NO. 11-864

IN THE

Supreme Court of the United States

COMCAST CORPORATION, *et al.*,

Petitioners,

v.

CAROLINE BEHREND, *et al.*,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE, PUBLIC JUSTICE, P.C., AND AARP AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Association for Justice (AAJ) is a voluntary national bar association whose members primarily represent plaintiffs in civil actions. AAJ is committed to the First Amendment value of providing access to courts for the redress of grievances and the Seventh Amendment value of dispute resolution through trials by juries. AAJ appears here to address the need for relatively inexpensive mechanisms for the resolution of disputes involving many victims of misconduct by large entities.

Public Justice, P.C. (Public Justice) is a national public interest law firm dedicated to pursuing justice for the victims of corporate and government abuses. Public Justice specializes in precedent-setting and socially significant individual and class action litigation designed to advance civil rights and civil liberties, consumer and victims' rights, workers' rights, the preservation of the civil justice system and the protection of the poor and powerless. Public Justice regularly represents consumers and employees in class actions, and its experience is that the class action device often represents the only meaningful way that individuals can vindicate important legal rights. Public Justice is gravely concerned that the arguments advanced by Petitioner in this case would, if adopted, eviscerate the only remedy available for large numbers of individuals who have each suffered only a small harm as a result of corporate misconduct.

AARP is a non-partisan, non-profit organization. As the largest organization dedicated to protecting the interests of people age 50 and older,

AARP is greatly concerned about fraudulent, deceptive, and unfair corporate practices, many of which have a disproportionate impact on older people. AARP thus supports laws and public policies designed to protect people and to preserve the legal means for people to seek redress when they are injured by such practices. Among these activities, AARP advocates for improved access to the civil justice system and supports the availability of the full range of enforcement tools. While many older people lose large amounts of money to such practices, many others lose relatively small amounts or are subjected to practices which violate statutes that provide low monetary remedies. These losses nevertheless are significant. Moreover, even small losses may accumulate into huge ill-gotten gains for corporations which may have thousands or even millions of customers, each subject to the same harmful practices. Meaningful protection in the marketplace requires access to effective redress through class action litigation. Consumers face a severe disadvantage in bringing suits against large corporations. AARP is interested in the Court's ruling because of the impact it will have on consumers' access to the courts.[1]

[1] Letters from counsel for all parties evidencing their consent to the timely filing of *amicus curiae* briefs have been filed with the Court. Pursuant to Rule 37.6, *amici* disclose that no counsel for a party wrote any part of this brief, nor did any person or entity other than *amici*, their members, or counsel make a monetary contribution to its preparation.

INTRODUCTION AND SUMMARY OF ARGUMENT

In interpreting the predominance requirement of Rule 23, the supposed truism that class certification creates an *in terrorem* effect on defendants should not be used as a guide. No empirical evidence supports the current existence of such an effect. Twenty years ago some empirical evidence, highly criticized, suggested such an effect might have been manifested in securities cases. That concern was considered and addressed by Congress in 1995 in the Private Securities Litigation Reform Act (PSLRA).[2] Several serious scholars and judges, writing before the millennium, propounded serious theoretical arguments suggesting that an effect might exist. Subsequent serious scholarship demonstrates that their concerns have been addressed or were unwarranted.

Both theoretical arguments and empirical evidence regarding the purported effect were considered for all cases in the Rules Enabling Act[3] process and were addressed by a 1998 amendment authorizing interlocutory appeals of class certification decisions. Neither rulemakers nor Congress chose to address the issue by imposing greater evidentiary hurdles in Rule 23(b)(3), choosing instead to continue to vest discretion in trial judges regarding such matters. That discretion is valued.[4] The Court should take care not to

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[2] Pub. L. 104-67, 109 Stat. 737 (1995).

[3] 28 U.S.C. §§ 2071-2077 (1998).

[4] *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008) ("The trial court, well-positioned to decide which facts and legal arguments are most important to each

supplant the rulemaking process by writing into the rules burdens not adopted there. *See Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993) ("[T]hat is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.").

