwide basis while preserving the defendants' rights to present all available defenses. *Id.*

Under Rule 23, a district court "must conduct a 'rigorous analysis' to determine whether" a putative class *in fact* satisfies Rule 23's requirements. *Id.* at 33, 35 (quoting *Dukes*, 564 U.S. at 350-51). "[C]ertification is proper only if" the district court "is satisfied, after a rigorous analysis" of *all* the arguments and evidence, that Rule 23's "prerequisites … have been satisfied." *Dukes*, 564 U.S. at 350-51 (quotations omitted).

Requiring this "rigorous analysis" at the class-certification phase is necessary in light of the substantial practical consequences of class certification. "Certification of a large class," the Supreme Court has explained, "may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord AT&T Mobility v. Concepcion*, 563 U.S. 333, 350 (2011). Class certification in practice often presents a defendant's only meaningful opportunity to challenge the plaintiff's contention that claims and defenses are suitable for classwide adjudication. And as a result, a lax approach to certifying class actions not only defies Rule 23 and Supreme Court precedent but also, as discussed in Part III below, seriously harms businesses and consumers alike.

II. THE DISTRICT COURT FAILED TO CONDUCT THE RIGOROUS ANALYSIS RULE 23 REQUIRES

In this case, plaintiffs' assertion that their claims could be adjudicated classwide turned on their expert's assertions that antitrust injury could be shown through common proof. The district court failed to engage in the rigorous analysis the Supreme Court requires, and its errors warrant this Court's immediate review.

A. The District Court Found Predominance Based On An Expert's Assertion Of A Common Method Without Asking Whether That Method Could In Fact Show Predominance

In antitrust cases like this one, Rule 23(b) permits classwide adjudication only if "every member of the proposed class[] can prove with common evidence that they suffered impact from the alleged conspiracy." *Blades v. Monsanto Co.*, 400 F.3d 562, 571 (8th Cir. 2005). Because "individual injury (also known as antitrust impact) is an element of the cause of action," "to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008). Rule 23 thus required plaintiffs to show, and the district court to find, that their common proof could show *every* class member suffered antitrust injury, without the need for individualized proof. *See Blades*, 400 F.3d at 575. Absent such a showing, certifying a class would deprive defendants of their "substantive right" to "litigate [their] statutory defenses to individual claims." *Dukes*, 564 U.S. at 367.

The district court misunderstood this inquiry by failing to ask whether Schulman's benchmark method could *in fact show* classwide injury—whether the method was valid. The court's cursory statement that it found Schulman's "opinion and testimony persuasive" without determining the merits, D.E.741 at 24, fell short of the required rigorous analysis of whether his common benchmark method could actually prove that every class member suffered injury. The court seemed to believe that, because defendants' expert's challenge to that the plaintiffs' expert's method was similarly based on "evidence common to the entire class," common issues necessarily predominated and the jury could "weigh the expert opinions at the merits stage." *Id.* at 25-26. But the Supreme Court has explained that the mere assertion of a "method of measurement" that "can be applied classwide" does not suffice for certification. *Comcast*, 569 U.S. at 36. The court must first rigorously analyze whether the method is *valid*—whether it can in fact prove what the plaintiffs claim it will.

Postponing meaningful scrutiny of methodological validity to the merits stage, as the district court did here, "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.* "Weighing conflicting expert testimony at the certification stage is not only permissible" but also "may be integral to the rigorous analysis Rule 23 demands." *In re Hydrogen Peroxide*, 552 F.3d at 323 (collecting

cases). The district court simply did not engage in the requisite rigorous inquiry here, which is the first legal error underpinning the class certification order.

B. The District Court Shirked The Required *Daubert* Analysis

The second, related legal error is the district court's failure to analyze whether this proffered expert opinion was even admissible. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589, 592-93 (1993). This Court held in *Zurn Pex* that at the class-certification stage, district courts must at least conduct "a focused *Daubert* analysis" that "scrutinize[s] the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence." 644 F.3d at 614. The court here did no such thing. The court's class-certification decision included no *Daubert* analysis and instead suggested that the issue had been resolved at oral argument. D.E.741 at 23 n.14, 25. But there, the district court denied the motion in one sentence that simply restated the *Daubert* standard. D.E.742 at 103. Reciting the test without analysis or elaboration is a far cry from a focused inquiry, or indeed any inquiry at all. The district court's approach to *Daubert* at the class-certification stage would render *Zurn Pex* meaningless.

The district court's laissez-faire approach to *Daubert* only underscores the need for this Court's guidance. Supreme Court decisions since *Zurn Pex*, particularly *Comcast*, should have "remove[d] any vestigial doubt about the appropriateness of full-blown *Daubert* analysis at the class certification stage." 1

McLaughlin on Class Actions § 3:14 (18th ed. 2021); *see* Pet. 23 (citing cases affirming the need for rigorous *Daubert* analysis at the class-certification stage). This case provides a good opportunity for this Court to clarify and harmonize *Zurn Pex* with this subsequent guidance.

III. IMPROPERLY CERTIFIED CLASS ACTIONS HARM BUSINESSES, CONSUMERS, AND THE ECONOMY

Ensuring that district courts rigorously analyze whether a claim can be litigated classwide *at the class-certification stage* is crucial because lenient class certification takes a substantial toll on the business community and, ultimately, consumers. Class actions entail enormous litigation costs. They can drag on for years before even reaching the class-certification phase. *See* U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 1, 5 (Dec. 2013), https://bit.ly/3rrHd29 ("Approximately 14 percent of all class action cases remained pending four years after they were filed"). Defending against a single large class action can costs tens of millions of dollars—or more. *See* Adeola Adele, Dukes v. Wal-Mart*: Implications for Employment Practices Liability Insurance* 1 (July 2011) (noting defense cost of $100 million). Corporate class action litigation costs totaled a record-breaking $3.37 billion in 2021. *See* 2022 Carlton Fields Class Action Survey 7 (2022), https://ClassActionSurvey.com. And "[e]ven in the mine-run case," a defendant may incur "potentially ruinous liability." *Shady Grove*

Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (quoting Fed. R. Civ. P. 23 advisory committee's note).

These consequences put class action defendants under great pressure to capitulate to what Judge Friendly called "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); *accord Concepcion*, 563 U.S. at 350 (describing "the risk of 'in terrorem' settlements that class actions entail"). Companies reported that they settled 73.1% of open putative class actions in 2021, an increase from prior years. *See* 2022 Carlton Fields Class Action Survey, *supra*, at 26. And class certification ratchets up settlement pressure enormously—so much so that "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010). As a result, the certification stage often proves the only opportunity for courts to meaningfully scrutinize putative class plaintiffs' claims. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009).

Without this Court's intervention, the district court's approach threatens to exacerbate the costs of class litigation borne by businesses and the economy as a whole. Rule 23's requirements are meant to ensure that class litigation does not hinge on plaintiffs' untested assertions, and *Daubert* review is intended to guard

against an expert's say-so dominating adjudication. The district court here abdicated its responsibilities on both fronts. This Court should grant immediate review to ensure that both guardrails of fair class adjudications are not further eroded.

CONCLUSION

The Rule 23(f) petition should be granted.

DATED: May 13, 2022

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 2,597 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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/s/ Anton Metlitsky
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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2022, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

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