No. 20-297

In the Supreme Court of the United States

TRANS UNION LLC,

Petitioner,

v.

SERGIO L. RAMIREZ,

Respondent.

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

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF MANUFACTURERS, ALLIANCE FOR AUTOMOTIVE INNOVATION, AMERICAN TORT REFORM ASSOCIATION, AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici have a substantial interest in ensuring that their members, which include manufacturers and other businesses regularly sued by plaintiffs seeking to represent classes of individuals, are guaranteed procedural and constitutional protections from unwarranted class certifications. The Article III requirement that each plaintiff suffer a compensable injury and the requirement of Rule 23(a)(3) of the Federal Rules of Civil Procedure that named plaintiffs be typical of those they purport to represent, including with respect to the harms alleged, are two important such safeguards. Requiring a plaintiff to demonstrate, through an evidence-based inquiry, that he or she is typical of the alleged class with respect to the actual harms sustained at issue in the case will give effect to those protections and reduce improper class action verdicts and settlements that fail to meet these basic standards.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States. It represents small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.3 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than nearly two-thirds of all private-sector research and

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[1] Pursuant to Rule 37.6, counsel for *amici* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. The parties have filed blanket consents to the filing of *amici curiae* briefs.

development in the nation. The NAM is the voice of the manufacturing community and a leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Alliance for Automotive Innovation ("Auto Innovators") is the leading advocacy group for the auto industry, representing 37 automobile manufacturers and value chain partners that together produce nearly 99 percent of all light-duty vehicles sold in the United States. Formed in 2020 through the combination of the Association of Global Automakers and Alliance of Automobile Manufacturers, Auto Innovators advocates for policies supporting the automotive industry's efforts to develop cleaner, safer and smarter mobility options for the American public.[2]

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations,

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[2] The Auto Innovators members include Aptiv PLC; Argo AI, LLC; BMW Group of North America, LLC; Robert Bosch GmbH; BYTON North America Corp.; Cruise LLC; DENSO International America, Inc.; Ferrari North America, Inc.; Ford Motor Company; General Motors Company; Harmon International, Inc.; American Honda Motor Company, Inc.; Hyundai Motor America; Infineon Technologies Americas Corp.; Intel Corp.; Isuzu Motors America, LLC; Jaguar Land Rover North America, LLC; Karma Automotive, LLC; Kia Motors America, Inc; Local Motors; Mazda North America; Mercedes-Benz USA, LLC; Mitsubishi Motors North America, Inc.; Nissan North America, Inc.; NXP Semiconductors USA, Inc.; Panasonic Corporation of North America, Inc.; Porsche Cars North America, Inc.; PSA North America, Inc.; SiriusXM Radio, Inc.; Stellantis, NV; Subaru of America, Inc.; Suzuki Motor of America, Inc.; Texas Instruments, Inc.; Toyota Motor North America, Inc.; Volkswagen Group of America, Inc.; and Volvo Car USA, Inc.

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 decades, ATRA has filed *amicus* briefs in cases involving important liability issues, including the proper application of Rule 23 in class actions.

The International Association of Defense Counsel ("IADC") is an invitation-only, peer-reviewed membership organization of about 2,500 in-house and outside defense attorneys and insurance executives. IADC is dedicated to the just and efficient administration of civil justice and improvement of the civil justice system. IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has been clear that to demonstrate typicality pursuant to Rule 23(a)(3), class members and the class representative must "possess the same interest and suffer the *same injury*." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (emphasis added) (quotation omitted). Therefore, a class cannot be certified or paid when there are class members who have not sustained the same injury as that of the named plaintiff. Such class members do not have the same right of recovery on their own, and the Federal Rules of Civil Procedure, 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)). Yet, as this case shows, courts are still certifying and allowing recoveries when most, if not all, of the class has sustained either no injury or, at least, not the same injury as the named plaintiff.