The Court's interpretation of Rule 23 should be guided by the policy "'at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights,'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); s*ee also id.* at 629 (Rule 23 should be interpreted "with the interests of absent class members in close view."), and by Rule 1, which imposes on district courts a duty to find "just, speedy, and inexpensive" ways to adjudicate meritorious claims and which "governs" the scope of the Federal Rules of Civil Procedure. *Amchem*, 521 U.S. at 681. *See also Willy v. Coastal Corp.*, 503 U.S. 131, 134 (1992). These values counsel care in increasing evidentiary burdens and litigation costs in the many class actions in which simpler types of evidence can demonstrate that the requirements of Rule 23 are met. For example, there is little need for complex evidence that damages can

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Rule 23 requirement, possesses broad discretion to control proceedings and frame issues for consideration under Rule 23."); *In re Initial Public Offerings Securities Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("To avoid the risk that a Rule 23 hearing will extend into a protracted mini-trial of substantial portions of the underlying litigation, a district judge must be accorded considerable discretion to limit both discovery and the extent of the hearing on Rule 23 requirements.").

be proved on a classwide basis when the issue is the legality of the levy of a monthly charge, over a defined period, against each class member. *See, e.g., In re Universal Serv. Fund Tel. Billing Practices Litig.*, No. 02-MD-1468-JWL, 2009 WL 435111, at *8 (D. Kan. Feb. 20, 2009), *aff'd.*, 619 F.3d 1188 (10th Cir. 2010) ("At trial, the court instructed the jury that, if it found for plaintiffs on their claim for breach of contract, 'the proper measure of damages is the amount by which the USF charges collected by AT&T from its California residential customers exceeded the amount AT&T was required to pay into the Universal Service Fund for those customers.'").

Class actions often present claims that are "not economically feasible" to bring individually and claimants often would be "without any effective redress unless they may employ the class-action device." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). The Court should not impose burdens that impede Rule 23 from playing its role in discharging one of the "first duties of government": providing access to courts for meritorious claims. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

ARGUMENT

I. THE PERSISTENT BUT CHIMERICAL IDEA THAT AN *IN TERROREM* EFFECT REQUIRES HIGHER PROCEDURAL HURDLES TO CLASS CERTIFICATION SHOULD NOT BE USED AS A GUIDE TO INTERPRETING RULE 23.

The Court here is urged to consider the purported *in terrorem* effect of class certification in interpreting the predominance requirement of Rule

23. It should decline the invitation. To any extent the effect ever existed it has been ameliorated by the PSLRA and by the creation of Rule 23(f).

Without invocation of empirical evidence this Court has endorsed the idea that settlement pressure in certain class action litigation leads to "legalized blackmail," *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 n.9 (1980) (citing Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. Cal. L. Rev. 842 (1974)), and has relied on the existence of an *in terrorem* effect. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of '*in terrorem*' settlements that class actions entail . . .").

Similarly, with little evidentiary support, Judge Posner influentially castigated "blackmail settlements." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995). *See* Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements,* 57 Baylor L. Rev. 681, 686 (2005) (describing the decision and its influence). Again, without evidentiary foundation, courts have invoked an *in terrorem* effect when their real concerns were about potentially coercive effects of substantive law, not of rules of procedure.[5]

[5] Judge Easterbrook has criticized this practice. "[I]t is not appropriate to use procedural devices to undermine laws of which a judge disapproves. . . . While a statute remains on the books . . . it must be enforced rather than subverted.") *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) (Easterbrook, J.) (internal citations omitted).

Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification,* 79 Geo Wash. L. Rev. 324, 362-63 (2011)[6]. The court below relied on the purported effect in deciding this case. *Behrend v. Comcast Corp.,* 655 F.3d 182, 213 n.17 (3d Cir. 2011) (Jordan, C.J., concurring in part and dissenting in part) (citing Circuit precedent, *In re Hydrogen Peroxide Antitrust Litig.,* 552 F.3d 305, 310 (3d Cir. 2008)). The existence of an *in terrorem* effect has become a ubiquitous belief.

Ubiquity does not equal truth. Evidence does not support the current existence of an *in terrorem* effect. In the early nineties some empirical evidence,[7] highly criticized,[8] suggested the existence of an *in terrorem* effect in securities litigation. Congress acknowledged that evidence and addressed the underlying concern in the 1995 Private Securities Litigation Reform Act., H.R. Rep. No. 104-369, at 31-32 (1995) (Conf. Rep.), *reprinted in* 1995

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[6] Professor Marcus is Associate Reporter for the Advisory Committee on Civil Rules. *Id*. at n.1.

[7] Notably, Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991). Alexander drew conclusions from a sample of six class actions.

