No. 14-1146

IN THE SUPREME COURT OF THE UNITED STATES

TYSON FOODS, INC.
Petitioner,

v.

PEG BOUAPHAKEO, et al., individually and on behalf of all other similarly situated individuals,
Respondents.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS, ALLIANCE OF AUTOMOBILE MANUFACTURERS, ASSOCIATION OF HOME APPLIANCE MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, AND METALS SERVICE CENTER INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations representing manufacturers and those concerned with the fairness of the civil justice system. *Amici* are concerned that courts, such as the Eighth Circuit here, are relying upon statistical models and speculative theories of damages to certify overbroad class actions that include uninjured members. The potential impact of the decision below extends beyond Tyson's exposure in this action and outside wage-and-hour litigation. If left undisturbed, it would contribute to the growth of no-injury class actions and lead to an unwarranted increase in the legal and business costs of *Amici*'s members.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

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[1] The parties have filed a blanket letter of consent to *amicus curiae* briefs with the Clerk of the Court. Per Rule 37.6, *Amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

The Alliance of Automobile Manufacturers, Inc. ("the Alliance"), formed in 1999 and incorporated in Delaware, has twelve members: BMW Group, FCA US LLC, Ford Motor Company, General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, and Volvo Car Corporation. Alliance members are responsible for 77% of all car and light truck sales in the United States. The Alliance's mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to meet emerging challenges associated with the manufacture of new automobiles. The Alliance files *amicus curiae* briefs in cases such as this one that are important to the automobile industry.

The Association of Home Appliance Manufacturers ("AHAM") is a not-for-profit trade association representing over 150 manufacturers of major, portable, and floor care residential appliances. The home appliance industry, with approximately 65,000 direct industry employees in the United States, contributes significantly to American jobs and economic security.

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 over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The American Petroleum Institute ("API") is a nationwide, not-for-profit trade association representing over 600 companies engaged in all aspects of the petroleum industry, including exploration, production, refining, transportation and marketing. API frequently represents its members in judicial and regulatory matters affecting the petroleum industry in the United States.

The Metals Service Center Institute ("MSCI"), more than 100 years strong, is the broadest-based, not-for-profit association serving the industrial metals industry. As the premier metals trade association, MSCI provides vision and voice to the metals industry, along with the tools and perspective necessary for a more successful business. MSCI's 400 member companies have over 1,500 locations throughout North America.

STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case to the extent relevant to the arguments made herein.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court warned against "Trial by Formula" in *Wal-Mart Stores, Inc. v. Dukes*, instructing courts that "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the *same injury*," not "merely that they have all suffered a violation of the same provision of law." 131 S. Ct. 2541, 2551, 2561 (2011) (internal citation omitted) (emphasis added). The Court further instructed in *Comcast Corp. v. Behrend*, that a model purporting to serve as evidence of damages in a class action must be closely tied to the injury on which liability is premised. 133

S. Ct. 1426, 1433-34 (2013). Despite these instructions, some courts, including the Eighth Circuit here, have continued to certify classes based on creative damage models and theories that give short shrift to this Court's rulings.

In the case before this Court, the Eighth Circuit improperly permitted the use of statistical sampling to create a fictitious "average employee" in a wage-and-hour lawsuit. Under the Plaintiff's own rose-colored methodology, more than two hundred class members had no injury at all. The jury verdict further suggested that Plaintiffs' sampling methodology resulted in "more than half of the putative class [having] suffered either no damages or only a de minimis injury measured in cents rather than dollars." *See Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 804 (8th Cir. 2014) (Beam, J., dissenting).

Rather than require Plaintiffs' counsel to narrow the definition of the class they sought to represent to only those with actual injuries, the court certified the class with the uninjured class members and included them in the aggregate damages award. "[E]ach purported class member, damaged or not, [would] receive a pro rata portion of the jury's one-figure verdict." *Id.* The legal shortcut here should be disallowed because it directly led to employees receiving awards when they had no viable claims or compensable injuries that could stand on their own.

The statistical modeling method used here is merely one way class action plaintiffs' counsel have developed to bring claims on behalf of individuals who have experienced no injury whatsoever. Variants of "no-injury claims" also arise in product liability, consumer protection, antitrust, data privacy, and

many other areas of law. As this brief discusses, some of these actions, as with the case at bar, improperly include a potentially large number of uninjured members based on creative damage models; others are based nearly entirely on uninjured classes because the "damages" are legal fictions created by the lawyers. In all of these cases, though, novel damage models and theories, when allowed, mask the inability of the vast majority of class members to fulfill core class requirements.

The practical impact of allowing claims of uninjured class members at any point in the litigation is antithetical to the purpose of Rule 23, which is to resolve claims efficiently and fairly where a multitude of people allege injury based on common facts and law. The presence of injured class members, regardless of how many, increase pressure on defendants to settle meritless claims, result in uninjured class members receiving windfall awards, and likely undercompensate individuals with actual losses because they have to share recovery with undeserving class members. Permitting certification of such no injury classes facilitates unwise regulation through litigation and litigation gamesmanship.

