

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAMONIE EARL, individually and on behalf of all others similarly situated; LINDA RUGG, individually and on behalf of all others similarly situated; TIMOTHY BLAKELY, JR.; STEPHANIE BLAKELY; MARISA THOMPSON, individually and on behalf of all others similarly situated; MUHAMMAD MUDDASIR KHAN; JOHN ROGERS, individually and on behalf of all others similarly situated; VALERIE MORTZ-ROGERS, individually and on behalf of all others similarly situated; JAMES LA MORTE; BRETT NOBLE, individually and on behalf of all others similarly situated; RUBEN CASTRO, individually and on behalf of all others similarly situated; FRITZ RINGLING, individually and on behalf of all others similarly situated; LITAUN LEWIS, individually and on behalf of all others similarly situated; LANCE HOGUE, JR., individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

THE BOEING COMPANY; SOUTHWEST AIRLINES Co.,

Defendants-Appellants.

On Rule 23(f) Appeal from the
United States District Court for the
Eastern District of Texas, No. 4:19-cv-507

BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE*
IN SUPPORT OF DEFENDANTS-APPELLANTS

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Earl v. The Boeing Company, No. 21-40720

Under Fifth Circuit Rule 29.2, I certify that the following listed persons and entities may have “an interest in the *amicus* brief”:

- *Amicus Curiae*: Washington Legal Foundation (WLF).
- Counsel for *Amicus Curiae*: Cory L. Andrews and John M. Masslon II.

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/s/ Cory L. Andrews
CORY L. ANDREWS

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IDENTITY & INTEREST OF *AMICUS CURIAE**

Founded in 1977, Washington Legal Foundation is a public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF believes that the quality of decision-making in federal court hinges on the ability and willingness of district judges to prevent unreliable “scientific” expert evidence from being admitted into evidence. To that end, WLF has long insisted that federal courts should exclude any expert opinion that lacks reliability. *See, e.g., Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

WLF’s Legal Studies Division, the publishing arm of WLF, regularly produces articles by outside experts on the need to ensure that unreliable expert testimony is never admitted into evidence. *See, e.g., Lee Mickus & Abigail Dodd, Stop Calling Them “Daubert Motions”: Federal Rule of Evidence 702 and Why Words Matter*, WLF Working

* All parties have consented to the filing of this brief. No party’s counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation or its counsel, helped pay for this brief’s preparation or submission.

Paper (Aug. 2021); Kirby T. Griffis, *The Role of Statistical Significance in Daubert/Rule 702 Hearings*, WLF Working Paper (Mar. 2017).

As the Appellants' opening brief convincingly shows, the district court's class-certification order allows class members who lack an Article III injury to sue in federal court. For that reason alone, the decision below cannot stand. Yet another key failing of the district court's order, and the focus of this brief, is that it sidesteps Rule 702's vital gatekeeping function for expert evidence and, in turn, Rule 23(b)(3)'s predominance requirement. Those errors, on which the district court based its certification order, invite reversal.

INTRODUCTION & SUMMARY OF ARGUMENT

This appeal arises from a putative class action against Boeing and Southwest Airlines following two tragic overseas accidents involving Boeing's 737 MAX 8 airplane. Unaffected by those tragedies, eleven named plaintiffs now seek billions of dollars under civil RICO on behalf of a global class of persons who paid, directly or indirectly, for a ticket on more than a thousand Southwest or American Airlines routes over an 18-month period. Although nearly all those ticketed passengers never flew on MAX aircraft, and all of them reached their ticketed

destination safely, Plaintiffs speculate that every ticket on any route ever scheduled to be flown by the MAX during the class period would have cost less had the risks of the MAX been known.