[8] *See, e.g.,* James D. Cox, *Making Securities Fraud Class Actions Virtuous,* 39 Ariz. L. Rev. 497, 503 (1997) (questioning whether "it is appropriate . . . to draw such a sweeping conclusion from a sample [so] slender"); Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions,* 104 Yale L.J. 2053, 2083-84 (1995); Joel Seligman, *The Merits Do Matter,* 108 Harv. L. Rev. 438, 448 (1994).

U.S.C.C.A.N. 730, at 730-31. Whatever effect might have existed before the PSLRA appears to have vanished.[9] The best available evidence suggests the effect has never played a significant part in non-securities class adjudication and does not justify use of the supposed effect in interpreting the predominance requirement of Rule 23. Doctrine suggests the same result, as the Congressionally created rulemaking process considered the issue of coercive settlement and chose to address it by adopting Rule 23(f) and not by amending Rule 23(b)(3).

The Federal Judicial Center studied coercive settlements as Congress considered the 2005 Class Action Fairness Act.[10] The FJC's findings regarding the magnitude of settlements in certified class actions seriously undermine the belief in an *in terrorem* effect. The FJC study analyzed cases initially removed to federal court and compared results of cases staying in federal court with cases remanded to state court. In cases in which classes were certified, 33 percent of the cases in state courts and 44 percent in federal courts involved monetary recoveries (many class actions seek primarily

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[9] Post PSLRA, class certifications are falling, in general. *See* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?,* 81 Notre Dame L. Rev. 591, 606 (2006) (rate of certification class actions between 1992-1994 (pre-PSLRA) declined by about one-third for the period 1999-2002 (post-PSLRA)). *See also* Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. Kan. L. Rev. 775, 789-90 (2010) (class certification motions declining).

[10] Pub. L. No. 109-2, 119 Stat. 4 (2005).

injunctive relief), with the median recovery, by judgment or settlement, being $850,000 in state court and $300,000 in federal court. Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?,* 81 Notre Dame L. Rev. 591, 639 & Table 15 (2006) (hereinafter "2006 FJC Report"). Such numbers seem unlikely to induce terror in the kinds of business organizations often involved in such claims[11] and are well within the bounds for which companies typically insure themselves.[12]

Those numbers are consistent with a 1996 FJC study designed in part to address the *in terrorem* question. Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, Federal Judicial Center, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$file/rule23.pdf (hereinafter "1996 FJC Report").That study reported median settlements (no judgments, as in the later study) in four high-volume districts based in Philadelphia, Miami, Chicago, and San Francisco. In non-securities cases settled after class certification, the median settlement amounts

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[11] Last year the smallest Fortune 500 Company had revenues of almost $5 billion. http://money.cnn.com/magazines/fortune/fortune500/2012/full_list/401_500.html

[12] Lynn M. LoPucki, *The Death of Liability*, 106 Yale L.J. 1, 46 n.202 (1996) (citing Tillinghast-Towers Perrin and the Risk and Insurance Management Society, *1995 Cost of Risk Survey* 1, 69 (1995)) (in 1995 firms with revenues of $100 million to $500 million carried insurance of $31 million to $50 million, enough to cover most class action settlements even today).

distributed to class members – amounts that can be compared to the numbers described in the 2006 study, and similar to them in nominal dollars – were: Philadelphia, $0; Miami, $123,973; Chicago, $44,639; San Francisco, $1,100,000.[13] Average awards per class member ranged from $315 to $528, *id.* at 13, very similar, in nominal dollars, to the median awards of $350 to $517 reported in the 2006 study. 2006 FJC Report*, supra,* at 639, Table 15.

Professor Brian T. Fitzpatrick of Vanderbilt University studied all class action settlements approved by federal judges in 2006-2007. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards,* 7 J. Empirical Legal Stud. 811 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1442108. In non-securities cases, he found median settlements "bunched around a few million dollars." *Id.* at *21 & Table 6. These amounts include attorney fees and are comparable to amounts found in the 1996 FJC Report, *see* n.13, when the 1996 numbers are adjusted to 2007 dollars.[14] The numbers Fitzpatrick reports are slightly higher than those found by the FJC, but, again, not of a magnitude sufficient to give

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[13] These numbers are net distributions. 1996 FJC Report, *supra*, at 166, Table 11. They exclude administrative costs and attorney fees. Administrative costs are not separately reported but attorney fees are. Adding attorney fees, the respective numbers are: Philadelphia, $225,000; Miami, $299,000; Chicago, $384,000; San Francisco, $3,100,000. *Id.*

