No. 17-395

IN THE

Supreme Court of the United States

TAYLOR FARMS PACIFIC, INC., D/B/A/ TAYLOR FARMS,

Petitioner,

v.

MARIA DEL CARMEN PENA, *et al.*, individually and on behalf of all similarly situated individuals,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF PETITIONER

ILYA SHAPIRO
TREVOR BURRUS
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001

JOHN B. LEWIS
DUSTIN M. DOW
BAKER & HOSTETLER LLP
Key Tower
127 Public Square
Suite 2000
Cleveland, OH 44114

ANDREW M. GROSSMAN
Counsel of Record
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

DEBORAH H. RENNER
DAVID M. MCMILLAN
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, N.Y. 10111

Counsel for Amicus Curiae

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* CATO INSTITUTE

Pursuant to Supreme Court Rule 37.2(b), the Cato Institute respectfully moves for leave to file the attached brief as *amicus curiae* in support of the Petitioner.

Counsel of record for both Petitioner Taylor Farms and Respondent Maria Del Carmen Pena received timely notice of *amicus*'s intent to file the attached brief under Rule 37.2. However, counsel for the Respondent did not answer the request for consent, thereby withholding it.

The interest of *amicus* arises from its commitment to defending free enterprise, individual rights, a limited and accountable government, constitutionalism, and the rule of law. To that end, Cato has participated extensively as *amicus curiae* in this Court and lower federal courts, publishes books and studies, conducts conferences, and produces the *Cato Supreme Court Review*.

Cato has a particular interest in this litigation because the Ninth Circuit's decision below threatens the due process rights of litigants. The misapplication of class-action procedural rules to alter or evade the burdens of substantive law raises substantial concerns regarding due process, and thereby implicates Cato's core commitment to constitutionalism, limited and accountable government, and—especially—the rule of law.

Amicus has no direct interest, financial or otherwise, in the outcome of this case. Its sole interest in

filing this brief is to defend the constitutional right to due process and ensure fairness and equity in the judicial process of class certification.

For the foregoing reasons, Cato respectfully request that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

ANDREW M. GROSSMAN
Counsel of Record
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

ILYA SHAPIRO
TREVOR BURRUS
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001

DEBORAH H. RENNER
DAVID M. MCMILLAN
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, N.Y. 10111

JOHN B. LEWIS
DUSTIN M. DOW
BAKER & HOSTETLER LLP
Key Tower
127 Public Square
Suite 2000
Cleveland, OH 44114

Counsel for Amicus Curiae

OCTOBER 17, 2017

QUESTION PRESENTED

Whether a district court may certify a class action based on information that does not meet the standards of admissibility set forth in the Federal Rules of Evidence and Civil Procedure.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, files briefs in the courts, and produces the *Cato Supreme Court Review*. This case is important to Cato because it concerns the misapplication of class-action procedural rules to alter or evade the burdens of substantive law, raising substantial concerns regarding due process and abuse of the class-action mechanism.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court's review is necessary to resolve a deep circuit split over the burden on the named plaintiff in a class action to prove the elements of class certi-

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[1]Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored this brief in any part and that nobody other than *amicus curiae* or its counsel made a monetary contribution to fund the brief's preparation or submission. Pursuant to Rule 37.2, counsel of record for Petitioner and Respondent received notice of *amicus*'s intent to file this brief at least ten days before the due date. Counsel for Respondent withheld consent and *amicus*'s motion for leave to file under Rule 37.2(b) preceded this brief.

fication with admissible evidence. Permitting certification in the absence of admissible evidence, as the decision below does, risks violating the due process rights of defendants and absent class members and, by potentially altering substantive outcomes, runs afoul of the Rule Enabling Act. Given the frequency with which certification is disputed, the amounts at stake, and settlement-forcing properties of certification decisions, the overriding importance of this issue is clear.