This Court can and should put a stop to such litigation abuse through its ruling in this case. It should make clear that class actions are not vehicles for awarding damages to individuals whose claims, if brought in their own names, would be dismissed. The Court should require that trial courts, as part of a "rigorous analysis" of class certification, obligate class counsel to tailor their class definitions to include only those who have experienced a common *injury*. This obligation to "right-size" class actions will

benefit workers and employers, consumers and product sellers, and the civil justice system as a whole by allowing the federal courts to produce fair legal outcomes. *Amici* respectfully urge the Court to reverse the decision below.

ARGUMENT

I. CREATIVE DAMAGE MODELS CANNOT BE ALLOWED TO SUBVERT SUBSTANTIVE AND PROCEDURAL REQUIREMENTS THAT FORBID CERTIFYING CLASS ACTIONS THAT INCLUDE UNINJURED PLAINTIFFS

The substantive and procedural requirements that class members suffer actual injuries common to the class compel district court judges to decline to certify purported plaintiff classes that include uninjured members. *See Comcast*, 133 S. Ct. at 1434. A person who is not injured does not have a cognizable claim. Creative damage models, including statistical sampling, cannot be allowed to distort class litigation by giving uninjured individuals the right to receive a compensatory award. As demonstrated by the failings here, when a class includes uninjured members, the court must deny or withdraw certification and require the plaintiff to narrow the proposed class to exclude those who have not experienced any injury.

A. A Formula Purportedly Showing that a Fictitious Average Class Member Suffered "Damages" Does Not Satisfy the Requirement that Each Individual Plaintiff Have a Concrete Injury

Injury-in-fact, a concrete injury capable of judicial resolution, is an indispensable requirement for any

individual seeking to establish a *prima facie* cause of action. Here, the Fair Labor Standards Act provides an employee with a cause of action to recover "unpaid overtime compensation" from his or her employer. 29 U.S.C. § 216(b). In order to bring a claim, an employee must establish that he or she has suffered the harm of unpaid overtime compensation. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946). An employee who has been properly paid is not entitled to compensation under the FLSA.

In this regard, the FLSA requires each plaintiff to "prove[] that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work." *Id.* at 687. The statistical sampling method used here undermines this core obligation. Plaintiffs fabricated an "average" employee and computed an aggregate award based on the fictional employee, regardless of any actual damages each employee sustained. The statistical sampling method obscured the fact that many plaintiffs had no injury, and the Defendant was denied its due process right to defend the individual claims. As a result, a multitude of workers who did not experience the alleged injury of unpaid time for donning and doffing equipment were nonetheless eligible for compensation.

Beyond the case at bar, injury-in-fact is a core substantive requirement for other actions commonly subject to class certification. For example, a leading treatise on tort law has explained that "[a]ctual loss or damage resulting to the interests of another" is a necessary element of common law causes of action. *See* W. Keeton, et al., Prosser & Keeton on the Law of Torts § 30, at 164-65 (5th ed. 1984); *In re Bridge-*

stone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d 1012, 1017 (7th Cir. 2002) ("No injury, no tort, is an ingredient of every state's law."). The same is true for other federal causes of action. *See, e.g., Matsushita Elec. Ind. Co., LTD. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (requiring plaintiffs in antitrust cases to "show an injury to them resulting from the illegal conduct"); *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 311 (3rd Cir. 2008) ("Importantly, individual injury . . . is an element of the cause of action"); *Amgem Inc. v. Connecticut Retirement Plans and Funds*, 133 S.Ct. 1187 (2013) (affirming that in securities actions a plaintiff must show injury caused by defendant's conduct).

Further, a plaintiff must demonstrate injury-in-fact to have Article III standing to bring a claim in federal court. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (referring to injury-in-fact as the "foremost" element of a claim). This Court has "always insisted on strict compliance" with this foundational requirement to ensure that each plaintiff is affected by his or her case "in a personal and individual way." *Raines v. Byrd*, 521 U.S. 811, 819 (1997).

The access to justice these laws collectively provide has become a hallmark of the American civil justice system. People can access the courts to seek redress for injuries, while courts are preserved for legal questions that can be addressed in concrete, factual contexts. Filing a lawsuit as a class action does not relax these requirements for individual injury. *See* 7 AA Charles Alan Wright, et al., Fed. Prac. & Proc. 3d § 1785.1 (2005) ("[T]he court must

be able to find that both the class and the representatives have suffered the same injury requiring court intervention."); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011) ("In an era of frequent litigation [and] class actions . . . courts must be more careful to insist on the formal rules.").

It is unlawful for the class mechanism or an aggregation technique, such as statistical sampling, to be manipulated in ways that convert deficient claims into viable ones. A plaintiff without an injury cannot be permitted to hide among those who may. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *Avritt v. Reliastar Life Ins. Co.,* 615 F.3d 1023, 1034 (8th Cir. 2010). How, then, would a court be able to separate the wheat from the chaff without engaging in an individual assessment of injury? Such a task would defeat the very purpose of class actions and make class certification untenable.