[14] Taking the FJC numbers as 1995 dollars and adjusting them to 2007 dollars using a Department of Labor calculator, http://www.bls.gov/data/inflation_calculator.htm, the respective numbers are: Philadelphia, $306,000; Miami, $407,000; Chicago, $522,000; San Francisco, $4,200,000.

alarm. Notably, Professor Fitzpatrick found that non-securities cases accounted for only about one-fourth of class action settlement monies.[15]

The 1996 FJC study addressed dispositive motions practice as an indicator of whether defendants felt coercive pressure, reasoning that frivolous claims do not survive dispositive motions. 1996 FJC Report, *supra* at 32. It reasoned also that if rulings on dispositive motions were made promptly, defendants have opportunities to resolve merits issues without undue settlement pressure. *Id.*

It found that dispositive motions were used in two-thirds of cases, *id.*, and that dispositive motions generally were ruled on in timely fashion. *Id.* at 33. It found:

> For at least one-third of the cases in our study, judicial rulings on motions terminated the litigation without a settlement, coerced or otherwise. The settlement value of other cases was undoubtedly influenced by rulings granting motions for partial dismissal or partial summary judgment and by rulings denying such motions. Such merits-related influences on settlement value, however, seem not to fall within the broadest definition of a strike suit.

1996 FJC Report, at 34. Settlement pressure derived from a merits-based determination is not a reason to constrain, through a narrow reading of Rule 23, the

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[15] 24 percent in 2006 and 27 percent in 2007. Fitzpatrick, *supra* at *18, Table 4.

number of plaintiffs who might assert the meritorious claim. *See supra* notes 5-6 and accompanying text.

The 1996 study also analyzed class certification itself as a potential cause of *in terrorem* settlement pressure, and concluded:

> Judicial rulings and active case management, including the setting of trial dates and holding pretrial conferences (see Table 19), cannot be said to eliminate the possibility of coerced settlements, but their prevalence in this study of class actions greatly diminishes the likelihood that the certification decision itself, as opposed to the merits of the underlying claims, coerced settlements with any frequency.

1996 FJC Report, at 61. That kind of active case management is ensconced as standard practice. *See Manual for Complex Litigation* (Fourth) § 21 (2004); and Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* (3d ed. 2010), both Federal Judicial Center publications.

One court, responding to an assertion that the coercive effect of a possible $1.7 million in liability was a reason not to certify a class, found that the rationales about coercion put forward, that "class actions are not triable, defendants [sic] exposure to valid small claims is increased, weak but large claims coerce compromise and class actions inherently coerce settlements," were "entirely

contradictory and not supported by empirical evidence." *Travel 100 Group, Inc. v. Empire Cooler Service Inc.,* No. 03 CH 14510, 2004 WL 3105679, at *7 (Ill. Cir. Oct. 19, 2004). That court relied on a definitive and detailed doctrinal and empirical analysis of the *in terrorem* effect published ten years ago by Professor Charles Silver,[16] *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357 (2003). No subsequent empirical evidence is inconsistent with Silver's analysis and no doctrinal work challenges it in any significant way.

Silver identifies the primary proponents of the *in terrorem* effect as Professor Milton Handler and Judges Henry Friendly, Richard Posner, and Frank Easterbrook. All primarily addressed securities cases and all except Easterbrook wrote primarily before the enactment of the PSLRA. Silver describes Judges Friendly, Posner, and Easterbrook as "towering figures in American jurisprudence" who "cannot be dismissed as ideologues." *Id.* at 1361. Silver identifies "four versions of the blackmail thesis," and certain variations among the versions:

> One contends that blackmail occurs because class actions are not triable.

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[16] Professor Silver is the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the University of Texas School of Law, where he also serves a Co-Director of the Center on Lawyers, Civil Justice, and the Media. He received an M.A. in political science at the University of Chicago and a J.D. from the Yale Law School. From 2003 to 2010, he served as an Associate Reporter on the American Law Institute's Project on the Principles of Aggregate Litigation. Federal and state judges, as well as leading treatises, have cited his work. *Silverman v. Motorola, Inc.,* No. 07 C 4507, 2012 WL 1597388, at *4 n.3 (N.D. Ill. May 7, 2012).

> Three contend that blackmail occurs because class actions are triable.
>
> The three triability-based theories treat claim size differently: One says blackmail occurs when claims are small; one says that it occurs when claims are large; and one says that it occurs regardless of claim size.

