No. 10-277

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

vs.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,

Respondents.

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

BRIEF OF CONSUMERS UNION OF UNITED STATES, INC., NATIONAL CONSUMER LAW CENTER, AND CENTER FOR CONSTITUTIONAL RIGHTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CONSUMERS UNION OF
UNITED STATES, INC.
MARK R. SAVAGE
1535 Mission Street
San Francisco, CA 94103
(415) 431-6747

ROBBINS GELLER RUDMAN &
DOWD LLP
KEVIN K. GREEN
(Counsel of Record)
655 West Broadway,
Suite 1900
San Diego, CA 92101
(619) 231-1058
kgreen@rgrdlaw.com

Counsel for Amici Curiae

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

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BRIEF OF CONSUMERS UNION OF UNITED STATES, INC., NATIONAL CONSUMER LAW CENTER, AND CENTER FOR CONSTITUTIONAL RIGHTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST[1]

Consumers Union of United States, Inc., nonprofit publisher of Consumer Reports®, provides consumers with information, education, and counsel about goods, services, health and personal finance. Consumers

[1] *Amici curiae* certify that no party's counsel authored any part of this brief and that no party or its counsel (aside from *amici curiae*, their members and their counsel) made any monetary contribution toward preparing or submitting this brief. *Amici curiae* further certify that the parties' counsel of record have consented to filing in letters lodged with the Clerk.

Union's publications and services have a combined paid circulation of approximately 8.3 million, and carry articles on its own product testing; on health, product safety, and marketplace economics; and on legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union's income derives solely from the sale of Consumer Reports®, its other publications and services, fees, noncommercial contributions and grants. Consumers Union's publications and services carry no outside advertising, and it does not accept donations from corporations or corporate foundations. Consumers Union has filed *amicus curiae* briefs in cases like this implicating consumer rights. *See*, *e.g.*, *Wyeth v. Levine*, 555 U.S. ___, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009); *Cuomo v. The Clearing House Ass'n*, *L.L.C.*, 557 U.S. ___, 129 S.Ct. 2710, 174 L.Ed.2d 464 (2009).

National Consumer Law Center is a nonprofit advocacy organization with headquarters in Boston, Massachusetts. It seeks to build economic security and family wealth for low-income and other economically disadvantaged Americans. *National Consumer Law Center* promotes access to quality financial services and protects family assets from unfair and exploitive transactions that wipe out resources and undermine self-sufficiency. For over 40 years, the organization has used its expertise to shape the rules of a fair marketplace. *National Consumer Law Center* has participated as *amicus curiae* in cases affecting these interests. *See*, *e.g.*, *Vallies v. Sky Bank*, 591 F.3d 152 (3d Cir. 2009). Additionally, the Court has cited *National Consumer Law Center* publications. *Jerman v. Carlisle*, *McNellie*, *Rini*, *Kramer & Ulrich LPA*, ___ U.S. ___, 130 S.Ct. 1605, 1617 n.12, 176 L.Ed.2d 519 (2010).

Center for Constitutional Rights, based in New York City, is dedicated to advancing and protecting the rights

guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, *Center for Constitutional Rights* is a nonprofit legal and educational organization committed to creative use of the law to facilitate social change. *Center for Constitutional Rights* has been a presence as *amicus curiae*, and has represented litigants directly, in cases impacting civil liberties and constitutional freedoms. *See*, *e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (friend of court); *Wilner v. National Sec. Agency*, 592 F.3d 60 (2d Cir. 2009) (counsel); *United States v. City of New York*, 258 F.R.D. 47, 63 (E.D.N.Y. 2009) (assisting claimants).

These organizations participated as *amici curiae* in the Ninth Circuit Court of Appeals below. J.A. 7a, 19a. Each has an abiding interest in the continuing vitality of Federal Rule of Civil Procedure 23. The class action is an effective device to protect workers and consumers and to vindicate important federal rights.

ISSUES ADDRESSED

When granting certiorari, the Court framed the following question for review: "Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)." *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S.Ct. 795, 178 L.Ed.2d 530 (2010). *Amici curiae* focus on two aspects of this certified question: (1) whether individual hearings are necessary to calculate the monetary relief owed to class members; and (2) whether the Court should use this case to address the proper role of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), on a Rule 23 motion seeking class certification.