A district court may not certify a class under Rule 23 without first resolving whether the plaintiff has introduced reliable evidence, including expert testimony, of classwide injury and damages. *Prantil v. Arkema Inc.*, 986 F.3d 570, 576 (5th Cir. 2021). Such evidence must also show that common issues will predominate over individualized ones. *Id.* at 576-80. Even so, the district court certified four classes comprising 200,000,000 claims after determining that Plaintiffs' lone damages expert could ultimately "fix" demonstrable flaws in his conjoint survey as evidence of predominance—at the class-certification stage—of classwide damages. That holding contravenes both Rule 702 and this Court's case law, providing an independent ground for reversal.

Left to stand, the district court's watered-down approach to the reliability of contested expert evidence would dramatically lower the bar for proving the predominance needed for class certification under Rule 23(b)(3). That is no small matter. The very fact of certification gives class-action plaintiffs inordinate leverage in settlement

negotiations. The district court's rule thus would transform the class action from a device that avoids the inefficiencies of trying the same claims repeatedly into a device that unfairly alters the parties' substantive rights.

Nor is that all. Even when cabined to truly classwide matters, civil RICO is uniquely prone to abuse. RICO is notorious for its elasticity and for enabling plaintiffs to convert an ordinary civil dispute into a federal racketeering case. And RICO provides treble damages and recovery of all costs, including attorney fees, to prevailing plaintiffs. Armed with the loss of goodwill and reputation that often follow the news that a defendant company has been accused of "racketeering" activity, civil RICO plaintiffs can extract settlements for even the most frivolous claims. If, as Plaintiffs urge, civil-RICO classes may be certified without reliable proof of predominance, civil-RICO's unfair leverage will only continue to grow.

ARGUMENT

I. THE DISTRICT COURT'S CERTIFICATION ORDER RESTS ON INADMISSIBLE EXPERT EVIDENCE.

To satisfy Rule 23, a class-action plaintiff must "prove that there are in fact sufficiently numerous parties, common questions of law or

fact, etc.” to justify class certification. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). The only way to “prove” these “facts” is with reliable, admissible evidence. In other words, unless an expert’s opinion “would be admissible at trial,” it cannot “justify class certification.” *Prantil*, 986 F.3d at 575-76.

The district court violated that rule here by allowing Plaintiffs’ deeply flawed damages model to serve as the basis for class certification. Indeed, Plaintiffs’ expert, Dr. Allenby, offered a conjoint analysis so riddled with defects that he ultimately offered to rework it later. Yet over Defendants’ objections, the district court accepted Dr. Allenby’s “anomalous result[s]” because he had “a viable plan to fix the underlying issue” sometime in the future. ROA.3473. That decision to punt on reliability at the class-certification stage lacks any legal or logical support and warrants reversal.

As the Court noted in granting Defendants’ request for a stay of all discovery pending appeal, Plaintiffs “must show that the price-deflating effect of public knowledge about the MAX’s defects would have been fairly uniform across all the various routes and dates (over 18 months) involved in the lawsuit. But both the plaintiffs’ and the

defendants’ expert testimony suggest plaintiffs will not be able to make that showing.” Stay Order (Dec. 22, 2021) at 4.

A. The district court erred when it applied a watered-down admissibility standard at the class-certification stage.

To certify a class under Rule 23(b)(3), a district court must “*find*” that common questions predominate over individual ones. Fed. R. Civ. P. 23(b)(3) (emphasis added). Just as it must “look beyond the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law” to resolve class-certification issues, *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 548 (5th Cir. 2003) (cleaned up), a district court must resolve key evidentiary disputes—and the plaintiff bears the burden of proving any disputed issue—at the certification stage.

Mindful of “the important due process concerns of both plaintiffs and defendants inherent in the certification decision,” this Court has insisted that “findings [at the class-certification stage] must be made based on adequate admissible evidence to justify class certification.” *Unger v. Amedisys, Inc.*, 401 F.3d 316, 319-20 (5th Cir. 2005). To remove any doubt about a district court’s gatekeeping role during class

certification, this Court has “insist[ed] that the metric of admissibility be the same for certification and trial.” *Prantil*, 986 F.3d at 575.

