NO. 22-16693

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE JUUL LABS, INC. MARKETING SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION

On Appeal from the United States District Court for the Northern District of California
(Case No. 3:19-md-02913) (District Judge William H. Orrick)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND REVERSAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Constitutional Provision

Statute

Rules

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Other Authorities

INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* in cases to oppose improper class-certification orders. *See, e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021); *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951 (2021). WLF also files briefs in cases addressing the proper threshold for the admission of expert evidence. *See, e.g.*, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). It filed a petition-stage *amicus* brief in this case and the two now-stayed companion cases.

INTRODUCTION

Class certification is often "the whole shooting match." David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN's Prod. Liab. L. & Strategy 10 (Feb. 2009); *see Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the

[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission.

plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). As the Supreme Court has recognized, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 163 (2008) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975)).

Given the importance of class certification in large multi-district litigation, it is imperative that district courts properly apply Rule 23's requirements. Blindly certifying a class merely on the plaintiffs' say-so is a recipe for *in terrorem* settlements. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). This case thus has far-reaching implications beyond this MDL. Reversal is necessary to stop district courts from taking shortcuts during the class-certification process.

STATEMENT

"According to the Federal Centers for Disease Control and Prevention, each year cigarette smoking kills more than 400,000 Americans, exceeding the combined deaths caused by automobile accidents, AIDS, alcohol use, use of illegal drugs, homicide, suicide, and fires." *Serv. Emps. Int'l Union Health & Welfare Fund v. Philip Morris,*

Inc., 83 F. Supp. 2d 70, 75 (D.D.C. 1999), *rev'd in part on other grounds*, 249 F.3d 1068 (D.C. Cir. 2001); *see also* Pub. L. No. 111-31, § 2(13), 123 Stat. 1776, 1777 (2009).

For years, many people could not quit smoking because they were addicted to nicotine. Although nicotine gum and patches were available, many people found them to be ineffective for stopping smoking. Finding alternatives that worked proved to be a long and grueling process. In 2007, two Stanford students founded a company to work on the problem. Eight years later, that company introduced JUUL e-cigarettes.

For the next three years, JUUL Labs, Inc. (JLI) competed with other companies, including one that Altria Group partially owned. Late in 2018, Altria divested itself from that competitor. Then, in December 2018, Altria bought a 35% non-voting interest in JLI.

JUUL products do not burn tobacco. Rather, they heat a nicotine-containing liquid, which produces an aerosol that the user inhales. The process exposes users to far fewer harmful chemicals than does smoking. This technology has been a smashing success. Since 2015, over one million adult smokers have ditched cigarettes for JUUL products. The switch has been complete for many smokers.

JUUL e-cigarettes and their advertisements have evolved over the years. They formerly came in many flavors but are now available in only Virginia tobacco and menthol; both flavors come in 3% and 5% nicotine concentrations. The 3% concentrations are an innovation intended to decrease nicotine reliance for occasional smokers. After about three years on the market, all JUUL products started carrying the FDA-mandated black-box statement on the front and back.

As for advertising, for four months in 2015 JLI ran its "Vaporized" campaign, targeted toward those in their late twenties and early thirties. After abandoning that campaign, JLI switched to product-focused marketing explicitly stating that JUUL products were not for sale to minors. In 2018, JUUL advertisements went even further by including the black-box nicotine warnings. That marketing, however, was short lived. A year later JLI quit advertising altogether.

In April 2018, the Food and Drug Administration began asking whether JLI was selling JUUL products to underage consumers. But FDA allowed JLI to continue selling JUUL because of potential health benefits. *See* FDA, *Enforcement Priorities for Electronic Nicotine Delivery Systems (ENDS) and Other Deemed Products on the Market Without Premarket Authorization, Guidance for Industry* 21 (2020).

Unsurprisingly, that same month the plaintiffs' bar sued JLI—not Altria. After more suits arrived, the Judicial Panel on Multidistrict Litigation created this MDL, and Plaintiffs filed a consolidated class-action complaint. Besides state-law fraud claims, the complaint asserted civil Racketeering Influenced and Corrupt Organizations Act claims against Altria.