SUMMARY OF ARGUMENT

First, petitioner Wal-Mart Stores, Inc. ("Wal-Mart") is

mistaken that a defendant has the right to individual hearings to determine the monetary relief owed to people adversely affected by a common business practice. This position flouts established law and, if adopted, would gut the class-action mechanism along with its intended efficiencies. Wal-Mart disregards widely approved aggregate techniques used to calculate monetary relief in class suits generally, and in employment-discrimination class actions specifically.

Second, the Ninth Circuit was correct that, in light of plaintiffs' experts satisfying *Daubert*, there is no need to address whether *Daubert* applies at the class-certification stage. To the extent the issue is reached at all, Wal-Mart's *amici* fundamentally misconceive the judicial inquiry. Factual determinations on a Rule 23 motion are only preliminary and for a narrow purpose – whether a class shall be certified. Although district courts must engage in a "rigorous analysis" of expert testimony and other proof, this occurs only to ensure the "prerequisites of Rule 23[] have been satisfied." *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982). The inquiry is not governed by the evidentiary requirements that apply to factual determinations on the merits at summary judgment or trial.

ARGUMENT

I. AGGREGATE TECHNIQUES ARE COMMONLY USED TO CALCULATE CLASSWIDE RELIEF IN CLASS ACTIONS

Due process in class actions compels a fair balancing of the plaintiff's interest in obtaining a remedy, avoiding erroneous deprivation of the defendant's property, and "any ancillary interest the [court] may have in providing the procedure or foregoing the added burden of providing greater protections." *Connecticut v. Doehr*, 501 U.S. 1, 11

(1991). Wal-Mart's insistence on individual hearings to determine monetary relief ignores the district court's conscientious balancing given the evidence below. In granting class certification, the judge closest to the case emphasized Wal-Mart's "extraordinarily sophisticated" computerized records enabling accurate determination of female employee losses from unlawful discrimination. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 180 (N.D. Cal. 2004). In addition to conflicting with the record, Wal-Mart's plea for individual hearings is inconsistent with aggregate-calculation techniques often used in class actions.

A. Employment Discrimination

In the employment discrimination realm, a formulaic approach to classwide relief is routinely applied to determine employee backpay.

In *McClain v. Lufkin Industries, Inc.*, 519 F.3d 264 (5th Cir. 2008), for example, the Fifth Circuit held that a formulaic approach to computing backpay is permissible where "the class is large, the promotion or hiring practices are ambiguous, or the illegal practices continued over an extended period of time." *Id.* at 281. Citing the seminal decision in *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974), the Fifth Circuit noted that individual hearings would be unnecessarily cumbersome and, further, class members outnumbered promotion vacancies. There was "no practical way to determine through individual hearings which jobs the class members," but for the discrimination, would have obtained. *McClain*, 519 F.3d at 281. The Fifth Circuit thus deferred to the lower court's trial plan calculating aggregate monetary relief. *Id.*

Here, likewise, if relief could not be sought on an aggregate basis, a large group of female Wal-Mart employees

would face daunting hurdles. Rule 23 gives them the option to band together in a single suit. "The discretion suggested by Rule 23's 'may' is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes." *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, ___ U.S. ___, 130 S.Ct. 1431, 1438, 176 L.Ed.2d 311 (2010) (plurality). In the words of a state supreme court: "One of the privileges our system of justice confers on every citizen is the ability to assert claims in the form of a class action if the requirements of Rule 23 are met. As a practical matter, this is often essential to the assertion of any claim at all." *Budden v. Board of School Comm'rs*, 698 N.E.2d 1157, 1162 (Ind. 1998).

In this case, a class action is the only viable avenue for the female workers because their average annual wage loss is little more than $1,000. Recently published class-action guidelines apply directly to these circumstances. A class action is "particularly appropriate" when the "individual recoveries are small, but involve many thousands or millions of dollars in damages in the aggregate. This is precisely the type of case that encourages compliance with the law and results in substantial benefits to the litigants and the court." *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 255 F.R.D. 215, 223 (2009) (National Association of Consumer Advocates). The consequences of turning a blind eye are troubling: "Rejecting class actions because individual recoveries are small, while ignoring the aggregate amounts involved, encourages wrongful conduct and largely immunizes entities caught stealing millions in $10 increments." *Id.* at 220.

