No. 23-5950

In the United States Court of Appeals for the Sixth Circuit

IN RE NISSAN NORTH AMERICA, INC. LITIGATION

On Appeal from the United States District Court
for the Middle District of Tennessee
Nos. 19-cv-843, 19-cv-854 and 22-cv-98
Hon. William L. Campbell, Jr., U.S. District Judge

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* SUPPORTING APPELLANTS AND REVERSAL

JENNIFER B. DICKEY
KEVIN R. PALMER
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
Telephone: (202) 463-5337

H. SHERMAN JOYCE
LAUREN SHEETS JARRELL
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue NW
Suite 400
Washington, DC 20036
Telephone: (202) 682-1163

DONALD M. FALK
SCHAERR | JAFFE LLP
Four Embarcadero Center
Suite 1400
San Francisco, CA 94111
Telephone: (415) 562-4942
dfalk@schaerr-jaffe.com

GENE C. SCHAERR
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 23-5950 Case Name: In re Nissan North America, Inc. Litigation

Name of counsel: Donald M. Falk

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None known.

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I certify that on February 2, 2024 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Donald M. Falk
Donald M. Falk

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 23-5950 Case Name: In re Nissan North America, Inc. Litigation

Name of counsel: Donald M. Falk

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None known.

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INTEREST OF THE *AMICI CURIAE* AND AUTHORITY TO FILE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the state and federal courts.

To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community, including cases addressing expert testimony. The Chamber has participated as amicus curiae in cases around the United States addressing legal standards in tort law. *See, e.g.*, *Drammeh v. Uber Techs., Inc.*, Ninth Cir. No. 22-36038; *Kuciemba v. Victory Woodworks, Inc.*, 531 P.3d 924 (Cal. 2023); *Helena Chem. Co. v. Cox*, 664 S.W.3d 66 (Tex. 2023) (expert); *Nemeth v. Brenntag N. Am.*, 194 N.E.3d 266 (N.Y. 2022) (expert).

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues.

Many members of the Chamber and ATRA must defend lawsuits that involve expert testimony, including in class actions. The standards for admitting expert testimony in class actions are thus of acute interest to *amici*.

No counsel for any party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made any monetary contribution intended to fund preparation or submission of this brief. *Amici* have filed a contemporaneous motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an ideal opportunity for the Court to address two recurring issues relating to the consideration of expert testimony as the class-certification stage.

The plaintiffs claim that the automatic emergency braking systems (AEBS) in four Nissan models in the 2017–2021 model years (or some subset) are defective because the AEBS in rare instances will brake when the driver believes braking is inappropriate. The district court certified ten statewide classes to press five claims each: breach of express warranty, breach of implied warranty, fraudulent omission, unjust enrichment, and violation of consumer protection statutes. The district court's certification order reflects two fundamental errors that this Court should correct.

First, the district court did not assess the admissibility of plaintiffs' expert witness testimony under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Although the district court reasoned that it did not need to consider that testimony to certify a class, that cannot be right. Plaintiffs offered the two expert reports to present classwide methods to determine issues

fundamental to all claims in the case: (1) whether the AEBS was defective and thus could support liability under any theory, and (2) damages. The district court's opinion identified no other common evidence to decide those issues. And such common evidence is necessary to support a finding that common issues will predominate over individualized issues, as required to certify a class under Rule 23(b)(3). The class certification must therefore be reversed on that basis, and the case presents an ideal opportunity for this Court to join the majority of circuits in holding that a district court assessing class certification must conduct a full *Daubert* analysis before expert evidence can be weighed in the balance.

The second error requiring clear resolution by this Court permeated the district court's entire class certification order. Analysis of commonality and predominance requires not just examination of the legal questions framed by the complaint, but of the evidence by which plaintiffs propose to provide common answers to those questions. Yet the district court mischaracterized the presence or absence of common evidence as an issue that can be put off until a decision on the merits. Indeed, the district court declined even to identify the legal questions

that would need to be answered in common, on the ground that those, too, were issues only for the merits and not for class certification. Both of those category errors conflict with *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338 (2011), and later decisions. This Court should take the opportunity to reiterate that "[t]he necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation." *Id.* at 351–52. It is not a feature that can be avoided or suppressed.