B. The Procedural Mechanism Offered by Rule 23 May Not Be Manipulated to Hide Legal Deficiencies in Individual Claims

The Court should make clear that Rule 23 precludes certifying or maintaining certification of classes that include uninjured members at any time in the litigation. The mere presence at the outset of a case of a class representative who alleges an actual injury, along with the potential for class members to have suffered the same injury, does not clear the essential, but low hurdle that each class member be injured. As here, lawyers may identify class representatives who can allege injury, but are presenting creative damage theories to extend these allegations of harm to a multitude of uninjured class members. *See* Victor E. Schwartz & Cary Silverman, *The Rise*

of 'Empty Suit' Litigation. Where Should Tort Law Draw the Line?, 80 Brook. L. Rev. 599, 635 (2015).

Aggregation of litigation through a class action cannot sacrifice procedural fairness. Under Rule 23, class representatives must have claims typical of those that he or she purports to represent. For this to occur, as the Court has stated, lead plaintiffs and class members must "possess the same interest and suffer the *same injury*" for which they seek redress. *Wal-Mart*, 131 S. Ct. at 2550 (emphasis added). Aggregation techniques, including statistical sampling, must be continuously scrutinized and rejected when it becomes clear that they have swept into the litigation individuals that have experienced no harm.[2]

Certification of classes that include uninjured members violates Congress's instruction that procedural rules, including Rule 23, "shall not abridge, enlarge or modify any substantive right." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (quoting Rules Enabling Act, 28 U.S.C. § 2072(b)); *see also Wal-Mart*, 131 S. Ct. at 2561. Aggregation is valuable only when it resolves claims "without altering the substantive standard that would be applied were each claim to be tried independently." Principles of the Law of Aggregate Litigation § 2.02 cmt. D, at 89 (2010); *Shady Grove Orthopedics Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) ("A class ac-

[2] The use of statistical modeling in particular can be a clear signal that the proposed class is simply not suitable for class treatment. *See Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (finding that "shortcut" in using a "fictional typical" class member "should have been a caution signal to the district court that classwide proof of damages was impermissible").

tion . . . leaves the parties' legal rights and duties intact and the rules of decision unchanged."); *Lewis v. Casey*, 518 U.S. 343, 357-58 n. 7 (1996) (stating the obligation for injury "is no less true with respect to class actions than with respect to other suits").

Some circuits have properly followed this Court's instructions and the letter of the Rules Enabling Act, holding that classes with uninjured members do not satisfy Rule 23's commonality and typicality requirements. *See, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013) (reversing certification where plaintiffs' model for showing class-wide damages did not distinguish class members who were overcharged from those who were not overcharged and, therefore, not injured). These courts have recognized that when a class includes uninjured members, it must deny certification and require plaintiffs' counsel to redefine the overbroad class "in such a way as to include only members" who were injured as a result of the defendant's conduct. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012). A defendant must be able to fully present defenses to liability and damages.

They also have recognized that a district court's obligation to remove uninjured class members is a continual one. *See In re Deepwater Horizon*, 739 F.3d 790, 799 (5th 2014) (recognizing this requirement "becomes gradually stricter as the parties proceed through 'the successive stages of the litigation'") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Should it become clear after certification that a class includes uninjured members, the court should expeditiously decertify and require counsel to narrow the class. *See* Fed. R.

Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment.").

It is inappropriate to "kick the can down the road" by certifying a class under the premise that a defendant can later challenge the existence of injury, whether at trial, through individual proceedings on damages or a claims process. *In re Nexium Antitrust Litig.*, 777 F.3d 9, 33 (1st Cir. 2015) (Kayatta, J. dissenting); *see also McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008) ("Roughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability."). A "certify now, worry later" approach, in practice, will result in settlement of overbroad classes and compensation of uninjured class members. Plaintiffs should have the burden to address this issue concretely when seeking class certification so as to establish the absence of individualized issues as to the fact of injury that would render class adjudication impracticable. *See Wal-Mart*, at 2551 ("A party seeking class certification must affirmatively demonstrate his compliance" with Rule 23).

The district court applied none of the above protections in the case before this Court. It should have denied certification because, even under the Plaintiffs' own damages model, at least two hundred class members were not injured. The district court's order that the defendant compensate these uninjured class members should be reversed.

C. The Court Should Establish a Bright Line Rule Against the Inclusion of Uninjured Class Members

Establishing a uniform, bright-line rule against the inclusion of any uninjured members in a class action is the only way to facilitate the fair and just resolution of such claims. As this Court has cautioned, class actions are not to be favored when a plaintiff cannot meet its burden of proof that class treatment is preferable. *Comcast*, 133 S. Ct. 1432 (citing *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979) (describing the class action mechanism as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only")). However, some courts are still not striking uninjured class members. Decisions that countenance including uninjured class members in certified classes have created widespread inconsistency in the law, with courts widely varying in how many uninjured class members can be ignored.