A district court thus errs when it relies on “expert opinions in its certification decision without first ensuring those opinions would be admissible at trial under the *Daubert* standard.” *Id.* at 574. Although the district court ruled that Dr. Allenby’s analysis was admissible, it (like the district court in *Prantil*) “was not as searching in its assessment” of the expert’s opinion “as it would have been outside the certification setting.” *Id.* at 576. And here, as there, a full “assessment of the reliability” of the plaintiff’s “scientific evidence for certification cannot be deferred.” *Id.*

According to the district court, however, class certification may rest on an expert’s otherwise unreliable testimony if that testimony can later be “fix[ed].” ROA.3474. But Rule 23 “does not set forth a mere pleading standard.” *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012) (quoting *Dukes*, 564 U.S. at 351). Contrary to the district court’s view, the elements of a claim are not capable of proof with common evidence if the only evidence proffered would later likely be inadmissible as proof of anything. *See Cruson v. Jackson Nat’l Life Ins.*

Co., 954 F.3d 240, 258 (5th Cir. 2020) (insisting that a “preliminary overview of how . . . damages might be calculated” is not proof of classwide damages).

The district court’s evidentiary shortcut was outcome dispositive to its certification decision. Indeed, the court incorporated its denial of Defendants’ earlier Rule 702 motion into its class certification ruling. ROA.3585-86. Had it conducted a proper Rule 702 and predominance analysis, as this Court requires, the district court would have found Dr. Allenby’s testimony inadmissible and could not have certified the class. Instead, the district court sidestepped the fact that Dr. Allenby’s damages model—by not considering the relevant ticket markets—failed to “measure only those damages attributable to [the plaintiff’s] theory.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). And it accepted Dr. Allenby’s admittedly “deficient” model at face value, even though it “would need to be modified and improved” to be admissible at trial. ROA.11606, 18357. This “failure to conduct a thorough analysis was reversible error.” *Cruson*, 954 F.3d at 255.

By deferring vexing questions about reliability until a later stage of the case, the district court jettisoned the “rigorous analysis” this

Court requires. See *Unger* 401 F.3d at 320-21 (citing *Gen'l Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)). After all, unreliable expert evidence is no evidence at all. Indeed, the key insight of Rule 702 is that unreliable evidence is never helpful—it does not “assist the trier of fact to understand the evidence or to determine a fact in issue.” *Daubert*, 509 U.S. at 591 (cleaned up); *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 274-75 (5th Cir. 1998). Above all, a plaintiff who purports to satisfy Rule 23’s predominance requirement with unreliable evidence at the class-certification stage has *not* proven that he can resolve the class members’ claims at trial “in one stroke.” *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 547-48 (5th Cir. 2020). This failure to show predominance is fatal to the district court’s certification order.

B. The flaws in Dr. Allenby’s testimony go to reliability, not weight.

In ruling that Dr. Allenby’s report was admissible, the district court left “any judgment as to the weight of his report to the jury.” But the reliability of expert evidence is a threshold question for the court, not the jury. And Rule 702 demands that district courts reject expert testimony divorced from “sufficient facts or data,” or that is not the product of “reliable principles and methods,” or where the proposed

witness has not “reliably applied the principles and methods to the facts of the case.” Fed. R. Evid. 702.

Dr. Allenby conceded that any alleged overcharge “would vary across” flight routes, so he could “only speculate as to how much heterogeneity” might exist in overcharges across routes. ROA.11636. And Dr. Allenby also failed to factor in competition from alternative airlines on different routes. Had he done so, he testified, it “could show that there was no price premium on many [routes].” ROA.11622. The district court’s approach to reliability thus obscures the fact that Defendants’ criticisms of Dr. Allenby’s methodology went directly to the admissibility guideposts established by *Daubert* and Rule 702: whether his opinion was based on sufficient facts, whether he reliably applied principles and methods to the facts of the case, and whether he accounted for alternative explanations in forming his opinion. *See Daubert*, 502 U.S. at 593-94; Fed. R. Evid. 702. These criticisms also showed why his methodology could never satisfy Rule 23(b)(3)’s predominance requirement. *See Fed. R. Civ. P. 23(b)(3)*.