After the District Court dismissed the RICO claims, Plaintiffs filed the operative complaint. It alleges that JLI was an enterprise under RICO. Plaintiffs assert that Altria and individual defendants are liable under RICO for JLI's actions. After the District Court declined to dismiss this novel claim, Plaintiffs successfully moved for class certification. This Court granted three petitions for allowance to appeal under Federal Rule of Civil Procedure 23(f). After JLI and the individual defendants agreed to a settlement, this Court stayed those appeals pending disposition of the settlement-approval proceedings. Because Altria did not settle, this appeal focusing on the RICO claims proceeds.

SUMMARY OF ARGUMENT

I.A. Plaintiffs bear the burden of proving, by admissible evidence, every element required for class certification. When experts are used to satisfy this burden, their testimony must also be admissible. And expert

evidence is admissible in federal court only if it complies with Federal Rule of Evidence 702. The District Court, however, failed to properly apply Rule 702 when analyzing Plaintiffs' expert evidence at the class-certification stage.

B. Before the Supreme Court's recent class-action decisions, a panel of this Court held that district courts may consider inadmissible evidence at the class-certification stage. Under the prior-panel rule, this would normally bind this panel and foreclose this argument. But because intervening Supreme Court precedent shows that this Court's prior precedent is wrong, this panel is bound by the Supreme Court's decisions and not the prior panel's ruling.

C. The Rule 702 analysis is sometimes time-consuming. That is why many district courts decline to undertake the work necessary to comply with it. Rather than engage in the proper Rule 702 analysis, district courts sometimes take the easy road by deeming objections to experts' methodologies as going to the weight—not the admissibility—of the experts' opinions. That is what the District Court did here. This legal error undermines the entire class-certification order and warrants reversal.

II. Plaintiffs' shortcomings for class-certification do not end with liability. They failed to prove, through admissible evidence, that class-wide damages could be calculated for the claims against Altria. Plaintiffs presented only one model to support their damages calculation. That model, however, covered a time when even Plaintiffs concede that Altria was not involved in racketeering activity. Thus, individual questions will predominate over any common questions of law or fact. This too is a reason to reverse the class-certification order.

III. The Rule 23 and Rule 702 defects suffice to reverse the District Court's ruling. But the Court need not reach those issues because the District Court lacked jurisdiction to certify the class. The Supreme Court recently reversed this Court and held that this Court's precedent on Article III's standing requirements missed the mark in many respects. Under the Court's *TransUnion* decision, a district court lacks jurisdiction to certify a damages class that has uninjured members. Because many of the class members never bought JUUL products while Altria was involved with JLI, they did not suffer an injury necessary for Article III standing.

ARGUMENT

I. THE DISTRICT COURT ERRED BY NOT CONDUCTING A FULL RULE 702 ANALYSIS.

Plaintiffs fell short of satisfying their burden for class certification. As Altria's brief exhaustively explains many of the flaws in Plaintiffs' model, this brief focuses on how Plaintiffs did not support their class-certification motion with admissible evidence.

A. Rule 702 Does Not Permit District Courts To Use A Truncated Rule 702 Analysis.

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, 350 (2011). The only way to "prove" these "facts," of course, is with admissible evidence. It follows that a district court may consider expert evidence at the class-certification stage only if it meets Rule 702's rigorous standard for admissibility. The expert's opinion must be (1) relevant; (2) based on sufficient facts or data; (3) the product of reliable principles and methods; and (4) reliably applied to the facts of the case.

At least five courts of appeals have held that expert evidence must be admissible if used to support class certification. *See Prantil v. Arkema Inc.*, 986 F.3d 570, 574-76 (5th Cir. 2021); *In re Blood Reagents Antitrust*

Litig., 783 F.3d 183, 187 (3d Cir. 2015) ("We join our sister courts to hold that a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*."); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 817 (7th Cir. 2010) (vacating district court's class-certification order for "failing to clearly resolve the issue of . . . admissibility before certifying the class"); *see also In re Carpenter Co.*, 2014 WL 12809636, *3 (6th Cir. Sept. 29, 2014) (holding that, because of *Dukes*, the district court properly applied *Daubert* at the class-certification stage); *Sher v. Raytheon Co.*, 419 F. App'x 887, 890 (11th Cir. 2011) ("the district court erred as a matter of law" by failing to perform a *Daubert* analysis at the class-certification stage).