Consider, for example, the Seventh Circuit, which authored a leading opinion allowing uninjured class members. *See Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009). In *Kohen*, the circuit held that "a class should not be certified if it is apparent that it contains a *great many* persons who have suffered no injury at the hands of the defendant." 571 F.3d at 677-78 (emphasis added). Another Seventh Circuit panel found that "[t]here is no precise measure for 'a great many.'" *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 819, 824-25 (7th Cir. 2012). A third panel held that even if class members were uninjured, their lack of injury was irrelevant to certification. *See Parko v. Shell Oil*

Co., 739 F.3d 1083, 1084-87 (7th Cir. 2014); *see also Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757-58 (7th Cir. 2014) (permitting certification of a class with uninjured members if the class representative's claim is not "idiosyncratic or possibly unique").

Confusion from the lack of a bright line rule among the courts is palpable, as many courts have searched for the right tipping point where the proportion of uninjured class members precludes certification. The First Circuit, for example, has found that not every class member must establish injury so long as the number of uninjured members is "de minimis." *In re Nexium Antitrust Litig.*, 777 F.3d at 21. Other courts have held that a class with uninjured members can be certified when "nearly all" class members experienced an injury, *see, e.g., In re Polyurethane Foam Litig.*, No. 1:10 MD 2196, 2014 WL 6461355, at *17 (N.D. Ohio Nov. 17, 2014) (unredacted opinion of Apr. 9, 2014), 23(f) *pet. denied sub nom. In re: Carpenter Co.* (6th Cir. Sept. 29, 2014), *cert. denied sub nom. Carpenter, Co. v. Ace Foam, Inc.*, 135 S. Ct. 1493 (2015), or the plaintiffs' proposed method of proof promises to establish "widespread injury" to the class or show that a "substantial majority" of members were injured by the defendant's conduct. *See, e.g., Kottaras v. Whole Foods Market, Inc.*, 281 F.R.D. 16, 23 (D.D.C. 2012).

A common fault in these cases is an unwillingness to look beyond the veneer of the class certification motion to determine whether the damage models are plausible, or whether such models suppress the true number of uninjured claimants in order to expand the class or push the class over the threshold that the circuit uses. *See, e.g., Wolin v. Jaguar Land Rov-*

er N. Am., LLC, 617 F.3d 1168, 1173 (9th Cir. 2010) (considering the lack of manifestation of a defect a merits issue not relevant to class certification); *Forcellati v. Hyland's Inc.*, No. CV 12-1983-GHK (MRWx), 2014 WL 1410264, at *12 (C.D. Cal. Apr. 9, 2014) (finding defendant's argument that products worked properly for some class members challenges the merits of plaintiff's allegations and has no bearing on class certification). In *Wal-Mart*, though, this Court clearly instructed that "[t]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." 131 S. Ct. at 2551-52. "Frequently, that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Id.*

Indeed, courts properly applying *Comcast* and *Wal-Mart* have recognized that "[i]t is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so 'requires inquiry into the merits of the claim.'" *In re Rail Freight*, 725 F.3d at 253 (citing *Comcast*, 133 S. Ct. at 1433). These courts have expressed that plaintiffs' damage models are often designed to create the largest sustainable classes and, therefore, are "prone to false positives." *Id.* "Attempts to meet the burden of proof using modeling and assumptions that do not reflect the individual characteristics of class members [should be] met with skepticism." *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 266 (3d Cir. 2011). A damages model, at the very least, must be able to "measure the actual [injury] of individual class members." *Id.* at 267. "If the damages model cannot withstand this scrutiny then, that is not just a merits issue. [Plaintiffs'] models are essential to

the plaintiffs' claim they can offer common evidence of classwide injury." *In re Rail Freight,* 725 F.3d at 253. Damages models cannot be used to calculate an aggregate amount of damages for the class, then "absolve[ ] plaintiffs from the duty to prove each class member was harmed by the defendants' practice." *In re New Motor Vehicle Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008).

This Court should clarify here that the pursuit of justice requires district judges to take the necessary steps throughout litigation to ensure that class actions are properly sized so that only people who are injured have access to the courts. The fictional "average" plaintiff theory used here does not survive this scrutiny. All class members are not identical to the average observed in the sample and should not have been paid as if they were, particularly anyone whose lack of injury should have disqualified them from being eligible for any award. The class action short cut works only when it leads to the same place as individually filed claims.

II. PROBLEMS CAUSED BY UNINJURED CLASS MEMBERS EXTEND FAR BEYOND WAGE-AND-HOUR LITIGATION AND STATISTICAL SAMPLING TECHNIQUES

In addition to the overbroad wage-and-hour class actions represented by the case at bar, class actions inflated by the presence of uninjured members have become significant sources of litigation abuse in other areas of the law. Specifically, *amici's* members are experiencing a surge in no-injury class actions based on equally creative theories of damages as statistical sampling over alleged product defects, marketing practices, and data breaches, among others.

The number of uninjured members can reach from the thousands to the millions.

In these lawsuits, class counsel will often define their classes to include anyone potentially affected by the alleged misconduct, such as a violation of corporate policy, statute, regulation or common law obligation. Certification of such an overly broad class is at best premature (because no genuine injury has occurred for the overwhelming majority of the class members), or at worst entirely meritless (because injury will never occur for them). By clarifying that Rule 23 requires courts to tailor how a class is defined to include only those who are truly injured, and exclude any plaintiff who could not sue in his or her own right, this Court can significantly reduce abusive "no injury" class litigation.