The decision below, and those of other courts adopting the same position, cannot be reconciled with this Court's recent class-action jurisprudence. *Wal-Mart Stores, Inc. v. Dukes*, held that, as a matter of due process, a district court must undertake a "rigorous analysis" of the named plaintiff's proof in support of certification—reliance on a plaintiff's unproven allegations would not suffice. 564 U.S. 338, 350–51 (2011). Subsequently, *Comcast Corp. v. Behrend*, clarified that "rigorous analysis" means that a plaintiff must satisfy Rule 23's requirements through "evidentiary proof." 569 U.S. 27, 33–34 (2013). *Dukes* and *Comcast* stand for the proposition that courts cannot "certify now and worry later." But that is exactly what the courts below here did by permitting inadmissible evidence to provide the basis for class certification.

If allegations alone cannot support class certification, it is difficult to understand how inadmissible evidence could. Indeed, inadmissible evidence is no different or better than mere allegations. A court's reliance on such "evidence" effectively relieves the

plaintiff of his burden to "affirmatively demonstrate his compliance with [Rule 23]." *Dukes*, 564 U.S. at 350.

Reliance on such "evidence" is an anomaly. In no other category of cases are parties foreclosed from having a meaningful opportunity to contest the admissibility of evidence presented in support of a binding court ruling. *Cf.* Fed. R. Civ. P. 56(c)(2) (permitting a party, on summary judgment, to object that material cited to support or dispute a fact cannot be presented in admissible form).

Worse, reliance on inadmissible "evidence" to support certification compromises the basic requirements of due process, significantly prejudicing both defendants and absent class members. For defendants, certification and the expenses and risks that flow from it often compel settlements divorced from merit considerations. "[T]he fight over class certification is often the whole ball game." *Hartford Accident & Indemnity Co. v. Beaver*, 466 F.3d 1289, 1294 (11th Cir. 2006). Likewise, for absent class members, certification is the step that determines whether they are bound by a settlement or adverse judgment that wipes out their individual claims. And, by affecting the parties' substantive rights, the use of inadmissible "evidence" to prove class requirements chafes against the Rules Enabling Act's manner-and-means-of-litigation limitation.

The Court should grant *certiorari* to hold that due process requires that evidence presented at the class

certification stage be subject to the same standards as evidence presented at trial.

ARGUMENT

I. The Court's Review Is Required To Resolve the Lingering Circuit Split on Whether Certification Can Be Proven by Inadmissible "Evidence"

The Court granted certiorari in *Comcast* to decide "[w]hether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence" in support of certification, but was unable to answer that question on the facts of the case. 569 U.S. at 32 n.4. As a result, the circuit split that the Court sought to resolve in *Comcast* persists and continues to require the Court's resolution. This case presents an appropriate vehicle to answer that question, the need for which has become only more pressing.

It is well-settled that "certification is proper only if 'the trial court is satisfied, after rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Dukes,* 564 U.S. at 350–51 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)); *Comcast*, 569 U.S. at 33–34. Such rigorous analysis may require the court "to probe behind the pleadings," *Falcon*, 457 U.S. at 160, and will "[f]requently…entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Dukes*, 564 U.S. at 351. The determination of whether a class can be certified "generally in-

volves" considering both factual and legal issues that make up the plaintiff's complaint. *Id.*; *see also Coopers & Lybrand v. Livesay,* 437 U.S. 463, 469 (1978).

Before *Comcast*, lower courts were divided on whether, or the degree to which, they could consider any merits issues at class certification. *See, e.g.*, *In re Blood Reagents Antitrust Litig.*, 283 F.R.D. 222, 240 (E.D. Pa. 2012), *vacated and remanded*, 783 F.3d 183 (3d Cir. 2015) (challenge to the merits of expert's opinion was premature as damages model "could evolve" over time); *Fisher v. Va. Elec. & Power Co.*, 217 F.R.D. 201, 211 (E.D. Va. 2003) (stating that "the Court will inquire no further into the merits than is necessary to determine the likely contours of this action should it proceed on a representative basis"); *Huff v. N.D. Cass Co.*, 485 F.2d 710, 714 (5th Cir. 1973) (en banc) ("It is inescapable that in some cases there will be overlap between the demands of [Rule 23] and the question of whether plaintiff can succeed on the merits.").