The Court has consistently embraced this view. A class action "may permit the plaintiffs to pool claims which would be uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). Where

each claim is for a modest amount, "most of the plaintiffs would have no realistic day in court if a class action were not available." *Id.* The "realistic alternative" is not numerous "individual suits, but zero individual suits." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (emphasis omitted).

The flip side – the judicial system's interest in efficient administration – is equally compelling. A class action avoids the task of adjudicating hundreds of thousands of individual, but similar, claims. "The more claimants there are, the more likely a class action is to yield substantial economies in litigation." *Id.* In this situation, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

B. Antitrust

In antitrust class actions, courts also rely on classwide aggregate techniques when calculating monetary relief.

While on the Second Circuit, Justice Sotomayor identified the severe result if, as Wal-Mart appears to invite, aggregate calculation methods were suddenly restricted. "'If defendants' argument (that the requirement of individualized proof on the question of damages is in itself sufficient to preclude class treatment) were uncritically accepted, there would be little if any place for the class action device in the adjudication of antitrust claims.'" *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) ("*Visa Check*"), *disapproved in part on other grounds by In re Initial Public Offering Sec. Litig.* ("*IPO*"), 471 F.3d 24, 39-40, 42 (2d Cir. 2006) (citation omitted). The same goes for employment claims and other areas of law where classes are often certified.

Notably, Wal-Mart was the lead class plaintiff in *Visa Check*, representing a class of approximately five million merchants. *See Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96, 101 (2d Cir. 2005). When Wal-Mart sought classwide relief, it did not object to aggregate techniques. Rejecting Wal-Mart's current stance that some classes are too numerous to apply those methods, the Second Circuit approved a $3 billion settlement – the largest in the history of antitrust law. *Id.*

Visa Check is instructive in another key respect. Defendants Visa and Mastercard contended that merchants such as Wal-Mart could mitigate any damages stemming from higher debit card fees. By this line of argument, Wal-Mart's ability to mitigate supposedly mandated individual hearings and impeded class treatment. *Visa Check*, 280 F.3d at 137-40. Disagreeing with Visa and Mastercard, the Second Circuit noted that the district court could address individual relief issues that might arise later in the litigation. *Id.* at 141. The "management tools" available included bifurcated liability and damage trials, appointing a special master to preside over individual damages proceedings, creating subclasses and, if necessary, altering the class definition. *Id.*; *accord Carnegie*, 376 F.3d at 661 (citing *Visa Check*, 280 F.3d at 141).

These options, which protect both the plaintiff class and the defendant, are meaningful and important. "'The purpose of Rule 23 is to provide flexibility in the management of class actions, with the trial court taking an active role in the conduct of the litigation.'" *Waters v. International Precious Metals Corp.*, 172 F.R.D. 479, 487 (S.D. Fla. 1996) (citation omitted). Contrary to the suggestion of Wal-Mart and its *amici*, this is not "conditional" certification nor "certify now and worry later." It is how class actions are intended to work. Here, class treatment should not be foreclosed based on Wal-Mart's con-

jecture about individual issues that, should they arise, may be readily managed within the district court's discretion and breadth of authority under Rule 23.

C. Civil Rights

Class actions have especially deep roots in the civil rights domain to remedy racial discrimination – perhaps most famously, in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). When determining relief in such cases, courts again invoke aggregate techniques.

One useful illustration is *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004). The complaint there "challenge[d] defendants' alleged practice of paying lower benefits and charging higher premiums to blacks in the sale of low-value life insurance." *Id.* at 411. Like the Wal-Mart class here, the plaintiffs sought class certification under Rule 23(b)(2). *Id.* They relied on "standardized formulas or restitution grids to calculate individual class members' damages." *Id.* at 419. Denying their motion, the district court stated that "'many and a variety of hearings would be required to determine[ ] personalized harm to each individual plaintiff.'" *Id.* at 418. But the Fifth Circuit reversed, reasoning that the "prevalence of variables common to the class makes damage computation 'virtually a mechanical task.'" *Id.* at 419. The damages, as here, did "not require the manipulation of data kept outside defendants' normal course of business." *Id.* at 420.

Monumental Life also discusses the ease with which backpay, in particular, may be calculated on an aggregate basis. As "compared to compensatory damages," the Fifth Circuit remarked, "'calculation of back pay generally involves less complicated factual determinations and fewer individual issues.'" *Monumental Life*, 365 F.3d at 418 (quoting *Coleman v. General Motors Acceptance Corp.*, 296 F.3d 443, 449 (6th Cir. 2002)).