This Court should join these five courts of appeals and clarify that district courts must conduct a full Rule 702 analysis at the class-certification stage. As the Third Circuit said in *Blood Regents*, requiring a full Rule 702 analysis when deciding a class-certification motion flows naturally from *Dukes* and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). *Blood Regents*, 783 F.3d at 187. This was a correct reading of *Dukes* and *Behrend*. In *Behrend*, the Court emphasized the need for "evidentiary

proof" before certifying a class action. 569 U.S. at 33-34. Although not at issue, the Supreme Court "doubt[ed]" in *Dukes* that "*Daubert* did not apply to expert testimony at the certification stage of class-action proceedings." 564 U.S. at 354.

These two Supreme Court cases strongly suggest that district courts must conduct a full Rule 702 analysis before certifying a class. "Expert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot prove that the Rule 23(a) prerequisites have been met in fact, nor can it establish through evidentiary proof that Rule 23(b) is satisfied." *Prantil*, 986 F.3d at 575 (cleaned up).

B. This Panel Should Hold That *Sali* Is No Longer Good Law.

True, this Court has held that district courts must consider inadmissible evidence when deciding class-certification motions. *See Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1003-06 (9th Cir. 2018). And if nothing had changed since then, the panel may be bound by that precedent. The landscape, however, has changed significantly over the past four years.

Sali is no longer good law. It rested on the Court's interpretation of the Supreme Court's standing precedent. *See Sali*, 909 F.3d at 1006. The

Supreme Court has since soundly rejected this Court's interpretation of its standing jurisprudence. In *TransUnion*, the Court reviewed an opinion of this Court holding that all class members had standing to sue for alleged Fair Credit Reporting Act violations. The Supreme Court reversed this Court's interpretation of the evidentiary requirements for proof of standing. *See TransUnion*, 141 S. Ct. at 2200.

A three-judge panel is not bound by a prior Ninth Circuit decision when "an intervening Supreme Court decision undermines an existing precedent." *Avagyan v. Holder*, 646 F.3d 672, 677 (9th Cir. 2011). In those circumstances, the Court is bound by the principles of vertical precedent to follow the Supreme Court's decision and not the undermined decision. As described above, *TransUnion* requires a full Rule 702 analysis at the class-certification stage. The only circuit to address the issue since *TransUnion*, the Fifth Circuit, thus joined its four sister circuits in requiring a full Rule 702 analysis. Nothing, including *Sali*, stops this panel from doing the same.

C. Applying The Correct Rule Requires Reversal.

The District Court applied a watered-down Rule 702 test when certifying the class. The District Court dismissed concerns about Dr.

Singer's testimony as going to the weight of the evidence and thus a matter for cross-examination. *See* 1-ER-27-28. That was error.

Dismissing objective flaws in expert evidence as going to the "weight" of that evidence to be explored on cross-examination 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.

"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." Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "At Risk,"* 14 Widener L. Rev. 427, 437 (2009). 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) (citation omitted).

It's no surprise, then, that legal scholars insist 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). In fact, jurors assume 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 rest of the District Court's class-certification order confirms that it did not conduct a full Rule 702 analysis. *See, e.g.*, 1-ER-47 (Defendants' "attacks bear on the weight and not the admissibility of [the experts'] opinions."). The District Court applied a watered-down Rule 702 analysis rather than the full scrutiny required by the rules and Supreme Court precedent. This failure to properly apply the Rule 702 standard is a legal error requiring reversal of the class-certification order.

II. THE DISTRICT COURT ERRED BY NOT REQUIRING PLAINTIFFS TO SHOW HOW CLASS-WIDE DAMAGES CAN BE CALCULATED.

A substantial issue exists as to how each Plaintiff was affected by Altria's alleged racketeering. Plaintiffs offered a single model to support their contention that damages could be resolved at the class-wide level. That model, however, covered the entire time that JUUL was sold—

including the time before Plaintiffs allege that Altria got involved with JLI.