The lower courts' confusion stemmed in part from an earlier decision by this Court, *Eisen v. Carlisle & Jacquelin*, which had been misinterpreted by some courts to prohibit any probing of the merits of a case at the class certification stage. 417 U.S. 156 (1974); *see, e.g.*, *Alexander v. Q.T.S. Corp.*, No. 98 C 3234, 1999 WL 573358, at *2 (N.D. Ill. July 30, 1999) (citing *Eisen* for the proposition that "[f]or purposes of determining certification, allegations made in the complaint are taken as true and the merits of the claim are not considered"). A vestige of *Eisen* lingers on as some courts continue to apply different eviden-

tiary standards at the class certification and merits phases of a case, with respect to both expert and fact evidence. While many courts over the years relied on *Eisen* for the proposition that a court could not consider any issue as the class certification stage that happened to overlap with a question on the merits, the Court's decision in *Dukes* should have killed off that view once and for all.

But confusion still lingers. In view of the rigor necessary for a class certification determination, the majority of courts require that evidence proffered at the class certification stage be admissible, just as it must be at the merits phase of a case *See, e.g.*, *In re IPO Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675–76 (7th Cir. 2001); *Gariety v. Grant Thorton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Coastal Neurology, Inc. v. State Farm Mut. Auto. Ins. Co.*, 458 F. App'x 793 (11th Cir. 2012); *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 186 (3d Cir. 2015); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013).

The Third Circuit in *In re Blood Reagents*, for example, vacated a certification order because the evidentiary standard applied by the district court—that the evidence "could evolve to become admissible evidence at trial"—failed under *Comcast*. 783 F.3d at 186. Similarly, the D.C. Circuit has held that courts must take a "hard look" at the soundness of statistical evidence presented at the class certification stage. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 253. And the Seventh Circuit re-

cently held that where the admissibility of expert testimony "critical" to class certification is challenged, the court must conduct a full *Daubert* analysis prior to denying certification. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 812 (7th Cir. 2012). Previously, that court had required a full *Daubert* analysis of critical testimony before *granting* certification. *Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 819 (7th Cir. 2010).

But the Eighth and Ninth Circuits swim against the current of admissibility as a baseline for evidence in support of certification. Those courts have permitted judicial findings as to the propriety of class certification to be based on inadmissible evidence. *E.g.*, *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011); Pet. App. 3a, 10A. In *Zurn*, the Eighth Circuit declined to require "an exhaustive and conclusive *Daubert* inquiry" at the class certification stage, reasoning that "a court's inquiry on a motion for class certification is tentative, preliminary, and limited." 644 F.3d at 613. Instead, it promoted approved the district court's application of a "focused *Daubert* inquiry" to assess only whether the expert evidence "should be considered in deciding the issues relating to class certification." *Id.* at 610. The Ninth Circuit, meanwhile, merely affirmed the district court's ruling without any reasoning beyond a general statement that "[e]vidence submitted in support of class certification need not

be admissible at trial." Pet. App. 3a, 10A (quotations omitted).[2]

The issue of whether class certification decisions must rest on admissible evidence cuts across substantive areas of law. *See, e.g.*, *Arredondo v. Delano Farms Co.*, 301 F.R.D. 493, 505 (E.D. Cal. 2014) (wage and hour case); *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 601–02 (3d Cir. 2012) (consumer fraud case); *Messner*, 669 F.3d at 812 (antitrust case); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (Title VII and Fair Employment and Housing Act case); *In re Zurn*, 644 F.3d at 612 (products liability case); *Andersen Living Trust v. WPX Energy Production, LLC*, 306 F.R.D. 312, 320 (D.N.M. 2015) (oil and gas lease case); *Sicav v. James Jun Wong*, 2015 WL 268855, *6 (S.D.N.Y. Jan. 12, 2015) (securities case); *Braggs v. Dunn*, 317 F.R.D. 634, 642 (M.D. Ala. 2016) (civil rights case).