ARGUMENT

I. District Courts Must Conduct A *Daubert* Analysis of Expert Testimony That Provides the Evidentiary Basis to Find Commonality.

A district court cannot simply ignore pertinent expert evidence necessary to the Rule 23 determination but must subject that evidence to the "rigorous analysis" required under Rule 23. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 35 (2013) (quoting *Dukes*, 564 U.S. at 350–51). The setting of this case is common in consumer class actions. A single expert opinion is the sole or principal support offered to show that a product design is so "defective" that every buyer is entitled to compensation because of the occurrence or substantial risk of product

failure. And another expert opinion provides the only proffered means to avoid "[q]uestions of individual damage calculations" that would "inevitably overwhelm questions common to the class." *Id.* at 34.

In circumstances such as these, consideration of the expert evidence is necessary. *Daubert* and Federal Rule of Evidence 702 prescribe the analysis that courts must perform before giving weight to any expert evidence—at class certification or any other stage.

A. This Court Should Join the Majority of Circuits and Hold That Expert Testimony Proffered to Support Class Certification Must Be Admissible Under *Daubert*.

It is true that the Supreme Court has not yet squarely held that expert evidence offered to support or oppose class certification, if challenged, must survive *Daubert* analysis to be considered. In *Dukes*, the Court expressly "doubt[ed]" that *Daubert* did *not* apply, 564 U.S. at 354, but subsequent cases have not presented *Daubert* challenges. *See, e.g.*, *Comcast*, 569 U.S. at 32 n.4 (noting that no *Daubert* challenge had been raised below); *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 459 (2016) (same).

Nevertheless, the necessary implications of the Court's opinions establish that expert testimony must meet the standards of the Federal

Rules of Evidence—and thus of *Daubert*—to assist a plaintiff in demonstrating that a case satisfies the elements of Rule 23. In reversing class certification because an expert opinion did not "establish[] that damages are capable of measurement on a classwide basis," the Court reiterated that a class may be certified only if the proponent of certification can "prove … *in fact*" that Rule 23(a) is satisfied, and can "also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast*, 569 U.S. at 33. In assessing whether Rule 23's requirements are met, courts should consider "*all* probative evidence." *Goldman Sachs Group, Inc. v. Ark. Teacher Ret. Sys.*, 594 U.S. ___, 141 S. Ct. 1951, 1960 (2021) (emphasis retained; cleaned up). But only admissible evidence can be probative.

In federal court, proof "in fact"—"evidentiary proof"—must comply with the Federal Rules of Evidence. *See Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015). No party can prove anything without evidence admissible under the Federal Rules, which apply to "every proceeding" in the federal courts. Fed. R. Evid. 102; *see* Fed. R. Evid. 101. A class certification is undoubtedly a "proceeding." And when proof consists of expert testimony, that testimony must comply with the

admissibility standards of Federal Rule of Evidence 702, which *Daubert* definitively construed, and which Congress and the Supreme Court amended to track *Daubert* explicitly. *See* Fed. R. Evid. 702, advisory committee's note to 2000 amendments.

The Supreme Court's discussion of expert evidence in *Dukes*, *Comcast* and *Tyson* should have "remove[d] any vestigial doubt about the appropriateness of full-blown *Daubert* analysis at the class certification stage." 1 MCLAUGHLIN ON CLASS ACTIONS § 3:14 (20th ed. 2023). And, as Nissan has pointed out (Br. 50–52), most of the courts of appeals that have addressed the issue recognize that expert evidence offered to establish Rule 23 class certification factors should be subjected to *Daubert* analysis at the threshold. *See Prantil v. Arkema Inc.*, 986 F.3d 570, 576 (5th Cir. 2021); *Blood Reagents*, 783 F.3d at 187 (3d Cir.); *Sher v. Raytheon Co.*, 419 F. App'x 887, 890–91 (11th Cir. 2011); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815–16 (7th Cir. 2010).

That makes perfect sense. There is no basis to excuse expert testimony from the "rigorous analysis" required by Rule 23, *see Comcast*, 569 U.S. at 33, 35 (quoting *Dukes*, 564 U.S. at 350–51), and *Daubert* provides the binding standard of rigor when expert testimony is at issue.