This case thus resembles *Dukes*, in which a group of Title VII plaintiffs sought to certify a class of employees subjected to Wal-Mart's policy of delegating pay and promotion decisions to site managers. There, the Court held that no class could be certified because individualized issues would exist as to whether, how, and why any given manager wielded his delegated discretion in a discriminatory manner. 564 U.S. at 355-56. The Court added that the plaintiffs could not overcome this problem with anecdotal evidence, because such a "trial by formula" could not support an inference that "all the individual, discretionary personnel decisions [we]re discriminatory." *Id*. at 358; *see also id*. at 367.

Likewise, individualized issues exist as to each Plaintiff's alleged injury from Altria's conduct. And like a "trial by formula" based on representative evidence, a "trial by formula" based on a single model that covered the entire time JUUL was on the market would create only the illusion of predominance, by concealing individual differences behind a single statistical figure.

Dukes confirms, in short, that class certification under Rule 23 may not stand on a device that masks some class members' lack of injury.

Dukes, 564 U.S. at 367. Other cases also show that claims like Plaintiffs' are not susceptible to class treatment. *See Behrend*, 569 U.S. at 35 ("for purposes of Rule 23(b)(3)," a model must "establish that damages are susceptible of measurement across the entire class"); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53-54 (1st Cir. 2018) ("The need to identify those [uninjured] individuals will predominate and render [a class] adjudication unmanageable[.]"); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013) ("common evidence" must show that "all class members were in fact injured"); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) ("Courts considering class certification must rigorously apply the requirements of Rule 23 to avoid the real risk, realized here, of a composite case being much stronger than any plaintiff's individual action would be."). The District Court's class-certification order conflicts with all these authorities.

What's more, using sales from the time before Altria was involved with JLI increases potential damages, thereby increasing Plaintiffs' leverage over it. "Courts have noted the risk of '*in terrorem*' settlements that class actions entail." *Concepcion*, 563 U.S. at 350. Using nonsensical timeframes in damages models makes that problem even worse.

Finally, using sales from before Altria's investment in JLI is, at bottom, no more than an attempt to pull the wool over people's eyes. It is generally for the judge to evaluate the opaque mathematics involved. Yet if a plaintiff's lawyer can gin up complexity, get the busy trial judge to (incorrectly) abandon recondite issues to the vagaries of trial, and arrive before a jury, he has largely managed to transform the case from a dispute over law, data, and competing analyses into a dispute over optics, emotions, and competing narratives. From there the case turns less on the merits than on the defendant's willingness to gamble.

"Actual, not presumed, conformance" with Rule 23 is "indispensable." *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 160 (1982). Yet relying on a lone damages model that doesn't even try to hide its use of sales outside the relevant period cannot even be "presumed" to conform with Rule 23. Not even close. This Court should remind the District Court that Rule 23 governs even MDLs.

III. THE DISTRICT COURT LACKED JURISDICTION TO GRANT PLAINTIFFS' CLASS-CERTIFICATION MOTION.

Besides Plaintiffs' failure to satisfy Rule 23's requirements, there is a more fundamental problem with the District Court's class-certification order—it lacked jurisdiction to enter the order. This is a threshold issue,

Chennette v. Porch.com, Inc., 50 F.4th 1217, 1221 (9th Cir. 2022) (citation omitted), and this Court can easily reverse the District Court's order on this basis alone—even if raised *sua sponte*.

Federal courts' jurisdiction is limited to "'Cases' and 'Controversies.'" *California v. Texas*, 141 S. Ct. 2104, 2113 (2021) (quoting U.S. Const. art. III, § 2). For a case or controversy to exist, plaintiffs must have standing. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011) (citation omitted). Plaintiffs bore the burden of establishing standing. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). They failed to meet that burden.

"[T]he irreducible constitutional minimum of standing consists of three elements." *Spokeo v. Robins*, 578 U.S. 330, 338 (2016) (citations omitted). A plaintiff must show "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion*, 141 S. Ct. at 2203 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiffs failed to satisfy the second element because any harm Plaintiffs suffered was not caused by Altria.