Here, there is no doubt that Mr. Ramirez suffered an injury when he was unable to complete a credit transaction. *See Ramirez v. TransUnion LLC,* 951 F.3d 1008, 1016 (9th Cir. 2020). When he tried to purchase a car, a credit report from TransUnion stated that his name matched a name on the Office of Foreign Assets Control (OFAC) list of Specially Designated Nationals (SDNs) with whom business in the United States is prohibited. *See id.* Rather than sue for his injuries alone, however, Ramirez filed a class action, seeking to represent all 8,185 people to whom TransUnion sent a letter between January and July of 2011 informing them that their name was a "potential match" to the name of an SDN. *Id.* In doing so, he stipulated that more than 75 percent of the class had no third-party inquiries that could have resulted in anyone beside the class members themselves seeing the potential match alert. *See id.* Further, he offered no evidence that any absent class member suffered any injury at all, let alone one like his. After a trial focused entirely on Ramirez's idiosyncratic injury, the jury awarded significant damages to the entire class.

As a threshold matter, the Court should issue a clear ruling that, under Article III of the U.S. Constitution, a person who has not sustained a compensable injury cannot receive a payment as part of a class action in federal court—nor can such a class action be certified—regardless of whether others have experienced injury. *See Tyson Foods, Inc. v. Bouaphakeo*,

136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not. The Judiciary's role is limited 'to provid[ing] relief to claimants, individual or class actions, who have suffered, or will imminently suffer, actual harm.'" (quoting *Lewis v. Casey*, 518 U.S. 343, 349 (1996)). This standing requirement sets a low, but essential, threshold for entry to the courts.

In addition, which is the focus of this *amici* brief, the Court should ensure that lower courts are undertaking the appropriate "rigorous analysis" of Rule 23's typicality requirement, particularly with respect to the injury element of a claim. *Wal-Mart*, 564 U.S. at 350–51. As discussed below, Rule 23(a)(3)'s typicality requirement often is under-examined and under-enforced. If the lower courts had properly examined at the certification stage whether Ramirez's injury was typical of the class he sought to represent, it would have been obvious that his experience was *atypical*. The outcome of this case would have been materially different had any of the other class members been the named plaintiff. This case provides the Court an important opportunity to reinforce the proper scope and conduct of a rigorous examination of typicality during class certification. Such a ruling would have an impact beyond no-injury class actions, as here, to the many other class actions where inattention to Rule 23's typicality requirement generates distorted legal doctrines and reversible settlements.

Amici respectfully request the Court to reverse the judgment below. It should hold that a plaintiff alleging a significant injury cannot represent a class of persons where all or some of them did not suffer

the "same injury" in the words of *Wal-Mart*. Failing to apply Article III and Rule 23's typicality requirement, particularly as here, incentivizes the filing of speculative, technical or abstract class actions divorced from real world impacts or actual injuries.

ARGUMENT

I. THE COURT SHOULD DEFINE THE SCOPE OF A RIGOROUS ANALYSIS FOR TYPICALITY UNDER RULE 23(a)(3).

As this Court has explained on multiple occasions, the class action mechanism provided in Rule 23 "imposes stringent requirements," applies to a limited set of cases, and, if a properly rigorous analysis of each Rule 23 requirement is conducted, will necessarily "in practice exclude most claims" from class treatment. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013); *see also Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979) (calling the class device "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only"). The Court has also "repeatedly held that a class representative must be part of the class and possess the same interest and *suffer the same injury* as the class members." *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982) (emphasis added, internal citation omitted).

Although district courts have wide discretion in deciding whether to certify a class, they may do so only after conducting a "rigorous analysis" of all Rule 23 requirements. *Wal-Mart,* 564 U.S. at 350–51. That rigorous analysis must include an affirmative factual determination that the class complies with each Rule 23 requirement. *See id*. Yet, Rule 23's

typicality requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class," has largely gone unexamined. Fed. R. Civ. P. 23(a)(3).

Typicality, like the other Rule 23 requirements, provides important "guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and class claims are so interrelated that interests of class members will be fairly and adequately protected in their absence." *Amchem*, 521 U.S. at 626 n.20 (citing *Falcon*, 457 U.S. at 157 n.13). This requirement is not a mere speed bump on the road to inevitable certification; it entails a serious inquiry to ensure class certification is denied to claims that should not be tried—or settled—on a class-wide basis. It also balances the need for justice to be done in an efficient manner with concerns that excessive class actions can become an improper barrier to economic activity.