As Nissan's brief explained, those decisions accord with the strong implication of *Dukes*, *Comcast*, and *Tyson*, where the Supreme Court subjected expert testimony to searching scrutiny without addressing *Daubert* issues directly.

Two circuits nonetheless have advanced a *Daubert*-lite approach, encouraging some variant of *Daubert* analysis without making the results of a searching Rule 702 inquiry dispositive. A divided panel of the Eighth Circuit permitted a "focused" rather than a "full and conclusive" *Daubert* analysis at the class certification stage on the theory that class certification is "inherently tentative." *In re Zurn Pex Pluming Prods. Liab. Litig.*, 644 F.3d 604, 612–13 (8th Cir. 2011). As Judge Gruender pointed out in his dissent, the majority's reasoning conflicts with the 2003 amendments to Rule 23 that deleted conditional class certification as an option. *Id.* at 628 (Gruender, J., dissenting). Before 2003, the Rule stated that certification orders "may be conditional." Fed. R. Civ. P. 23(c)(1)(C) (2000). The Judicial Conference deleted this option from the Rule and explained that "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." Fed. R. Civ. P. 23(c)(1)(C), advisory committee's

note to 2003 amendment. Rule 702 and *Daubert* set out a single, controlling, and unconditional standard for the admissibility—and thus the consideration—of expert testimony in federal court. They either are met or not met; they cannot be met tentatively, conditionally, or speculatively. The Eighth Circuit panel majority thus misapplied the current, governing version of Rule 23.

Taking another but equally erroneous tack, a Ninth Circuit panel held that "a district court should evaluate admissibility under the standard set forth in *Daubert*," but insisted that "admissibility must not be dispositive." *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018) (as amended after denial of reh'g). But that makes no sense at all. Where—as here—a plaintiff must proffer evidence to meet the requirements of Rule 23, admissibility by its very nature can be dispositive. Evidence that cannot be admitted cannot support a court's decision. And the Federal Rules of Evidence are binding rules, not optional guidelines.

In addition, *Sali*'s precedential value is doubtful. As the dissent from denial of rehearing en banc pointed out, *Sali v. Corona Reg'l Med. Ctr.*, 907 F.3d 1185, 1188 & n.7 (9th Cir. 2018) (Bea, J., dissenting, joined

by four judges), an earlier Ninth Circuit panel explicitly approved a threshold *Daubert* analysis at the class certification stage and held that even admissibility of an expert opinion is insufficient to satisfy a Rule 23(a) element unless the opinion is directed to (and answers) the correct question. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). That is, a prior panel held that admissibility of an expert opinion is necessary but insufficient to establish commonality. One Ninth Circuit panel normally cannot overrule another, *Duarte v. City of Stockton*, 60 F.4th 566, 574 (9th Cir. 2023), *cert. denied,* 143 S. Ct. 2665 (2023), so *Ellis*, not *Sali*, would control even in the Ninth Circuit.

Indeed, *Comcast* made clear that *Ellis* was correct. Mere admissibility under *Daubert* is insufficient unless the admissible testimony provides a basis to determine the claim element it addresses through common evidence. The defendant in *Comcast* did not raise a *Daubert* challenge. *See* 569 U.S. at 32 n.4. Yet the Court nonetheless held that the expert's testimony "falls far short of establishing that damages are capable of measurement on a classwide basis." *Id.* at 34.

Properly understood, admissibility under Rule 702 is a necessary first step to considering expert testimony proffered as a common method

of determining liability, injury, or damages. Only testimony that is entitled to legal weight—testimony that is admissible evidence—can weigh in the certification balance.

B. Proper Gatekeeping of Expert Testimony Is Critical to Any Rigorous Analysis of Commonality and Predominance.

From the early days of the modern class action, the Supreme Court has insisted that district courts perform a "rigorous analysis" to ensure that the Rule 23 factors are met before certifying a class. *See*, *e.g.*, *Dukes*, 564 U.S. at 350–51 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). Expert testimony is often offered at the class-certification stage to attempt to meet the commonality and predominance requirements. Necessary to any rigorous analysis of such expert testimony is an accurate application of the *Daubert* analysis under Federal Rule of Evidence 702. Without considering admissibility under *Daubert*, a court would be unable to assess whether plaintiffs could possibly prove their claims at the merits stage without individualized issues predominating.