D. Consumer

Courts have likewise endorsed aggregate techniques to compute classwide monetary relief in consumer class actions.

In *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32 (1st Cir. 2003), the plaintiffs alleged that a cellular phone company's practice of charging customers for incoming calls was a breach of contract and violated state and federal statutes. *Id.* at 34-35. The company took issue with the contention that the plaintiffs' losses could be extracted from the defendant's computer system and analyzed through a "mechanical process." *Id.* at 40. Holding class treatment was proper, the First Circuit explained that class certification should not be denied solely due to damage-calculation issues. *Id.* at 40 & n.8.

The principle at the heart is venerable in class-action jurisprudence. "Particularly where damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be calculated on an individual basis is no impediment to class certification." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259-60 (11th Cir. 2004) (footnotes omitted). Again, "Rule 23 allows district courts to devise imaginative solutions to problems created by . . . individual damages issues." *Carnegie*, 376 F.3d at 661 (seventeen-million-member class action against banks and tax preparers).

Here, Wal-Mart's comprehensive records allow mechanical application of a formula to generate monetary relief. *See Dukes*, 222 F.R.D. at 180. As then-Chief Judge Frank Johnson explained in certifying a class in similar circumstances: "[N]o separate trials will be required on the issue of damages. Damages can be mathematically calculated on the basis of the information

presently contained in the [defendant]'s records . . . without the need to further burden the Court with the presentation of evidence in each individual case." *Partain v. First National Bank of Montgomery*, 59 F.R.D. 56, 59 (M.D. Ala. 1973) (footnotes omitted).

By way of comparison, state class-action practice (under similar rules of court) is in accord. Where calculating monetary relief is not "particularly complex or burdensome," as the record showed here, "the overwhelming weight of authority" holds that "'a trial court should not dispose of a class certification solely on the basis of disparate damages.'" *Hamilton v. Ohio Sav. Bank*, 694 N.E.2d 442, 455 (Ohio 1998) (citation omitted); *see also Sav-on Drug Stores, Inc. v. Superior Court*, 17 Cal. Rptr. 3d 906, 918 n.6, 923 n.12 (Cal. 2004) (noting use of aggregate techniques in various class-action settings).

II. *DAUBERT*'S PROPER ROLE AT CLASS CERTIFICATION IS NOT PRESENTED AND, EVEN IF CONSIDERED, THE POSITION OF WAL-MART'S *AMICI* ON *DAUBERT* IS UNPERSUASIVE

Pushing a point Wal-Mart itself barely mentions, the Washington, Atlantic and New England Legal Foundations (collectively, "Foundations") urge the Court to mandate aggressive examination of experts at the class-certification stage. For several reasons, the Foundations' invitation to interject a *Daubert* inquiry should be declined.

A. The Ninth Circuit Did Not Address the Scope of *Daubert* and the Point Would Benefit from Further Legal Development

This Court usually does not resolve a question "in the first instance" that the lower appellate court "did not reach." *Melendez-Diaz v. Massachusetts*, ___ U.S. ___,

129 S.Ct. 2527, 2542 n.14, 174 L.Ed.2d 314 (2009). In light of the record, the Ninth Circuit did not decide whether "*Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial." *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 602 n.22 (9th Cir. 2010) (*en banc*).

Rather, the Ninth Circuit explained that "even assuming" *Daubert* applied, "the district court here was not in error. Thus we need not resolve this issue here." *Id.* The district court properly made "factual determinations regarding evidence as it relates to common questions of fact or law," without delving into "which parties' evidence is ultimately more persuasive as to liability." *Id.* at 602. Within its sound discretion, the district court ruled that Wal-Mart mounted no viable challenge to plaintiffs' experts. *See Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189 (N.D. Cal. 2004) (separate order addressing evidentiary objections).

Moreover, Wal-Mart's strategic choices below necessarily cabin the issue before this Court. "Wal-Mart did not (and does not) challenge Dr. Bielby's methodology or contend that his findings lack relevance because they 'do [ ] not relate to any issue in the case.'" *Dukes*, 603 F.3d at 602 (quoting *Daubert*, 509 U.S. at 591). Instead, Wal-Mart chose to "challenge[] only whether certain inferences can be persuasively drawn from his data." *Id.* The Ninth Circuit was correct that *Daubert* focuses not on "persuasiveness" – Wal-Mart's focus – but "scientific reliability and relevance." *Id.* (citing *Daubert*, 509 U.S. at 587-92).