Id. (footnotes omitted).

Silver shows that Handler's concern is primarily that class action cases cannot be tried, and demonstrates that "federal judges have addressed Handler's manageability concerns." *Id.* at 1365. He notes, though, that by doing so, "[T]hey have brought Friendly's fear of enormous trial judgments to life. . . . Few things unsettle a defendant like the knowledge that a jury soon will decide the outcome of a lawsuit involving thousands of claims and millions of dollars in liability." *Id.* This kind of pressure, however, is not coercive in any way that should concern interpretation of Rule 23. It results from a decision of Congress to authorize class actions and a decision of the judiciary that a meritorious claim is before it. The fear of losing at trial, Silver notes:

> [P]oses no challenge to consent. It is a reason for thinking that a defendant is right to settle, not for thinking that a defendant is coerced.
>
> This point is fundamental. All American civil justice systems generate settlement pressure by forcing parties to risk losing at trial. Few judges complain about this, even though fear of

> losing at trial typically generates cheap settlements because plaintiffs and their lawyers are more risk averse than defendants.

Id. at 1366-67. *See supra* notes 5-6 and accompanying text.

Silver identifies efficiency as a key concern of Judge Posner and concedes that a plausible argument regarding efficiency can be made:

> By comparison to a series of small trials, a class action that plays on a defendant's risk aversion is likely to overdeter. Because the purpose of litigation is to encourage efficient conduct outside of the courthouse, a class action is undesirable when claims practicably can be tried individually.

Id. at 1375-76. That concern, however, is met already in Rule 23(b)(3), which requires a finding that a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy." It does not provide a basis for increasing the burden, also imposed by the rule, of demonstrating predominance.

Judge Easterbrook "offered securities class actions as prime examples of lawsuits in which blackmail settlements occur," *id.* at 1382, a concern that has been addressed in the PSLRA. Another concern of Easterbrook, according to Silver, is that the "'imperfect alignment of managers' and investors' interests leads defendants to pay large amounts to settle class actions containing weak claims." *Id.* at 1382 (quoting *West v. Prudential Sec., Inc.*, 282 F.3d

935, 937 (7th Cir. 2002) (Easterbrook, J.)). Silver, in response, poses this question: "When class actions are procedurally proper, why should judges deny certification to protect shareholders from opportunistic conduct by their own agents? The wisdom of allowing defects in business arrangements to dictate the choice of litigation procedures is not self-evident." Silver, *supra* at 1383. It also interferes with judgments Congress has about both substantive law and the rules.

Coincident with consideration of the PSLRA by Congress, and pursuant to the Rules Enabling Act, the Civil Rules Advisory Committee analyzed the purported *in terrorem* effect:

> Advocates for reform advised the Committee that in many cases the certification decision was dispositive of the litigation; once a class is certified and the stakes of the litigation are magnified, whatever the merits of the claim, the defendant has little choice but to bow to the overwhelming pressure to settle.

Report of the Civil Rules Advisory Committee to the Standing Committee, at 28 (May 14, 2001), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2001.pdf. "To address this problem and foster the growth of appellate law, the Committee proposed Rule 23(f)" authorizing interlocutory appeals of class certification decisions. *Id*. The proposed rule was vetted by Congress and adopted in 1998. The Advisory Committee note accompanying the rule specifically alludes to the *in terrorem* concern: "An order granting certification . . .

may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."

In practice Rule 23(f) has become a significant safety valve for persons opposing class certification motions. Professor Silver, on the basis of then-available empirical evidence, in 2003 called the rule "a one-way ratchet for defendants." Silver, *supra*, n.8. The description remains accurate. Defendants now take 69 percent of the appeals under Rule 23(f) and obtain reversals in 70 percent of those decisions. Robert H. Klonoff, *The Decline of Class Actions,* 90 Wash. U.L. Rev. ___, *14, App. A (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038985.

The appealability rule was formulated through the rulemaking process, with the assent of Congress, and took into account the magnitude of claims that could be involved in class certification decisions and the pressure they could bring to bear on those facing liability. When the rulemakers again considered Rule 23, culminating in amendments enacted in 2003, they noted they were dealing with issues they had not already addressed in the 1996 amendments[17] and that they were choosing to focus

[17] The drafts in the agenda book are the proposals presently identified as candidates for continued work. The criteria for such candidates are: (1) proposals for rule changes to respond to problems identified either in the lengthy last round of class action rulemaking in the 1990s or in submissions to the Committee since then; (2) that do not essentially repeat approaches that did not succeed in the last round of class action rulemaking; and (3) that could feasibly survive the process for rule enactment.