Rule 702 requires the district court, before admitting expert testimony, to determine whether the "testimony is based on sufficient

facts or data" and "is the product of reliable principles and methods," and that "the expert's opinion reflects a reliably application … to the facts of the case." Fed. R. Evid. 702(b), (c), (d). The proponent of expert testimony bears the burden of demonstrating that the requirements of Rule 702 are satisfied. See Fed. R. Evid. 702 & advisory committee's note to 2023 amendments (noting that preponderance standard has always applied, but divergence by some courts required making burden explicit). A district court "must find that [an expert opinion] is properly grounded, well-reasoned, and not speculative before it can be admitted." Fed. R. Evid. 702, advisory committee's note to 2000 amendments. In contrast, district courts must exclude experts' conclusory pronouncements that lack adequate factual or analytical foundation and thus cannot reflect a reliable methodology.

Expert evidence is especially important in class actions based on asserted defects in sophisticated products, whether automobiles or smartphones. Expert testimony may be necessary to prove a classwide defect in these circumstances, where the limits and expectations surrounding complex technology are beyond the ken of lay jurors. *See*, *e.g.*, *Brown v. Raymond Corp.*, 432 F.3d 640, 644 (6th Cir. 2005)

(Tennessee law); *Braverman v. BMW of N. Am., LLC,* Nos. 21-55427 & 21-55428, 2023 WL 2445684, at *2 (9th Cir. Mar. 10, 2023); *Kirk v. Clark Equip. Co.*, 991 F.3d 865, 878–79 (7th Cir. 2021) (applying Illinois law); *White v. Howmedica, Inc.*, 490 F.3d 1014, 1016 (8th Cir. 2007) (Nebraska law). As one court observed, "the ordinary consumer of an automobile simply has 'no idea' how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards." *Soule v. General Motors Corp.*, 8 Cal. 4th 548, 567, 882 P.2d 298, 308 (1994).

Several principles should guide the application of Rule 702 and *Daubert* at the class certification stage in cases like this one that are based on alleged product defects.

First, to provide sufficient foundation under Rule 702, a district court must ensure that expert conclusions have adequate foundation in data and analysis. Rule 702 requires a district court to exclude opinions based on a "subjective, conclusory approach." Fed. R. Evid. 702, advisory committee's note to 2000 amendments. Thus, an expert opinion must be "supported by appropriate validation." *Daubert*, 509 U.S. at 590.

For example, an opinion must have some factual or analytical basis to conclude that products made with a supposedly "defective" design fail

more often or earlier than nondefective products. Without underlying comparative data of some kind, the "defect" label is just a subjective conclusion that does not help the factfinder. *See* Fed. R. Evid. 702(a).

Moreover, *Daubert* made clear that "a key question" about any expert opinion is "whether it can be (and has been) tested." *Daubert*, 509 U.S. at 593; *see Belville v. Ford Motor Co.*, 919 F.3d 224, 233–35 (4th Cir. 2019). Empirical verification separates science from speculation.

Second, Rule 702 requires a district court to assess the fit between an expert's conclusions and the underlying data and analysis. This assessment may involve an inquiry into "[w]hether the expert has adequately accounted for obvious alternative explanations." Fed. R. Evid. 702, advisory committee's note to 2000 amendments. That may well entail examining what, if any, "reliable principles and methods" the expert used to rule out other causes, and whether "the expert's opinion reflects a reliable application of th[ose] principles and methods" to reach conclusions ruling out other causes. Fed. R. Evid. 702(c), (d).

An expert cannot rely on a series of logical leaps to carry a narrow and indistinct premise to a sweeping conclusion. The conclusions must

fit their factual and analytical foundation as well as the legal theory they are designed to support. *See Daubert*, 509 U.S. at 591–92.