A. The Ninth Circuit's Ruling Illustrates the Consequences of Ignoring Typicality with Respect to Injury.

In this case, there is no doubt that Ramirez suffered injury related to TransUnion's alleged violation of the Fair Credit Reporting Act. Ramirez and his wife were negotiating to buy a car when the salesman told him—in front of his wife and father-in-law—that he could not buy the car "because he was on 'a terrorist list.'" *Ramirez*, 951 F.3d at 1017. Ramirez canceled a vacation and hired a lawyer to deal with the issue. *See id.* at 1019. But, there is no evidence that anyone else in the class suffered any injury, let alone as serious an injury as Ramirez, and there is no legal rationale for compensating them as

if they did. It should have been abundantly clear that Ramirez's claim of injury was atypical of the class. The class was erroneously certified, and the Ninth Circuit should have vacated the class-wide award.

In finding that "Ramirez's injuries were not so unique, unusual, or severe to make him an atypical representative of the class," the Ninth Circuit made a common error: it focused only on TransUnion's alleged misconduct instead of also assessing the typicality of the alleged injuries caused by that misconduct. *Id*. at 1033. To do this, the court repeatedly equated the "risk of harm" to each class member—finding the "nature of the inaccuracy is severe"—with the actual severity of Ramirez's harm. *Id.* at 1026, 1033. It was in this context that the court described Ramirez's injury as only "slightly more severe" or "more colorful" than the others. *Id.* at 1033. It further brushed aside core differences in their injuries by stating that, regardless, Ramirez's injuries "still arose from the same event or practice or course of conduct that [gave] rise to the claims of other class members and [his claims were] based on the same legal theory"—again, focusing solely on commonality of allegations against TransUnion, not on any injury caused to class members. *Id.* (internal quotation omitted). Common risks of harm arising out of similar facts and circumstances represent only part of a typicality analysis. The court must also assess the claim's other elements, namely causation and injury.

The nature of the trial compounded this error. Although the court implied it would be inappropriate for unique aspects of Ramirez's claims to become the focus of the trial, it failed to acknowledge that is exactly what happened. *See id.* (claiming after trial

"the unique aspects of Ramirez's claims" would not "threaten to become the focus of the litigation") (internal quotation omitted). Indeed, the trial focused nearly exclusively on Ramirez's atypical injury, not the risk of harm to others. *See id.* at 1038-39 (McKeown, J., dissenting) ("[T]he hallmark of the trial was the absence of evidence about absent class members, or any evidence that they were in the same boat as Ramirez."). The verdict provided the uninjured class with a huge windfall, compensating every class member as if he or she had also been denied credit, called a terrorist, and humiliated in front of family.

These individuals are not entitled to compensation as if they suffered the same harm as the named plaintiff. If a class member were substituted for Ramirez, the litigation's outcome would have been different. This case shows how far wrong a court can go in finding typicality when it does not adhere to the facts or conduct a rigorous analysis. A proper typicality analysis would have avoided this injustice.

B. The Court Should Expressly State That Typicality Applies to Each Element of the Claims and Defenses, and Relevant Facts.

The shortcomings of the lower courts' analyses provide an excellent roadmap for where guidance is needed. In overturning the Ninth Circuit here, the Court should outline the scope and factors a trial court must consider in conducting a rigorous, evidence-based analysis of typicality under Rule 23(a)(3). The starting point for this test must be an assessment of the *differences* between the named plaintiff and class members with respect to each element of the claim and defense, and whether those differences preclude them from being sufficiently in-

terchangeable. *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) ("[A]s goes the claim of the named plaintiffs, so go the claims of the class."). Here, an uninjured class member could not fairly represent Ramirez's interests; therefore, he cannot fairly represent theirs. They are not interchangeable.

In reviewing the Court's jurisprudence, as well as that of lower courts, *amici* suggest a proper evidence-based typicality test could be articulated as follows:

> A plaintiff is typical if he or she can show, through affirmative evidence, that a trial of the facts proving each element of the cause of action does not materially differ from, and would fairly resolve, the claims of all other members of the proposed class. This inquiry focuses on each element of each claim and defense, and facts that will be used to prove each claim and defense.