A. Product Claims By Consumers Whose Products Have Not Malfunctioned

Many of *amici's* members manufacture products. "No injury" class actions concerning product defects typically involve a product that may have malfunctioned for a few people, including the named plaintiffs, but has not caused any problems for the vast majority of consumers. *See generally* Schwartz & Silverman, 80 Brook. L. Rev. at 628-48. Many of these individuals are fully pleased with their products, but are swept into litigation seeking their right to collect for a risk that has not and likely will never materialize. While courts have been rightly skeptical of these class actions, too many "no injury" suits are still allowed.

In recent years, class counsel have become adept at disguising their "no injury" class actions under in-

ventive damage models and theories, much like the statistical sampling model at bar. For example, rather than bring claims only for those who have defective products, they may cleverly invoke a state consumer protection act to allege that all consumers, including those who are fully satisfied with their products, experienced a loss. In some cases, they suggest that the discovery of defect, even in only a few products, has created an economic loss for the entire class: the product's actual value at sale, given the potential for the defect, was lower than the purchase price, or the defect in some items has caused the entire line's resale value to diminish. *See id.* at 628-29. Some such claims have resulted in multi-million and billion dollar settlements. *See id.* at 629.

Recent, prominent examples of "no injury" product litigation have involved front-loading washing machines and automobiles, which are repeatedly targeted in such class actions.[3] When class members

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[3] Courts also have consistently rejected class actions against pharmaceutical manufacturers alleging creative theories of economic loss when the drug at issue worked without incident for, and may well have benefited, the class members. *See, e.g.*, *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002) (holding plaintiffs lacked standing to seek reimbursement of value of drug found to have a risk of causing liver damage where only other patients may have experienced such harm and the class did not allege the drug caused them physical or emotional harm or that the drug was ineffective); *In re Vioxx Prods. Liab. Litig.*, 874 F. Supp. 2d 599, 601 (E.D. La. 2012) ("There is no obvious, quantifiable pecuniary loss that Plaintiff incurred from purchasing a drug that worked for him and did not cause him any harm."); *Williams v. Purdue Pharm. Co.*, 297 F. Supp. 2d 171, 176-77 (D.D.C. 2003) (finding no injury in fact where class members suffered no ill effects or lack of efficacy from pain medication that was allegedly deceptively marketed); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 68-

do not have actual injuries, their claims should be rejected so courts can focus on those who do.

1. Washing Machine Litigation

The washing machine litigation involves allegations that all high-efficiency front-loading clothes washers are more likely than top-loading washers to develop mold and odors. About two dozen consumer class actions purporting to represent some ten million people have been filed in federal court against all major manufacturers of front-load washers. Although evidence presented by the manufacturers shows that the vast majority of purchasers never experienced any manifestation of the alleged defect, courts have certified, and appellate courts have affirmed, these extraordinarily broad class actions.

Specifically, courts have accepted the theory that the issue of defect is common to the class (even though some of the cases involved more than a dozen machine models), and that individual damages can be sorted out in proceedings *after* a determination of a defect or through a damages schedule. *See Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012), *cert. granted, judgment vacated*, 133 S. Ct. 2768 (2013), *on remand*, 727 F.3d 796, 798 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 412 (6th Cir. 2012), *cert. granted, judgment vacated sub nom. Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013), *on remand*, 722 F.3d

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69 (S.D.N.Y. 2002) (denying class certification where it was undisputed that the drug was "enormously beneficial to many patients" who "presumably got their money's worth and suffered no economic injury").

838 (6th Cir. 2013), *cert denied*, 134 S. Ct. 1277 (2014). Some courts have implausibly suggested that the manufacturers should "welcome class certification" to *disprove* the allegations. *Whirlpool,* 722 F.3d at 857; *see also Butler*, 727 F.3d at 799 (reaffirming its prior finding that if "most members of the plaintiff class had not experienced any mold problem" then class certification will lead to "judgment that would largely exonerate Sears — a course it should welcome, as all class members who did not opt out of the class action would be bound by the judgment").

This Court is generally familiar with these cases, as it granted *certiorari*, vacated, and remanded two of them for reconsideration in light of *Comcast*. Nevertheless, in both of these cases, the Sixth and Seventh Circuits affirmed their earlier rulings, focusing on language in *Comcast* that requires a showing of predominance at the class certification stage and applied that holding only to liability, not liability and damages. *See Butler,* 727 F.3d at 800-01; *Whirlpool,* 722 F.3d at 856.

Whirlpool is one of the few class action defendants in recent years that took the risk of proceeding to trial. It won a favorable verdict in the first case. *See* Paul M. Barrett, *Whirlpool Wins 'Smelly Washer' Test Case, With More Trials to Come*, Bloomberg Business, Nov. 5, 2014, *at* http://www.bloomberg.com/bw/articles/2014-11-05/whirlpool-wins-smelly-washer-test-case-with-more-trials-to-come. Jurors found that the washers were not defective. *See Allison v. Whirlpool Corp.*, No. 1:08-WP-65001 (N.D. Ohio) (Verdict Form, Oct. 30, 2014).