In this vein, what the Supreme Court held in the context of expert testimony for class-action damages applies equally when classwide liability is at issue. Expert testimony that purports to provide a means of determining any issue classwide must line up with the plaintiffs' theory of liability. *See Comcast*, 569 U.S. at 35–37. The fit between the theory of liability and the expert's methods and testimony is critical. As the advisory committee's note to the 2000 amendments to Rule 702 admonished, even generalized expert testimony must "'fit' the facts of the case." *See Daubert*, 509 U.S. at 591. The conclusions to which the expert testifies—and the underlying basis for those conclusions—must conform to the correct legal standard. Mere provision of a method, "*any* method," is not enough; in the class action context, that "proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Comcast*, 569 U.S. at 36 (emphasis in original).

It is especially important to enforce Rule 702's standards strictly in this context. An expert witness should not be permitted to label a design as a "defect" without any empirical or even analytical basis to

differentiate the performance of that design from nondefective designs. Otherwise, the standard for all products becomes one of perpetual perfection in every component, which is not what anyone bargains—or wants to pay—for. *See Grodzitsky v. Am. Honda Motor Co.*, 957 F.3d 979, 985 (9th Cir. 2020) (expert claimed that the component "shouldn't fail ever" and "should work for the life of the car").

Rule 702 is designed to keep out of court conclusions that rest on an "analytical gap" between foundation and conclusion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Rigorous application of Rule 702 and *Daubert* reduces the risk that expert *ipse dixit* will substitute for verifiable evidence at the class certification stage.

C. Rigorous Application of Rule 702 Does Not Improperly Prejudge the Merits.

The district court may have shied away from a more searching examination of the expert's methods at the certification stage on the ground that to do otherwise would intrude on the merits. For example, in the order under review, the district court characterized as a merits issue the dispute whether plaintiffs had identified a "defect" or only a "system limitation." 2023 WL 2749161, at *4. While *resolving* that dispute may be a merits question, the question whether plaintiffs have

presented evidence that would compel a decision on a common basis is not. And even if in a particular case the inquiries overlap, this Court has already recognized that the overlap is permissible. *E.g.*, *In re Ford Motor Co.*, 86 F.4th 723, 729 (6th Cir. 2023) (citing *Dukes*, 564 U.S. at 351). Indeed, Rule 23 requires a court to determine *what* the evidence must prove classwide, so some inquiry into the merits is likely if not inevitable.

II. This Court Should Make Clear That District Courts Cannot Postpone Rigorous Analysis of Commonality and Predominance.

The Supreme Court in *Dukes* made clear that the identification and analysis of common questions under Rule 23 encompasses more than the mere collection and recitation of abstract issues. 564 U.S. at 349; *see Fox v. Saginaw Cnty., Mich.*, 67 F.4th 284, 300 (6th Cir. 2023). Rather, courts must examine whether, for each purported common question, the plaintiffs have presented evidence that would require the factfinder to produce a classwide common answer. As this Court put it, "[o]rdinarily, ... the class determination should be predicated on *evidence* presented by the parties concerning the maintainability of the class action." *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 851 (6th Cir. 2013) (emphasis added). Yet the common questions that

the district court identified consist solely of the type of abstract issues—divorced from evidence of common proof—that the *Dukes* Court rejected. *See* 564 U.S. at 349–50.

According to the district court, the common questions were "whether the AEB systems are defective, whether Nissan knew of the defect, whether Nissan concealed the defect, and whether Nissan's conduct rises to the level of being violative of certain common law and statutory protections." 2023 WL 2749161, at *4. Those, indeed, are among the questions presented by the dozens of causes of action that the ten classes here assert. But those are the type of abstract questions that any "competently crafted class complaint" can raise. *Dukes*, 564 U.S. at 349 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–32 (2009)). Such "high-level" questions do not satisfy Rule 23. *See Fox*, 67 F.4th at 301. And the district court said not a word about how the plaintiffs could prove any of these issues, let alone all of them, with common evidence that would compel a classwide answer.

In contrast, the district court characterized questions about the individualized or otherwise fragmented nature of plaintiffs' proof as

questions about the merits that could be omitted from the class certification analysis. Remarkably, when its attention was drawn to other elements of some of plaintiffs' claims—such as the requirement in express warranty claims of presentation to the seller with an opportunity to repair—the district court declined to address the individualized evidence needed to prove those claim elements, deferring those issues to the merits. But Rule 23 demands more, and the district court's "high-level identification" of putatively common issues, without delving into what must be proved and whether common evidence could prove it, is not sufficient. *Fox*, 67 F.4th at 301.