Because the Ninth Circuit did not analyze *Daubert*'s role on a Rule 23 motion, the more prudent approach would require the issue to develop first at the circuit level before this Court considers weighing in. Although the Foundations brand the Ninth Circuit an outlier, this char-

acterization is inaccurate. Just one circuit mandates a "full *Daubert* analysis" on class certification. *American Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010) (*per curiam*). And even there, the Seventh Circuit confined its holding to where expert evidence is "critical" to the motion. *Id.* at 815.

Other appellate courts phrase the inquiry slightly differently and, in any event, have not faced the *Daubert* issue the Seventh Circuit addressed only last year. Contrary to what the Foundations imply, most of the leading circuit authorities do not even cite *Daubert* – much less apply it to class-certification motions. *See*, *e.g.*, *IPO*, 471 F.3d at 42 (2d Cir.) (district court "is to assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met"); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 314-15 & n.13 (3d Cir. 2008) (defense motion relying on *Daubert* was denied and ruling was not appealed); *Unger v. Amedisys Inc.*, 401 F.3d 316, 323 (5th Cir. 2005) (stating that "'it makes sense to consider the admissibility of the testimony of an expert . . . prior to considering class certification'") (citation omitted); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) (district court should focus on whether "common evidence could suffice . . . to show classwide injury").

Before the Seventh Circuit's recent opinion, only one published circuit decision, to *amici*'s knowledge, specifically discussed *Daubert*'s relevance to a Rule 23 motion. The Second Circuit instructed that "a motion to strike expert evidence pursuant to *Daubert* . . . involves a[n] inquiry distinct from that for evaluating expert evidence in support of a motion for class certification." *Visa Check*, 280 F.3d at 132 n.4 (Sotomayor, J.); *see also In re NYSE Specialists Sec. Litig.*, 260 F.R.D. 55, 66 (S.D.N.Y. 2009) (following same); *cf. International Union v.*

General Motors Corp., 497 F.3d 615, 636 (6th Cir. 2007) (*Daubert* does not apply to "fairness hearing" on class-wide settlement).

In sum, the appellate precedent on *Daubert*'s place in class-action procedure is inconclusive. The settled discord necessary for certiorari jurisdiction simply does not exist. *See* Supreme Court Rule 10. Confirming as much, Wal-Mart has abandoned its initial suggestion that the Ninth Circuit somehow fostered a clash on *Daubert* that should be reviewed. *Compare* Petition for Writ of Certiorari at 24-25 *with* Brief for Petitioner at 30-31.

The narrow scope of Wal-Mart's interlocutory appeal underscores that this case does not really present the abstract legal issue. The Foundations criticize, foremost, the district court's *separate* order discussing *Daubert* and disposing of Wal-Mart's motions to strike plaintiffs' experts. *See Dukes*, 222 F.R.D. at 191-95. The Ninth Circuit, however, limited the appeal to the class certification order alone. J.A. 2a, 14a-15a, 27a-28a. This reflects that Rule 23(f) review does not "extend[] to any other type of order." *McKowan Lowe & Co., Ltd. v. Jasmine, Ltd.*, 295 F.3d 380, 390 (3d Cir. 2002). In this posture, there is actually "no jurisdiction to review the motion[s] to strike." *Visa Check*, 280 F.3d at 132 n.4; *see also Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 314 (5th Cir. 2005) (declining to review "exclusion" of "expert report").

B. The *Daubert* Inquiry Does Not Apply to a Class-Certification Order Making Only Preliminary Factual Determinations

In any event, the evidentiary rules that control merits determinations, including the admissibility of expert testimony, do not apply in the same way to a procedural motion to certify a class.