More typical, however, is the path of BSH Home Appliances Corp., where the U.S. District Court for

the Central District of California certified classes that included purchasers of front-loading washers in four states. *See Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466 (C.D. Cal. 2012), *leave to appeal denied sub nom, Cobb v. BSH Home Appliances Corp.*, 2013 WL 1395690 (9th Cir. Apr. 1, 2013), *cert. denied*, 134 S. Ct. 1273 (2014). After BSH exhausted its appellate options following class certification, the manufacturer settled the litigation. *See Tait v. BSH Home Appliances Corp.*, No. SACV 10-0711-DOC (Anx) (C.D. Cal. July 27, 2015) (Order Granting Plaintiffs' Motion for Attorney's Fees and Reimbursement of Expenses, and Plaintiffs' Request for Service Awards; Granting Plaintiffs' Motion for Final Approval of Class Action Settlement).

Under the settlement, any original purchaser of a Bosch or Siemens brand 27-inch front-loading washer, regardless of a mold issue, was eligible for a $55 payment. *See id.* at 5. Out of an estimated 650,000 class members, however, less than 3% of the class submitted claims, suggesting that most viewed their washing machines as properly working. *See id.* at 10. As a result, the attorneys who brought the lawsuit will end up collecting fees and costs (including $2.3 million in expert fees) equal to more than six times the funds actually distributed to washing machine owners. *See id.* at 26.

2. Unmanifested or Fixed Auto Defects

Courts frequently entertain class actions alleging that a car or truck has a defect that entitles all owners to compensation, even when the vehicle has worked (sometimes for years) without incident for most owners. These nebulous claims typically rely on expert testimony to present a theory of class-wide

damages, just as the case at bar involved sampling theories to create an average plaintiff. For example, some cases suggest that consumers paid for a "problem free" car or their resale value had fallen. *See* Schwartz & Silverman, 80 Brook. L. Rev. at 634.

Often, these "no injury" class actions are perversely filed *after* a company has properly reported a potential problem, undertook a voluntary recall or repair program under the warranty, and offered to fix the problem free of charge. *See id.* at 653. For example, the Central District of California heard a purported class action where one of the class representatives testified in his deposition that after the manufacturer addressed an issue with his car's anti-lock brakes at no charge through a software update, he was "happy" and the car was "working fine." *See, e.g.*, *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales Practices & Prods. Liab. Litig.*, 915 F. Supp. 2d 1151, 1154, 1159 (C.D. Cal. 2013). Yet, he sought to represent a nationwide class of purchasers, claiming they did not receive the benefit of the bargain. The district court dismissed the case, properly finding that "[m]erely stating a creative damages theory does not establish the actual injury that is required to prevail on his product liability claims." *Id.* at 1157-58; *see also Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999) (similar result).

Not all courts have taken the required approach of dismissing these class actions. *See, e.g., Daffin v. Ford Motor Co.*, 458 F.3d 549, 553 (6th Cir. 2006) (certifying a class when the class representative experienced a sticking throttle, but class as a whole had not). The "sudden unintended acceleration" cases involved about 400 people who alleged personal

injuries, wrongful death, or property damage from a defect in the cars that caused sudden acceleration; yet, they sued for an estimated 22 million owners. *See* Schwartz & Silverman, 80 Brook. L. Rev. at 638. The class actions claimed that the *risk* of product failure led to a decrease in the resale value of their cars. *Id.* The federal court overseeing the multi-district docket for these claims found that the plaintiffs satisfied the minimum threshold for standing, regardless of whether they experienced the alleged defect, *see In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Prod. Liab. Litig.*, 754 F. Supp. 2d 1145, 1161 (C.D. Cal. 2010), and declined to dismiss the plaintiffs' claims. 785 F. Supp. 2d 925, 932 (C.D. Cal. 2011). Toyota settled for $1.1 billion. *See* Schwartz & Silverman, 80 Brook. L. Rev. at 638-40. The results were comparable to the washing machine cases. The law firms that brought the massive class actions would receive $200 million in fees, but only two percent of class members sought recovery. *See id.* at 640.

B. "No Injury" Consumer Class Actions Facilitate Improper Regulation Through Litigation

The threat of massive liability from "no injury" litigation, along with the negative publicity that often surrounds claims against consumer products, has also been used to "regulate" corporate conduct by securing settlements that include fundamental changes to business practices. In some situations, the changes achieved in these specious lawsuits have been studied and rejected in Congress and the appropriate federal agencies. *See* Robert B. Reich,

Regulation is Out, Litigation is In, U.S.A. Today, Feb. 11, 1999, at 15A.