"on the process by which class actions are litigated, rather than on changing the standards for certifying cases as class actions."[18]

The choice of the rulemakers to address the concern about *in terrorem* effect through appealability, and not to address the concern by divesting trial courts of discretion regarding substantive burdens to be borne in the predominance inquiry, was purposeful and should be viewed as legislative, s*ee Coopers & Lybrand v. Livesay*, 437 U.S. 463, 472 (1978) (this kind of action "is plainly a legislative, not a judicial, function"); s*ee also Blackie v. Barrack*, 524 F.2d 891, 899 (9th Cir. 1975) ("[t]he fairness of the pressure . . . is not a question for [judges] to decide. The fact is that Congress, by authorizing . . . Rule 23(b)(3), created a vehicle to put small claimants in an economically feasible litigating posture."), and is due deference from this Court. *Leatherman,* 507 U.S. at 168-69. *See also Jones v. Bock*, 549 U.S. 199, 217 (2007) ("[W]e have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns."). Deference is due especially when, to address a problem, the rulemaking process has expanded the jurisdiction of the Courts of Appeals, Congress having designated "rulemaking, not expansion by court decision,' as the preferred means for determining whether and when

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Memorandum from Lee H. Rosenthal, Ed Cooper, and Rick Marcus to the Committee on the Federal Rules of Civil Procedure (Feb. 26, 2001), *in* Agenda Book, Committee on the Federal Rules of Civil Procedure March 12, 2001, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2001-03.pdf.

[18] *Id*.

prejudgment orders should be immediately appealable." *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 130 S. Ct. 599, 609 (2009).

Deference should be afforded not only for doctrinal reasons, but for practical ones. "[T]he rulemaking process has important virtues. It draws on the collective experience of bench and bar . . . and it facilitates the adoption of measured, practical solutions." *Id*. (internal citation omitted). The rulemaking process is a doctrinally more appropriate and institutionally more suitable forum than this Court for wrestling with the issues at hand:

> [T]he argument is . . . properly addressed to Congress. We have no reliable knowledge, and no good means of acquiring any, about the present nature and number of class action settlements, and of how that experience compares with individual lawsuits of the same type, or pressing claims of similar magnitude. Thus, we have no means of deciding whether the present hue and cry of "blackmail" in fact reflects an abnormally high incidence of unfairly coerced settlements, or is rather the pained outcry of defendants whose previously advantaged litigating position has been undermined, and who must now confront small claimants (who have been given the capacity to exert pressure proportionate to the magnitude of the total injury occasioned by defendant's alleged violation of the law) on more equal grounds.

Blackie, 524 F.2d at 899-900.

II. ANY PRONOUNCEMENTS REGARDING EVIDENTIARY BURDENS ON MOVANTS FOR CLASS CERTIFICATION SHOULD BE FASHIONED WITH REGARD TO CLAIMS WHICH EFFECTIVELY CANNOT BE LITIGATED INDIVIDUALLY BECAUSE OF COSTS BUT WHICH CAN BE LITIGATED EFFICIENTLY AS CLASS ACTIONS.

This Court's jurisprudence appropriately reflects particular sensitivity to class action claims that are small in relation to costs of litigating them individually. *See, e.g., Amchem*, 521 U.S. at 617; *Deposit Guar. Nat'l Bank*, 445 U.S. at 338-339; *Phillips Petroleum v. Shutts*, 472 U.S. 797, 809 (1985) ("[T]his lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available."). State doctrine reflects the same sensitivity to providing access to courts. *See, e.g., Weld v. Glaxo Wellcome Inc.,* 746 N.E.2d 522, 532 (Mass. 2001) ("This case presents a classic illustration of the policies of judicial efficiency and access to courts that underlie the consumer class action suit: it aggregates numerous small claims into one action, whose likely range of recovery would preclude any individual plaintiff from having his or her day in court."); *Darling v. Champion Home Builders Co.*, 638 P.2d 1249, 1252 (Wash. 1982) ("Class actions . . . establish effective procedures for redress of injuries for those whose economic position would not allow individual lawsuits. Accordingly, they improve access to the courts." (citation omitted)). The Court should take care in answering

the Question Presented that it does not impose burdens where they are not needed and where they would do much harm.