Like statutes, the Rules of Evidence are limited by their

"plain language." *Huddleston v. United States*, 485 U.S. 681, 687 (1988). In relevant part, the principal rule at issue specifies: "If scientific, technical, or other specialized knowledge will assist the *trier of fact* to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto . . . ." Fed. R. Evid. 702 (emphasis added). This means the court at trial or on summary judgment, *see Daubert*, 509 U.S. at 596, or the jury, *see Powers v. Ohio*, 499 U.S. 400, 412-13 (1991). The strictures governing expert testimony do not suggest any application to class-certification motions. *See* Fed. R. Evid. 702-705. Nor does this Court's seminal opinion, which "determine[d] the standard for admitting expert scientific testimony in a federal *trial*." *Daubert*, 509 U.S. at 582 (emphasis added). The Court recognized "a gatekeeping role for the judge" even where the function "will prevent the jury from learning of authentic insights and innovations." *Id.* at 597.

As *Daubert*'s progeny illustrate, the gatekeeping role is meant to insulate jurors, not judges. *See, e.g.*, *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999); *United States v. Scheffer*, 523 U.S. 303, 309 (1998). Lower courts have reached the same conclusion. "The 'gatekeeper' doctrine was designed to protect juries and is largely irrelevant in the context of a bench trial." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 852 (6th Cir. 2004). "The primary purpose of the *Daubert* filter is to protect juries from being bamboozled by technical evidence of dubious merit . . . ." *SmithKline Beecham Corp. v. Apotex Corp.*, 247 F. Supp. 2d 1011, 1042 (N.D. Ill. 2003) (Posner, J., sitting by designation), *aff'd on other grounds*, 403 F.3d 1331 (Fed. Cir. 2005). As the Advisory Committee stated, the Rules of Evidence "afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day." Fed.

R. Evid. 704, Advisory Committee Notes (1972 proposed rules).

Class certification, by contrast, does not present these concerns. It is decided by the judge, usually early in the litigation, and "is not accompanied by the traditional rules and procedures applicable to civil trials." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). Making factual determinations as necessary to the ruling, the judge decides only "'whether the requirements of Rule 23 are met.'" *Id.* (citation omitted). This presents not a trial of facts in the usual sense, but "a mixed question of fact and law." *IPO*, 471 F.3d at 40.

Class-certification proceedings are therefore ill-suited for a *Daubert* inquiry. With good reason, a "*Daubert* motion is typically not made until later stages in litigation, such as in association with a motion for summary judgment, motion in limine, or at trial, and a district court should not postpone consideration of a motion for class certification for the sake of waiting until a *Daubert* examination is appropriate." *Visa Check*, 280 F.3d at 132 n.4 (Sotomayor, J.). Under the *Daubert* regime, an expert would face complete exclusion at an early stage (with rehabilitation later unlikely, if even attempted). Especially with no jury involved, this makes little sense. As Judge Posner stated in the context of bench trials: "*Daubert* requires a binary choice – admit or exclude – and a judge in a bench trial should have discretion to admit questionable technical evidence, though of course he must not give it more weight than it deserves." *SmithKline Beecham*, 247 F. Supp. 2d at 1042.

In short, evidence on class certification and at trial are two different things. Whether the movant's evidence would qualify to go before a jury is not the right question, since the proof is not offered for that purpose. The law of evidence recognizes that proof appropriately considered

in one setting might not be considered in another on a different issue. "Hearsay testimony," for instance, "may be admitted to demonstrate typicality" even though it would not be presented to a jury on the merits. *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 562 n.14 (8th Cir. 1982); *see also Fisher v. Ciba Specialty Chemicals Corp.*, 238 F.R.D. 273, 279 (S.D. Ala. 2006) (collecting cases).

Amici curiae want to be clear on the standard they support. District courts benefit from, and should have discretion to consider, any evidence shedding light on whether Rule 23 is satisfied. "At the class certification stage of the proceedings, 'robust gatekeeping' of expert evidence is not required; rather, the court must assess only whether expert evidence is useful in evaluating whether class certification requirements have been met." *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 616 (N.D. Cal. 2009). The conclusion that "*Daubert* does not control in this context" is bolstered by a "substantial body of case law." *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 399 n.4 (S.D. Ohio 2007). Other decisions phrase the inquiry essentially the same way. *See, e.g.*, *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 267 F.R.D. 549, 556 (D. Minn. 2010); *Duchardt v. Midland Nat'l Life Ins. Co.*, 265 F.R.D. 436, 441 (S.D. Iowa 2009).