As this Court has insisted, an “expert’s testimony must be reliable at each and every step or else it is inadmissible.” *Knight v. Kirby Inland*

Marine Inc., 482 F.3d 347, 355 (5th Cir. 2007). This “reliability analysis applies to all aspects of an expert’s testimony, the facts underlying the expert’s opinion, the link between the facts, and the conclusion.” *Id.* (quoting *Heller v. Shaw Indus.*, 167 F.3d 146, 155 (3d Cir. 1999)). Indeed, no court should “admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.” *Joiner*, 522 U.S. at 146. Such evidence “contributes nothing to a ‘legally sufficient evidentiary basis’” for a verdict. *Weisgram v. Marley Co.*, 528 U.S. 440, 454 (2000) (internal citation omitted).

Nor is it enough to invoke the cross-examination of testifying experts while leaving any dispute about reliability to the “weight” a jury decides to give that testimony. While cross-examination has its benefits, it is no panacea; it cannot readily distinguish valid expert opinions from junk science; it is no substitute for the court’s gatekeeping role in determining an expert’s reliability in the first instance.

Dismissing key, demonstrable, and objective flaws in expert evidence as going to the “weight” of that evidence inevitably leaves jurors with the rarified task of resolving the basic reliability of a given expert’s testimony. Jurors cannot and should not be expected to make

those sorts of reliability determinations. As Professor Jules Epstein has explained:

This treatment of cross-examination as the palliative of choice has its flaws, not merely in its expectation that cross-examination without other resources can fairly respond to an expert witness. The mythic status of cross-examination in this regard actually impedes accurate fact-finding because leading questions are not always an appropriate or sufficient tool for truth finding. Courts have not acknowledged these limitations.

Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and “At Risk,”* 14 *Widener L. Rev.* 427, 437 (2009) (internal citations omitted). In other words, the mere “fact that an expert witness was ‘subject to a thorough and extensive examination’ does not ensure the reliability of the expert’s testimony; such testimony must still be assessed *before* it is presented to the jury.” *Nease v. Ford Motor Co.*, 848 F.3d 219, 231 (4th Cir. 2017) (emphasis added) (citation omitted).

It’s no surprise, then, that legal scholars have long insisted that “cross-examination does little to affect jury appraisals of expert testimony.” Christopher B. Mueller, *Daubert Asks the Right Questions: Now Appellate Courts Should Help Find the Right Answers*, 33 *Seton Hall L. Rev.* 987, 993 (2003). On the contrary, studies have revealed jurors’ commonly held assumption that, because the trial judge

admitted the expert evidence, it must have passed at least some degree of scientific scrutiny. *See, e.g.*, N.J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 Psychol. Pub. Pol'y & L. 1, 7 (2009).

The only way to ensure that a jury does not give too much weight to unreliable evidence is never to admit it in the first place. “The basic calipers that jurors use to evaluate testimony—their own life experience—are of little value when jurors evaluate whether an expert is telling the truth.” Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217, 220 (2006). Thus, any doubts about the “factual basis, data, principles, [or] methods” of expert testimony—or “their application”—require the trial judge to determine whether that testimony is reliable *before* admitting it. *Kumho Tire Co.*, 526 U.S. at 149 (emphasis added). The district court botched that gatekeeping role here.

C. Allowed to stand, the district court’s approach to expert evidence would impermissibly lower the bar for class certification.

Class certification is the most important decision a district court makes in a class action. As one commentator has aptly put it, it’s “the whole shooting match.” David L. Wallace, *A Litigator’s Guide to the ‘Siren Song’ of ‘Consumer Law’ Class Actions*, LJM’s Prod. Liab. L. & Strategy 10 (Feb. 2009). “With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs’ case by trial.” Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). Only around two percent of certified class actions ever go to trial. See *2019 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 34 (2019) <<https://classactionsurvey.com>>.

This hydraulic pressure to settle holds true even if the plaintiffs’ claims lack merit. “[F]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (emphasizing the “risk of ‘in terrorem’ settlements that class actions

entail”); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (“A court’s decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims.”).