The Court's guidance is needed to create consistent procedural and substantive requirements for class certification across jurisdictions and subject

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[2] Curiously, even though it allows inadmissible fact evidence to form the basis of a class certification decision, the Ninth Circuit subjects expert evidence to *Daubert* scrutiny at the class-certification stage. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d at 982 ("Instead of judging the persuasiveness of the evidence presented [in the commonality context], the district court seemed to end its analysis of the plaintiffs' evidence after determining such evidence was merely admissible [in the motion to strike context].") But there is no good rationale for requiring admissibility for expert but not fact evidence.

matters—and to ensure respect for the due process rights of defendants and absent class members.

II. The Court's Intervention Is Required To Enforce the Rights Recognized in *Dukes* and Prevent Prejudice to Defendants and Class Members

Permitting courts to apply a lower standard of evidence at the class certification stage than at trial is inconsistent with the Court's decision in *Dukes*. *Dukes* echoes the Court's previous decisions holding that lower courts must engage in a rigorous analysis in determining the propriety of class certification, and further discredits lower-court decisions that have read *Eisen* to preclude reviewing the merits at the class certification stage. But *Dukes* specifically stated that plaintiff must prove the propriety of class certification, even if that means proving the issue "again at trial in order to make out the case on the merits," to satisfy the requirements of Rule 23 and comport with basic notions of due process. 564 U.S. at 351 n.6. Any lower standard falls short of these obligations, risking coercion of defendants to settle unmeritorious clams and risking the rights of absent class members.

A. Due Process Requires that Certification Be Based on Reliable Evidence Rather than Mere Assertion

As set forth in the 1966 Advisory Committee notes relating to Rule 23(b)(3): "[This Subdivision] encompasses those cases in which a class would achieve economies of time, effort, and expense, and promote

uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment.

The text of Rule 23(b)(3) requires that the court "find," not assume, that there are questions of law or fact common to class members that predominate. *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005). As one commentator has recognized:

> It would be bizarre to conclude that the framers of Rule 23 would have set forth a careful set of prerequisites for class certification only to deny trial courts the ability to apply those prerequisites in a factually-based and reasoned manner.

Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 Hofstra L. Rev. 51, 63 (2004).

This Court has acknowledged the significant impact of a class certification on the parties. "A district court's ruling on the certification issue is often the most significant decision rendered in" class proceedings. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *see also Coopers & Lybrand*, 437 U.S. at 476 ("Certification of a large class 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.").

As to defendants, "[c]lass certification magnifies and strengthens the number of unmeritorious claims." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). Similarly, research has found that aggregation of claims makes it more likely that a defendant will be found liable, resulting in a higher aggregate damage award. David F. Herr, *Ann. Manual for Complex Litig., Fourth* § 22.312 n.1069 (2017). Class certification creates "insurmountable pressure on defendants to settle, whereas individual trials would not." *Castano*, 84 F.3d at 746. This pressure squeezes the defendant, regardless of the merits. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 260 tbl. 4 (2010) (noting that the average settlement in certified federal class actions was well over $100 million). Judge Posner recently recognized that "a study of certified class actions in federal court in a two-year period (2005 to 2007) found that *all* 30 such actions had been settled." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (emphasis in original) (citing Emery G. Lee III et al., *Impact of the Class Action Fairness Act on the Federal Courts* 2, 11 (Federal Judicial Center 2008)).