A. Determining Whether a Claim Element Can Be Proved With Classwide Evidence Necessarily Involves Identifying What Plaintiffs Need to Prove.

Dukes long ago superseded the district court's approach, which "flatly contradicts [the Supreme Court's] cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim." *Comcast*, 569 U.S. at 35. The analysis of commonality and predominance requires not just a recitation of claim elements, but an examination of each element of each claim to determine whether

plaintiffs can rely on identified classwide evidence or instead must rely on individualized proof.

The analytical structure for commonality and predominance is not complicated. For each cause of action for which plaintiffs seek to certify a class, the district court must identify the elements that must be proved, then determine which of them can be established with common proof that compels a classwide answer. Then, if any elements require individualized proof, the court determines whether as a practical matter the common or the individualized issues predominate.

The court must be satisfied that the classwide evidence addresses the right question. Classwide evidence of a contract wouldn't weigh in the balance for a negligence class, any more than classwide evidence of a tort duty could help certify a contract claim.

So there is some overlap with the merits, *Dukes*, 564 U.S. at 351, but only to the extent of pinning down what needs to be proved and whether plaintiffs have a classwide way of proving it. "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*,

568 U.S. 455, 466 (2013). But merits *must* be considered to that strictly limited extent. That is why the Supreme Court has repeatedly explained that the "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Comcast*, 569 U.S. at 34 (cleaned up).

This Court was crystal clear on the point in *Fox*: a court cannot assess commonality and predominance if it does "not describe any of [the claims'] elements" and "explain which could be proved across the board for the entire class." 67 F.4th at 301. As another panel put it, "[a] proper analysis must consider which of these elements can be established on a class-wide basis and which would require proof for each of the class members." *Woodall v. Wayne Cnty.*, No. 20-1705, 2021 WL 5298537, at *7 (6th Cir. Nov. 15, 2021). *See also Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1240 (11th Cir. 2016) (noting that commonality and predominance inquiry rested on resolution of "several preliminary questions of state law" as to the elements of the causes of action).

B. This Case Raises Recurrent Impediments to Common, Classwide Proof.

The district court's analytical error led it to overlook two substantial impediments to common proof among the classes certified

here. Those impediments arise in many class actions addressing product defects and warrant this Court's close attention.

First are the divergences between vehicle models and over time. There appear to be substantial differences in AEBS performance between models and model years due to software upgrades that corresponded with materially reduced warranty complaint and repair rates. Nissan's knowledge of any issues relating to unwanted braking also necessarily changed as experience accumulated. What Nissan knew by the 2019 model year (when the first software upgrade was released) was different from what it knew in the 2017 model year (when the AEBS at issue was first released). That is, the answer both as to defect and as to knowledge would necessarily be different before and after the experience accumulated in 2017 and 2018, and before and after the various software updates were released. That is especially so because the updates apparently reduced the incidence of unwanted braking reports for some models by a factor of ten. *See* Nissan Br. 12.

The district court's "surface-level approach" to the model differences, software updates, and corresponding changes in Nissan's knowledge has widespread significance and should be corrected. *See*

Ford, 86 F.4th at 727–29. As the recent *Ford* decision indicates, material improvements and other changes in products, and the feedback effect of those changes on a manufacturer's knowledge, are factors often present in contemporary class actions that involve overbroad, catch-all classes.

Second, while in some consumer class-action cases it might be possible to define narrower, cohesive classes in light of changes over time, this case also presents an additional impediment to commonality and predominance. Even cursory evaluation of most of the plaintiffs' claims reveals individualized issues that appear likely to swamp any common issues. Inherently individualized issues such as presentation for repair—a critical precondition for express warranty claims—and actual reliance (under common law and some statutory claims for deceit) are only the most obvious among the many issues that Nissan identifies (at Br. 32–44). *See*, *e.g.*, *Amgen*, 568 U.S. at 473 (noting common issues would not predominate if individualized reliance must be proved).