All absent class members must have suffered an Article III injury caused by the defendant. Because the "constitutional requirement of standing is equally applicable to class actions," "each [class] member must have standing." *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778-79 (8th Cir. 2013) (citations omitted). In other words, "a named plaintiff cannot represent a class of persons who lack the ability to bring suit themselves." *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 620 (8th Cir. 2011) (quotation omitted).

The Supreme Court's *TransUnion* decision highlights this requirement. There, the Court held that every member of a class must have standing to assert claims against a defendant. *See TransUnion*, 141 S. Ct. at 2203-07. *TransUnion* shows that, to sustain a class-certification order, all absent class members must have standing to sue. Although the Court held that over 1,800 absent class members had standing to assert one claim, it held that those same absent class members lacked standing to assert two other claims.

The Court distinguished between those whose credit reports were distributed to third parties and those whose credit reports were not. *TransUnion*, 141 S. Ct. at 2207-13. It analyzed standing for each subgroup; it did not paint with a broad brush. This case is easier. The

two classes that the District Court certified are separated by the class members' ages when they purchased JUUL products; there are no separate classes based on when the purchases were made.

The failure to separate the class by timeframe is fatal to Plaintiffs' attempts at showing the District Court had subject-matter jurisdiction to grant the class-certification motion. The class period starts in 2015—three years before Altria obtained a non-voting interest in JLI. Altria could not have caused Plaintiffs' alleged injury—inflated prices for JUUL products—if Altria had no interest in JLI at the time Plaintiffs purchased JUUL products. Even if Plaintiffs paid inflated prices between 2015 and 2018, that harm was not caused by Altria's actions; Altria was not involved in any decisions about JUUL products.

Nor does the District Court's reliance on *Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768 (9th Cir. 2002), *see* 1-ER-32, relieve Plaintiffs from their burden of proving standing. The Court explained that "RICO liability requires a direct and proximate causal relationship between the asserted injury and the alleged misconduct." *Id.* at 774. Here, there is no causal relationship between Plaintiffs' alleged injury and Altria's alleged misconduct for the time before Altria acquired an interest in JLI. So under this Court's precedent, many class members

were not harmed by Altria. Thus, they lacked standing and the District Court lacked jurisdiction to certify the class.

Again, Plaintiffs bore the burden of proving every element of standing at the class-certification stage. And the analysis above shows how they failed to meet that burden. But even if the Court relaxed their burden to prove standing at the class-certification stage, the District Court still lacked jurisdiction to grant class certification. Just reading the operative complaint suffices to see the jurisdictional problem.

Plaintiffs allege that Altria began using JLI as an enterprise in 2017, *see* 2-ER-234-35—while Altria still owned a competitor. Even if that is true, that is still two years *after* the start of the class period. So even if Altria used JLI as an enterprise starting in 2017, that means that the absent class members who bought JUUL products in 2015 and 2016 could not have been harmed by Altria's actions. Because they were not harmed by Altria, the absent class members would lack standing to sue Altria individually. And because they would lack standing to sue individually, under *TransUnion* they cannot be part of the class. Yet the District Court overlooked this jurisdictional problem and certified two classes with unharmed members.

Permitting certification of a class including those who suffered no Article III injury caused by Altria raises the same issues as allowing uninjured plaintiffs to sue individually on their own behalf. If anything, the concerns here are greater than when a single uninjured plaintiff sues in federal court. In those cases, the uninjured plaintiff decides what violations of law to vindicate. Here, however, the absent class members are not choosing to vindicate a right. Rather, Plaintiffs and their counsel are purportedly vindicating interests for these uninjured individuals. This Court should reject this skirting of important standing requirements and reverse the District Court's order.

* * *

The District Court's class-certification order reveals its contempt for the Supreme Court's standing and class-certification decisions. Its critical mass theory is boundless and its view that problems with Plaintiffs' model can be fixed after class-certification makes *Behrend* a dead letter. The Court should require strict adherence to Supreme Court precedent or once again risk the Supreme Court's reversal.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,216 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

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