This impact of class certification stretches across all types of litigation, regardless of subject matter. For example, "[t]he risks associated with antitrust class actions dictate that most cases will be on the fast track to certification, long before a summary judgment motion or merits adjudication of any kind can play a role." John T. Delacourt, *Protecting Com-*

petition by Narrowing Noerr: *A Reply*, 18 Antitrust 77, 78 (2003); *see also* Eisenberg & Miller, *supra*, at 262 tbl. 5 (average settlement for antitrust certified class action over $160 million). Indeed, the settlement values of certified class action lawsuits can run into the hundreds of millions, regardless of subject area: mass torts average approximately $255 million; consumer actions average $128 million; and tax cases average $188 million. *Id.* And employment lawsuits, like the *Dukes* action, average over $12 million at settlement following certification. *Id.*[3]

As the Eleventh Circuit has recognized, "blackmail" may be the only value of class certification: Once one understands that the issues involved in the instant case are predominantly case specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is, except the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement. *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1240 n.21 (11th Cir. 2000) (emphasis added).

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[3] Wage and hour claims, as in the instant case, have a significant settlement value in the class action context. One report indicates: "…the value of wage and hour settlements increased significantly. The value of the top 10 settlements hit $695.5 million in 2016, a 50 percent increase over 2015's $463.6 million valuation, and more than triple the $215.3 million valuation in 2014." Robert Teachout, *Fewer Wage and Hour Class Actions Filed, But Value of Settlements Spikes*, Society for Human Resource Management, Feb. 7, 2017 at 2 (citing the results of the Seyfarth Shaw 2016 annual report).

Judge Easterbrook, writing for the Seventh Circuit in *Szabo*, articulated the issue as follows: "[c]lass certification turns a $200,000 dispute (the amount that *Szabo* claims as damages) into a $200 million dispute. Such a claim puts a bet-your-company decision to…managers and may induce a substantial settlement even if the customer's position is weak." 249 F.3d at 675. Judge Posner agreed: "[a]ggregating a great many claims…creates a potential liability so great that the defendant is unwilling to bear the risk, even if it is only a small probability, of an adverse judgment." *Eubank*, 753 F.3d at 720.

B. Class Certification Based on Asserted Evidence Severely Prejudices the Legal Rights of Absent Class Members

Class certification also has an important impact on absent class members whose legal rights depend on advocacy of class counsel who they have never met. Class actions are "exception[s] to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979). Absent putative class members who do not exclude themselves from a class will be bound by any judgment and will not be able to proceed individually. *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940); Restatement (Second) of Judgments § 41(1)(e). Allowing inadmissible evidence to be considered at the class certification stage may permit certification in cases that ultimately lack support in admissible evidence.

As a recent article explained, class certification decisions are the key event that transform individuals holding potential claims into class members whose claims will be decided or settled:

> Class actions…are different. The named plaintiff seeks to represent hundreds (or, in the case of *Dukes*, hundreds of thousands) of people who will never see the inside of the courtroom and will never talk to a lawyer about legal strategy. If she wins, so do they. But if she loses, so do they, and because they could have litigated those claims in the class action, they will be precluded from bringing a new case based on the same subject matter.

Andrew J. Trask, Wal-Mart v. Dukes: *Class Actions and Legal Strategy*, 2010-2011 Cato Sup. Ct. Rev. 319, 353 (2011).

To avoid prejudice to such class members, as well as defendants, a full admissibility determination must be made as to any evidence submitted in support of certification. The evidentiary rules applied at trial have been developed over centuries to ensure the reliability of the evidence that judges and juries use to make high-stakes decisions. The purported efficiency of class litigation is not a valid reason to avoid the rules of evidence in class certification proceedings, particularly when such avoidance amounts to a denial of due process rights.

III. Relying on Inadmissible Evidence at the Class Certification Stage Violates the Rules Enabling Act

Employing reliable evidence is essential to ensuring that class certification does not alter parties' substantive rights, in violation of the Rules Enabling Act, by preventing defendants from challenging the veracity and reliability of class certification evidence.

The Rules Enabling Act states that rules promulgated pursuant to its authority "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Rules must "really regulat[e] procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 14 (1941).