Left to stand, the district court’s approach to Rule 702 and predominance under Rule 23 would dramatically lower the threshold for class certification. If a district court may certify a class merely on the say-so of a plaintiff’s expert without resolving questions of reliability and individualized defenses, it places a heavy thumb on the scale in favor of class certification. Such deference “amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert.” *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002).

This case proves the point. Plaintiffs seek to satisfy Rule 23(b)(3)’s rigorous requirements by claiming that, although damages may vary from class member to class member, the issue of damages is “common” because it will be susceptible to classwide proof at trial through Dr. Allenby’s later-“fixed” damages model. Under the district court’s *Daubert*-lite approach, any plaintiff who can find an expert with a

damages model in hand, even if unreliable and ultimately unworkable, can secure class certification. That can't be right.

Deferring questions of expert reliability until the merits stage may be convenient for district courts, but it leaves defendants in a perilous bind. Once a class is certified, few companies are prepared to roll the dice on incurring a massive judgment. In the end, a class action in which the plaintiffs can obtain certification based on unreliable, inadmissible expert testimony is a powerful cudgel for securing lucrative settlements.

What's more, runaway litigation costs do not simply fall on individual defendants; they impose a drag on the entire U.S. economy. The costs of abusive class actions are "payable in the last analysis by innocent investors for the benefit of speculators and their lawyers." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975) (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J. concurring)). Without a gatekeeper at the class-certification stage, the district court's flawed approach, if affirmed, would raise the cost of doing business in a wide swath of industries that find themselves perennial targets of the plaintiffs' bar. And the

ultimate price for those added costs is often passed along to consumers, employees, and shareholders.

II. AFFIRMING THE DISTRICT COURT’S CLASS-CERTIFICATION ORDER WOULD ALSO INVITE A FLOOD OF CIVIL RICO ABUSE.

Civil RICO is “the litigation equivalent of a thermonuclear device.” *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). Given the statute’s remarkable breadth and generous remedies, and given how easily plaintiffs’ counsel can bring everyday business activities under its ambit, civil RICO is itself an invitation for *in terrorem* suits.

Though Congress enacted RICO as a new tool for combating organized crime, civil RICO is rarely used for that purpose. Instead, the ever-increasing number of civil RICO suits filed each year target activity that would not fit most people’s definition of “racketeering.” And because RICO’s text has been construed so broadly, civil-RICO claims now arise in disputes that Congress never could have intended the statute to cover.

Creative plaintiffs’ lawyers have brought civil RICO claims “centered on a myriad of subjects, including sexual harassment, the 1986 air strike on Libya, mismanagement of hazardous waste sites,

anti-abortion protest activities, a parishioner's grievances against her former church, a strict products liability suit involving defective infant formula, and a wrongful discharge action." Petra J. Rodrigues, *The Civil RICO Racket: Fighting Back with Federal Rule of Civil Procedure 11*, 64 St. John's L. Rev. 931, 936-37 (1990).

Judges and legal scholars have routinely criticized civil RICO's overly expansive reach for giving "many ordinary civil cases" an "entrée to federal court." Anne B. Poulin, *RICO: Something for Everyone*, 35 Vill. L. Rev. 853, 857 (1990); see *Anza v. Ideal Steel Supply Co.*, 547 U.S. 451, 471-72 (2006) (Thomas, J., dissenting) ("Judicial sentiment that civil RICO's evolution is undesirable is widespread."); William H. Rehnquist, *Remarks of the Chief Justice*, 21 St. Mary's L.J. 5, 13 (1989) (inviting "amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court").