This trend is exemplified by a recent surge of class actions against food makers. *See* Inst. for Legal Reform, The New Lawsuit Ecosystem: Trends, Targets and Players 89 (2013), *at* http://www.institutefor legalreform.com/uploads/sites/1/web-The_New-Lawsuit-Ecosystem-Report-Oct2013_2.pdf. These actions often target modern advances in food, including products sold by large agribusinesses and the use of genetically modified crops. The suits may, for example, allege consumer fraud for advertising such crops or products as "All Natural." Courts have certified classes even when evidence suggests that the label is not deceptive, there is no difference in the purchasing behavior of most individuals who saw a label with or without the phrase, or the use of this phrase was not important to people's actual purchasing decisions. *See, e.g., In re ConAgra Foods, Inc.*, -- F. Supp.3d --, No. CV 11-05379 MMM, 2015 WL 1062756, at *27, *64-65 (C.D. Cal. 2015).

In these cases, plaintiffs, with the aid of expert testimony, have sought to show an injury through complex models that purport to isolate the "price premium" stemming from the labeling. *See id.* at *67-71 (finding while one expert's "hedonic regression analysis" failed to isolate impacts of non-GMO labeling on price, in combination with a second expert's "conjoint analysis," plaintiffs damage methodology satisfied *Comcast's* requirements). Courts have dismissed some of the most extreme no-injury food class actions on various grounds. *See* Schwartz & Silverman, 80 Brook. L. Rev. at 657-61 (examining cases). Many of these food class actions, however,

have resulted in multi-million dollar settlements and changes to product labeling that satisfy the plaintiffs' own subjective preferences. *See id*. at 669-72.

C. The Burgeoning New Area of "No Injury" Data Breach Litigation

A new area of no-injury litigation is in the area of data security and privacy, where most individuals do not experience any injuries from a data breach.[4] As one analysis of the litigation found, "[t]here is no shortage of alternative theories upon which plaintiffs have brought suit," with the most common alleging negligence, breach of contract, and state consumer protection violations. *See* Zetoony, 2015 Data Breach Litig. Rep. at 8. In these class actions, few if any of the claimants have had any economic loss.

Many courts, following *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013), have properly dismissed data breach classes with uninjured claimants. They have found that the loss or theft of data with personal information does not automatically give rise to a class action on behalf of every individual included on the computer, network, or file. Often,

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[4] Plaintiffs' lawyers filed approximately 110 class actions in federal courts alleging claims stemming from data breaches between July 2013 and September 2014, many of which target retailers. *See* David Zetoony et al., 2015 Data Breach Litig. Rep. 3 (Bryan Cave 2015), *at* http://bryancavedatamatters.com/wp-content/uploads/2015/04/2015-Data-Breach-Litigation-Report.pdf. They also filed 672 data privacy class actions (involving the collection, use, and sharing of information) in federal courts during this period, targeting every industry. David Zetoony et al., 2015 Data Privacy Litig. Rep. (Bryan Cave 2015), *at* http://bryancavedatamatters.com/wp-content/uploads/2015/05/2015-Privacy-Litigation-Report.pdf.

the creative damage models and theories are too speculative because it is unknown whether anyone actually accessed and used the plaintiffs' data. *See, e.g., Reilly v. Ceridian Corp.*, 664 F.3d 38, 40 (3d Cir. 2011). They have also found that a risk of future harm, identity theft, does not give standing because the vast number of people will not be affected. *See*, *e.g.*, *In re Sci. Applications Int'l Corp. Backup Tape Data Theft Litig.*, 45 F. Supp.3d 14, 26-27 (D.D.C. 2014) (compiling data breach class actions cases reaching similar conclusion); *Sam's East, Inc.*, No. 12-2618, 2013 WL 3756573, at *3 (D. Kan. July 16, 2013) (finding increased risk of identity theft is a "future-oriented, hypothetical, and conjectural" claim).

Inventive class action plaintiffs' attorneys have responded by developing new damages theories, which include statistical sampling, to create an "average" loss – much like in the case at bar. *See*, *e.g.*, *In re Hannaford Bros. Co. Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013) (denying certification because plaintiffs had not developed expert testimony, but not postulating as to whether the modeling would have been valid if presented).

A recent decision in the Seventh Circuit decision throws fuel on the no-injury fire. The court ruled that class plaintiffs may proceed with a claim despite suffering no actual harm so long as there is a "substantial risk" of injury from the theft of their credit card information. *Remijas v. Neiman Marcus Group*, LLC, --- F.3d ---, No. 14-3122, 2015 WL 4394814, *4-5 (7th Cir. July 20, 2015).[5] The Seventh Circuit's opin-

[5] To its credit, the Seventh Circuit viewed the plaintiffs' other theories of injury as "more problematic," leaving their sufficiency to provide standing on their own "dubious." *Id.* at *6.

ion returns the case to the district court with instructions that may lead to the certification of a 350,000 member class action where only 9,200 (2.6%) experienced fraudulent activity and those that did had already been fully reimbursed. *See id.* at *1, *4.