This Court should take the opportunity to address these important and recurring issues. Between the overbreadth of the classes and the inherently individualized nature of several elements of plaintiffs' claims, it is doubtful that any class in this case could be certified.

III. Rigorous Analysis of Expert and Lay Evidence Addressing Commonality and Predominance Is Necessary to Avoid the Unwarranted Costs of Improperly Certified Class Actions.

The requirement of adequate, evidence-based analysis of the Rule 23 factors is "a crucial part of avoiding the procedural unfairness to which class actions are uniquely susceptible." *Ford*, 86 F.4th at 729. Without such rigorous analysis, businesses will be pressured to settle improperly certified class actions, at deadweight economic loss to businesses and, ultimately, consumers at large.

Litigating class actions is expensive. The cases can persist for years before class certification, let alone resolution. *See* U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 1, 5 (Dec. 2013), *available at* https://bit.ly/3rrHd29 ("Approximately 14 percent of all class action cases remained pending four years after they were filed") (emphasis omitted). Indeed, as the district court docket numbers indicate, this case has entered its fifth year. Defending against a single large class action can costs tens of millions of dollars—or more. *See* Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (July 2011) (noting defense cost of $100 million). Among large companies

alone, corporate class action litigation costs reached a record-breaking $3.64 billion in 2022. *See* Carlton Fields, *Class Action Survey* 4 (2023), *available at* https://ClassActionSurvey.com. And these costs are growing quickly. The $3.89 billion projected for 2023 nearly doubles the figure from 2013. *Id.* at 5.

In addition, the Supreme Court has long recognized "the risk of 'in terrorem' settlements that class actions entail." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 662 (2022) (quoting *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 350 (2011)). As Justice Ginsburg observed, even "the mine-run case" risks "'potentially ruinous liability.'" *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (quoting Fed. R. Civ. P. 23, advisory committee's note to 1998 amendment). "[E]xtensive 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, Inc.*, 552 U.S. 148, 163 (2008). And "the prospect of aggregating thousands of weak or frivolous individual claims into a single sprawling class action—with the potential to coerce companies into settlement—has invited a bevy of dubious

consumer class action suits." U.S. Chamber Institute for Legal Reform, *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform* 22 (2022), *available at* http://tinyurl.com/2jvv33az. "[W]here questionable lawsuits are allowed to proceed, companies have to choose between entering into 'in terrorem' settlements or rolling the dice on a class trial and relying on the judgment of an unpredictable jury." *Id.*

Class certification heightens settlement pressure to the point that "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010). Companies reported that they settled 47% of open putative class actions in 2022. *See* Carlton Fields, *Class Action Survey*, *supra*, at 26. "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Nagareda, *supra*, 84 N.Y.U. L. Rev. at 99. As a result, the certification stage often provides the only opportunity for courts to meaningfully scrutinize putative class plaintiffs' claims. See *id.* at 99–100; *see also Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 296 n.7 (2014) (Thomas, J., concurring).

The district court's approach paves the way to certification of inherently individualized claims. If all meaningful analysis of common proof is deferred until the merits, then plaintiffs' ability to prove their case with common, classwide evidence may never be tested. Yet district courts have important gatekeeping obligations under both Rule 23 and Rule 702. In light of the significant economic stakes, this Court should deliver clear guidance to ensure that those functions are adequately performed.

CONCLUSION

The class certification order should be reversed.

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Respectfully submitted,

/s/ Donald M. Falk

DONALD M. FALK
SCHAERR | JAFFE LLP
Four Embarcadero Center
Suite 1400
San Francisco, CA 94111
Telephone: (415) 562-4942
dfalk@schaerr-jaffe.com

GENE C. SCHAERR
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
gschaerr@schaerr-jaffe.com

JENNIFER B. DICKEY
KEVIN R. PALMER
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
Telephone: (202) 463-5337

H. SHERMAN JOYCE
LAUREN SHEETS JARRELL
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue NW
Suite 400
Washington, DC 20036
Telephone: (202) 682-1163

Counsel for Amici Curiae

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Attorney for **Amici Curiae**

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I certify that on February 2, 2024, the foregoing Brief of *Amici Curiae* was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

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Donald M. Falk