The governing test is therefore "what the rule itself regulates: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality op.) (quoting *Mississippi Publ'g Corp. v. Murphree*, 326 U.S. 438, 446 (1946)). The *sine qua non* of a permissible procedural rule is that, while it may regulate "the process for enforcing [the parties'] rights," it does not "alter [] the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either." *Id.* at 407–08 (surveying cases).

Class certification creates "insurmountable pressure on defendants to settle, whereas individual trials would not." *Castano*, 84 F.3d at 746. Thus, as a practical matter, allowing plaintiffs to engage in free-form Rule 23 practice dramatically impacts the substantive rights of defendants by forcing settlement of claims which may not have otherwise survived a motion to dismiss. This is a particularly grave concern given class counsel's financial incentive for certification to secure settlement funds from the defendant. *See* Arthur R. Miller, *An Overview of Federal Class Actions: Past, Present, and Future* 12 (2d ed. 1977) (recognizing, 40 years ago, that "plaintiffs' lawyers believe that their ability to obtain a large settlement turns on securing certification."). This is why the Rule 23 requirements exist, and why "a party seeking to maintain a class action must affirmatively demonstrate his compliance with Rule 23." *Behrend*, 569 U.S. at 33 (quoting *Dukes*). It is untenable, therefore, that this high-stakes, potentially outcome-determinative proceeding should be decided on nothing more than *ipse dixit* assertions of class counsel.

With loosened evidentiary standards, individual class members could "prove" claims without presenting any admissible evidence at all—for example, as here, by presenting as "evidence" a baseless, lawyer-generated spreadsheet purporting to show that the class should be certified. Likewise, defendants would be deprived of their statutory right to be held liable only for violations of statutory obligations and their right to challenge individual claims and to present

individualized defenses. This was why *Dukes* rejected the "Trial by Formula" plan wherein liability and damages would be determined for a "sample set of the class members" and then extrapolated out to the "entire remaining class," relying on multiplication "to arrive at the entire class recovery—without further individualized proceedings." 564 U.S. at 367. That approach, this Court concluded, violated the Rules Enabling Act because it precluded Wal-Mart from "litigat[ing] its statutory defenses to individual claims" and thereby impermissibly abridged its rights. *Id.*

For the same reason that a formula cannot be a substitute for individualized evidence of liability, injury, or damages, except for when those questions truly are common, reliance on an inadmissible, lawyer-created spreadsheet to certify a class abridges defendants' substantive rights and violates the Rules Enabling Act. *See Dukes,* 564 U.S. at 350

The Court should make clear that it meant what it said in *Dukes* and *Comcast* and that interests of convenience and efficiency, or even a court's view of what constitutes rough justice, are unequal to the fundamental rule-of-law and due process concerns that mandate strict adherence to Rule 23's class certification requirements.

* * *

The Ninth Circuit's approach signals a return to the "certify now, worry later" approach that plagued the courts when they were saddled with a fundamental misperception of what this Court's *Eisen* de-

cision meant. It is now clear that *Eisen* does not prohibit a court from examining the merits of an action at the certification stage if necessary to the class certification decision. There is no justification for lowering the standard for admissibility at the class certification stage. To the contrary, there is a need to ensure that courts uniformly adopt the same stringent evidentiary standards applicable at trial at the class certification stage to protect both defendants and absent class members from the ramifications of a wrongly decided class certification decision.

CONCLUSION

The petition should be granted.

Respectfully submitted,

ANDREW M. GROSSMAN
Counsel of Record
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

JOHN B. LEWIS
DUSTIN M. DOW
BAKER & HOSTETLER LLP
Key Tower
127 Public Square
Suite 2000
Cleveland, OH 44114

ILYA SHAPIRO
TREVOR BURRUS
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001

DEBORAH H. RENNER
DAVID M. MCMILLAN
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, N.Y. 10111

Counsel for Amicus Curiae

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