Unless this Court takes a strong stance against "no injury" litigation, the Seventh Circuit ruling will be viewed as an invitation for class action claims any time personal information is compromised, without the need to show actual harm.[6]

III. CERTIFICATION OF CLASSES WITH UNINJURED MEMBERS LEADS TO DISTORTED OUTCOMES AND ENCOURAGES SPECULATIVE LITIGATION

As can be seen from the cases discussed in this brief, certifying class actions that are inflated with uninjured members hinders the ability of the American civil litigation system to generate sound results. The size of the actions increase the pressure on defendants to settle, the plaintiffs' attorney fees outpace class members' recoveries, and little, if any, attention is given to resolve claims of those with actual injuries. Ultimately, these cases undermine respect for the judicial system, as the public has come to view class action litigation as driven by the financial

[6] The Court will have the opportunity to decide one variant of "no injury" data privacy litigation, considering whether a statutory violation can confer Article III standing upon a plaintiff who suffers no actual harm, in the next term. *Spokeo v. Robins*, No. 13-1339.

interests of lawyers rather than losses suffered by those they purportedly represent.[7]

In particular, this Court has explained that certifying a class "may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (observing that with "even a small chance of a devastating loss, defendants will be pressured into settling questionable claims").[8] Justice Ginsburg has further observed that when "a class action poses the risk of massive liability unmoored to actual injury," the "pressure to settle may be heightened." *Shady Grove Orthopedic Assocs.*, 559 U.S. at 445 n.3 (2010) (Ginsburg, J., dissenting). Including uninjured class members or basing a class action on nearly all unin-

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[7] *See, e.g.*, Editorial, *Supreme Laundry List*, Wall St. J., Oct. 9, 2012 ("Without the governor of common injury required by *Wal-Mart*, product liability suits and consumer class actions become the tool of plaintiffs lawyers who gin up massive claims in hopes that companies will settle").

[8] As courts have observed, "the sheer size and complexity of the action, the added time, expense and effort needed to defend it as a class suit may force the defendant, despite the doubtful merit of the claims, to settle rather than to pursue the long and costly litigation route." *Gen. Motors Corp. v. City of New York*, 501 F.2d 639, 657-58 (2d Cir. 1974) (Mansfield, J., concurring); *see also In re "Agent Orange" Prod. Liab. Litig.* 818 F.2d 145, 151 (2d Cir. 1987) (affirming $180 million class settlement even though it was clear the trial court "viewed the plaintiffs' case as . . . virtually baseless"); *cf.* Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973) (labeling "[s]ettlements induced by a small probability of an immense judgment in a class action" as "blackmail settlements").

jured members increases this coercion to settle. As a practical matter, there often is no opportunity to segregate out uninjured class members after class certification or at trial.[9] Defendants end up paying claims to people they have not injured.

These cases also create internal conflicts among class members by undercompensating individuals with significant losses. *See Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013) (rejecting, in wage-and-hour suit, a proposal to extrapolate the experience of 42 "representative" employees to 2,341 class members who worked varying hours because it would confer a windfall on some members and undercompensate others). Some prominent observers suggest that lawyers purposefully exclude plaintiffs with significant injuries from class actions, preferring to reduce the claim to the lowest common denominator to obtain certification of the largest class with the greatest settlement leverage and potential for a lucrative fee award. *See The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act*, Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 114th Cong. 6 (Feb. 27, 2015) (statement of Chairman Goodlatte) (observing class members with injures have been "forced to sacrifice valid claims in order to preserve the lesser claims that everyone in the class can assert").

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[9] When amending Rule 23 in 1996, the Advisory Committee on Civil Rules acknowledged the concern that class actions could be used "to coerce a defendant into settling rather than risking defeat and 'losing the company.'" *See* John K. Rabiej, *The Making of Class Action Rule 23 – What Were We Thinking?*, 24 Miss. C. L. Rev. 323, 351 (2005).

How this Court rules on this case will have a direct impact on the growing body of "no-injury" case law leading businesses to face an increasing number of highly speculative, creative class actions. American businesses already spend $2 billion on class action litigation per year. *See* Carlton Fields Jorden Burt, *The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 3 (2015), *at* http://classactionsurvey.com/pdf/2015-class-action-survey.pdf. Now, approximately 54% of major companies are currently engaged in class actions, continuing an upward trend. *Id*. at 6. Labor and employment suits, including wage-and-hour cases such as the case before this Court, and consumer protection claims, as many *Amici* experience, constitute more than half of such class actions. *Id*. at 7.

Many plaintiffs in the case at bar, along with the other "no injury" suits discussed above, were likely satisfied with their pay, product or service. Creative theories of damages, including statistical models, cannot substitute for the need to show injury. By reversing the Eighth Circuit ruling, the Court can ensure that Rule 23 does not open a path to paying uninjured plaintiffs. The Court should provide a bright line rule requiring objective proof of injury and requiring courts to safeguard class actions from uninjured class members throughout a case. The public good of the American civil justice system can be achieved only when it reaches legally appropriate outcomes. When courts do not demand that each and every plaintiff show an actual injury to proceed with a claim and receive compensation, this goal is undermined. The result is not "access to justice," but removing the hinges from the courthouse doors.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reverse the Eighth Circuit and find that proper application of Rule 23 precludes certification of classes with uninjured members.

Respectfully submitted,

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