Many consumer class actions bear little resemblance to the complex antitrust claim at issue here. For example, many consumer claims seek make-whole relief that is calculable ministerially. *See, e.g., In re Community Bank of N. Va.*, 418 F.3d 277, 306 (3d Cir. 2005) ("Whether an individual borrower has a viable TILA [Truth in Lending Act] or HOEPA [Home Owner's Equity Protection Act] claim may be determinable by conducting simple arithmetic computations on certain figures obtained from the face of each loan's TILA Disclosure Statement."); *In re Monumental Life Ins. Co.,* 365 F.3d 408, 419 (5th Cir. 2004) ("The policy variables are identifiable on a classwide basis and, when sorted, are capable of determining damages for individual policyowners; none of these variables is unique to particular plaintiffs. The prevalence of variables common to the class makes damage computation 'virtually a mechanical task.'" (footnote and citation omitted)); *Carnegie v. Mutual Sav. Life Ins. Co.*, No. Civ.A.CV-9953292NE, 2004 WL 3715446, at *16 (N.D. Ala. Nov. 24, 2004) ("Class members are 'automatically entitled to the difference between what a black and a white paid for the same policy,' and that difference in fact has been calculated using standardized formulas based upon information kept by Mutual Savings in the normal course of business. No subjective evidence was or will be required to determine each class member's claim for damages." (internal citation omitted)); *Chisolm v. TranSouth Fin. Corp.*, 184 F.R.D. 556, 566 (E.D. Va. 1999) (damages to each class member could be calculated by entering objective data into a

spreadsheet). In *Chisolm* the trial court was comfortable accepting representations of counsel, and under the circumstances that comfort seems wholly rational. Proving to a trial court that damages are readily calculable does not necessarily require expert testimony at all, can be quite simple, and should remain that way for appropriate cases.

Damages in more complex cases can be proven in other ways and, critically, need not be proven at the same time as all other issues. Courts have wide discretion to bifurcate trials under Rule 42(b). "The judge can bifurcate (or for that matter trifurcate, or slice even more finely) a case at whatever point will minimize the overlap in evidence between the segmented phases or otherwise promote economy and accuracy in adjudication." *Hydrite Chemical Co. v. Calumet Lubricants, Co.*, 47 F.3d 887, 891 (7th Cir. 1995). *See also Manual for Complex Litigation* (Fourth) § 11.632 (2004) ("Whether the litigation involves a single case or many cases, severance of certain issues for separate trial under Federal Rule of Civil Procedure 42(b) can reduce the length of trial, particularly if the severed issue is dispositive of the case. . . ."). Cases can be, and are routinely, tried according to trial plans crafted by experienced judges and practitioners. *Manual for Complex Litigation* (Fourth) § 21.141 (2004) ("A trial plan often assists in identifying the relationship between individual and common elements of proof, but Rule 23 does not operate in a vacuum. Bifurcation and severance under Rule 42 are available as tools that might make a case more manageable by separating out discrete issues for a phased or sequenced decision by the judge or at trial."). District court judges have enormous experience in handling the practical elements of presentation and evaluation of evidence

and proof and have been effectively managing litigation in varied and innovative ways for decades. *See In re Master Key Antitrust Litig*., 528 F.2d 5, 15 (2d Cir. 1975) ("bifurcated trials have frequently been employed with great success. even in antitrust suits." (citations omitted)). This flexibility the rules provide district court judges should not be constrained by broad interpretation of Rule 23.

Class actions "can be the Colt pistol of the little folks, i.e., in appropriate cases, they provide the key to the Temple of Justice for those who could not possibly afford an individual action against an economically advantaged defendant." *In re Prempro*, 230 F.R.D. 555, 574 (E.D. Ark. 2005) (Wilson, J.). Broad pronouncements from this Court indiscriminately increasing evidentiary burdens at the class certification stage for all kinds of cases could render meritorious cases not viable. *See* Marcus, *Reviving Judicial Gatekeeping*, 79 Geo. Wash. L. Rev. at 359-60. Any pronouncements this Court makes must account for the diverse situations encountered in class action litigation and must give due regard to the role of Rule 23 in fostering the fundamental constitutional right "to appeal to courts . . . for resolution of legal disputes." *Borough of Duryea, Pa. v. Guarnieri,* 131 S. Ct. 2488, 2494 (2011).

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

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