Contrary to what has been suggested, this approach to evidence on class certification comports with a "rigorous analysis." *Falcon*, 457 U.S. at 161. The Foundations posit a false choice between full application of *Daubert* and class treatment grounded on the flimsiest expert testimony imaginable. There is a sensible medium between the two extremes. Put concisely, the judge carefully scrutinizes the evidence while respecting the procedural and provisional nature of class certification. This is no cakewalk for the movant. As the district court below stated,

judges do not "uncritically accept all expert evidence that is offered in support of, or against, class certification. Rather, the question is whether the expert evidence is sufficiently probative to be useful in evaluating whether class certification requirements have been met." *Dukes*, 222 F.R.D. at 191.

Different scrutiny of evidence at the preliminary stage of class certification takes into account the nascent state of the record. Class status must be determined at "an early practicable time" when only limited discovery usually has occurred. Fed. R. Civ. P. 23(c)(1)(A). One decision thus rejected a *Daubert* inquiry as "inappropriate" on class certification but left open "revisit[ing] this issue after discovery has been completed and the parties submit the scientific evidence on which they intend to rely for dispositive motions and/or trial." *O'Connor v. Boeing North American, Inc.*, 184 F.R.D. 311, 321 n.7 (C.D. Cal. 1998); *cf. In re Netbank, Inc. Sec. Litig.*, 259 F.R.D. 656, 670 n.8 (N.D. Ga. 2009) (holding *Daubert* motions in abeyance). Lacking "a complete set of data," experts cannot fairly be expected to be trial-ready before, quite often, any merits discovery. *Midwestern Machinery v. Northwest Airlines, Inc.*, 211 F.R.D. 562, 566 (D. Minn. 2001).

As *Eisen* commands, moreover, the preliminary determinations on class certification do not prejudice the defendant. "A court's determination that an expert's opinion is persuasive or unpersuasive on a Rule 23 requirement does not preclude a different view at the merits stage of the case." *Hydrogen Peroxide*, 552 F.3d at 324. It is widely understood that "the determination as to a Rule 23 requirement is made only for purposes of class certification and is not binding on the trier of facts, even if that trier is the class certification judge." *IPO*, 471 F.3d at 41 (citing *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366

(4th Cir. 2004)). The *in terrorem* description of class actions is further undermined by the possibility, as in this case, of immediate review under Rule 23(f) of an order certifying a class.

Finally, even if *Daubert* applied to Rule 23 determinations, plaintiffs have demonstrated that their experts satisfied *Daubert* and its rubric is not as demanding as the Foundations assume. The Rules of Evidence follow a "general approach of relaxing the traditional barriers to 'opinion' testimony." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988). *Daubert* "does not require the most elaborate or sophisticated tests or studies that can be imagined by opposing counsel." *Oddi v. Ford Motor Co.*, 234 F.3d 136, 160 (3d Cir. 2000). Just as the "flexibility" animating Rule 23 "enhances the usefulness of the class-action device," *Falcon*, 457 U.S. at 160, the Court has called *Daubert*, where it does apply, a "'flexible'" framework. *Kumho Tire*, 526 U.S. at 141. Flexibility means adaptation to context based on the considerations discussed above.

The Court should not endorse a tool for mischief that would bog down class-certification procedure with excessive and premature challenges to the movant's experts. As a matter of judicial administration, this would unnecessarily burden district judges. In end result, this would also undermine the "'effective strength'" Rule 23 is meant to provide a group of citizens injured by a common wrong. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citation omitted).

CONCLUSION

The district court's class certification is legally and factually sound and should be upheld.

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Respectfully submitted,

ROBBINS GELLER RUDMAN & DOWD LLP
KEVIN K. GREEN
(Counsel of Record)
655 West Broadway,
Suite 1900
San Diego, CA 92101
(619) 231-1058
kgreen@rgrdlaw.com

CONSUMERS UNION OF UNITED STATES, INC.
MARK R. SAVAGE
1535 Mission Street
San Francisco, CA 94103
(415) 431-6747

ROBBINS GELLER RUDMAN & DOWD LLP
SUSAN K. ALEXANDER
Post Montgomery Center
One Montgomery Street,
Suite 1800
San Francisco, CA 94104
(415) 288-4545

NATIONAL CONSUMER LAW CENTER®
STUART T. ROSSMAN
7 Winthrop Square,
4th Floor
Boston, MA 02110
(617) 542-8010

CENTER FOR CONSTITUTIONAL RIGHTS
DARIUS CHARNEY
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464

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Counsel for Amici Curiae