Of course, the allure civil RICO holds for plaintiffs' attorneys is easy to see. RICO applies not only to individuals, but also to corporations. It promises treble damages and full recovery of costs—including attorney fees—to prevailing plaintiffs. See *Sedima, S.P.R.L. v.*

Imrex Co., 473 U.S. 479, 504 (1985) (Marshall, J., dissenting) (“RICO is out of control not only because it is so easy to claim grounds for a suit, but because the appeal of treble damages plus legal fees has proved irresistible for plaintiffs and their lawyers.”). And RICO’s liberal venue provision, which allows suit in any district in which the defendant “resides, is found, has an agent, or transacts his affairs,” 18 U.S.C. § 1965(a), invites a civil-RICO plaintiff to effectively shop for a forum of her choosing.

“Once a clever lawyer can characterize an opponent’s actions as constituting one or two of the myriad of predicate acts, it takes little imagination to deem those actions RICO violations.” Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO’s Remedial Provisions*, 43 Vand. L. Rev. 623, 626 (1990). And civil-RICO plaintiffs (and their attorneys) can leverage the lawsuit’s disastrous public-relations impact to force settlements from firms that, understandably, fear the loss of reputation that accompanies news of alleged “racketeering” activity. In short, the “danger of vexatiousness” is acute in civil-RICO suits. *Int’l Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 153 (4th Cir. 1987).

What's more, data suggests that private plaintiffs increasingly are filing RICO lawsuits for alleged "racketeering" that federal prosecutors see no reason to pursue. Between 2001 and 2006, for example, plaintiffs brought "an average of 759 civil-RICO claims" each year. Nicholas L. Nybo, *A Three-Ring Circus: The Exploitation of Civil RICO, How Treble Damages Caused It, and Whether Rule 11 Can Remedy the Abuse*, 18 Roger Williams U. L. Rev. 19, 24 (2013). Yet during that same stretch of time, "a paltry average of 212 criminal RICO cases were referred to the United States Attorney's Office." *Id.* Similarly, a 2002 study found that, of all RICO cases decided by federal appellate courts between 1999 and 2001, 78% were civil and only 22% were criminal. Pamela H. Busy, *Private Justice*, 76 S. Cal. L. Rev. 1, 22 & n.111 (2002). Even when injury in fact is not in dispute, civil RICO is uniquely prone to abuse.

Look no further than this case. The entire premise of Plaintiffs' RICO claim here—the sole remaining claim in the lawsuit—is that two publicly traded, Fortune 500 companies, both subject to federal securities laws and SEC regulations, are engaged in a decades-long RICO enterprise. ROA.2114-16; *see also* ROA.2051-2056. Unfortunately, the truth or falsity of that incredible premise won't be resolved at trial

until *after* class certification—thus putting even greater pressure on Defendants to settle.

Too often, a civil-RICO class action in which certification is bottomed on an expert’s unreliable say-so is a powerful cudgel for securing lucrative settlements. Few companies are prepared to roll the dice on incurring a treble-damages judgment, plus an award of attorney fees, along with the stigma that attaches to a “racketeering” jury verdict. While this hydraulic leverage to settle is calculated to extract windfalls from large companies such as Boeing and Southwest, small businesses are even more susceptible to *in terrorem* settlements.

Unless the Court reverses the aberrant holding below, speculative RICO class actions will proliferate even more. And while civil actions under RICO have always been a lightning rod for criticism, extending RICO to cover purely abstract, unrealized harms—as the district court did here—further exacerbates the problem. Given the unusual breadth of RICO, the untold mischief to follow from sidestepping Rule 702’s gatekeeping duty warrants reversal.

CONCLUSION

The Court should reverse the district court's certification order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that

1. This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 4,123 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced serif typeface (Century Schoolbook) in 14-point font.

3. This brief includes any required privacy redactions under 5th Cir. R. 25.2.13, the electronic submission is an exact copy of the paper submission, and a virus-detection program (Webroot Antivirus Software 2021) scanned this document and detected no virus.

Dated: January 14, 2022

/s/ Cory L. Andrews
CORY L. ANDREWS

CERTIFICATE OF SERVICE

I certify under Fed. R. App. P. 25(c)(2) that on January 14, 2022, I filed the foregoing with the Clerk of the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, which will serve all counsel of record.

/s/ Cory L. Andrews
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