This test gives effect to four critical tenets for assessing typicality. First, it focuses on the *differences*, not commonalities, between the class and its representatives. Courts have found the key distinction between typicality and the other Rule 23 requirements, such as commonality, is that typicality requires the court to analyze the differences among the class members. *See Deiter v. Microsoft Corp.*, 436 F.3d 461, 466–67 (4th Cir. 2006); *cf. Dukes v. Wal-Mart Stores, Inc.*, 474 F.3d 1214, 1232 n.10 (9th Cir. 2007), *rev'd*, 564 U.S. 338 (2011) ("Commonality examines the relationship of facts and legal issues common to class members, while typicality focuses on the relationship of facts and issues between the class and its representatives.") (citing 1 Newberg on Class Actions §

3:13). Thus, a court must decide whether, despite the commonalities, there are sufficient factual or legal distinctions that would preclude certification. The case at bar is the quintessential example of how commonality and typicality differ.

Second, this test requires the named plaintiffs and proposed class to represent each other's interests *with respect to each element of the claim, including injury*. *See In re Am. Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996) ("A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members."). As a Federal district court observed, some courts look only at the allegations against the defendant, but typicality requires also examining "*the effects on the plaintiff class* of the defendant's conduct, and the degree to which those effects are similar from plaintiff to plaintiff." *In re Welding Fume Pros. Liab. Litig.*, 245 F.R.D. 279, 304 (N.D. Ohio 2007) (emphasis in original).

Third, this test requires that the *facts offered* to prove each element and defense of the claim are also typical between the class and its representatives. As demonstrated here, a "plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim." *Deiter*, 436 F.3d at 466–67. Rather, evidence used to establish their claims must be "typical of the proof of the claims of absent class members." *Id.* at 467. This analysis, as this Court has stated, requires lower courts to "probe behind the pleadings," which can be artfully drafted

to cover disparate plaintiffs, to the facts that will be used to prove the claims. *Falcon*, 457 U.S. at 160.

Fourth, the nature, allegations and outcome of a class action should not materially differ based on which member of the class is the named plaintiff. As Judge Posner has explained: "A class is disserved if its representative's claim is not typical of the claims of the class members, for then if his claim fails, though claims of other class members may be valid, the suit will at the least be delayed by the scramble to find a new class representative." *CE Design Ltd. v. King Architectural Metals, Inc.* 637 F.3d 721, 724 (7th Cir. 2011) (Posner, J.). "Alternatively, a class representative's atypical claim may prevail on grounds unavailable to the other class members, leaving them in the lurch." *Id.*

These principles—assessing differences between the class and named plaintiffs' claims and defenses, as well as facts used to prove each claim and defense, to weed out atypically strong or weak class representatives—adds an explicit recognition of the Court's requirement that named plaintiffs proffer affirmative evidence that the class complies with each Rule 23 requirement. *See Wal-Mart,* 564 U.S. at 350. Adhering to them will help restore order to class litigation and curb payments to mixed or uninjured class members represented by atypical plaintiffs.

II. ENFORCING TYPICALITY OF INJURY WOULD HELP AVOID PROBLEMS CAUSED BY MIXED AND NO INJURY CLASSES.

The considered experience of *amici* and their members is that "[w]ithout the governor of common injury required by *Wal-Mart*," plaintiffs and their at-

torneys will look for ways to sue for classes that are undeserving, for monetary awards that are excessive, and in situations where personal injury or other legal theories are more appropriate. Editorial, *Supreme Laundry List*, Wall St. J., Oct. 9, 2012. Counsel are lured by the notion that class litigation may allow them to evade difficult individualized questions of causation and damage and generate settlement pressure irrespective of the merits of the claims. *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).

For example, in the past few decades, *amici* manufacturers have seen a decided shift in product based-claims: plaintiffs file lawsuits under novel class theories in an effort to avoid the traditional elements and defenses of products liability. *See* Sheila B. Scheuerman, *Against Liability for Private Risk-Exposure*, 35 HARV. J.L. & PUB. POL'Y 681, 691 (2012). This includes using pure statutory theories of harm, as here, where the class did not suffer harm. For example, there has been a cottage industry of class actions alleging various food labels were deceptive, even when no reasonable consumer could have been tricked by the allegedly deceptive labels. *See* Schwartz & Silverman, *supra*, at 654-73.

The practical impact of allowing such claims is antithetical to the purpose of Rule 23 and the Rules Enabling Act. The failure to properly apply Rule 23's typicality requirement is generating litigation that ought not to exist and facilitating litigation gamesmanship, rather than creating, as the Rule intended, a limited exception to traditional litigation.

A. Atypical Plaintiffs Generate Unwarranted Awards for Those Without the Same Injury in Product and Other Contexts.

Many of *amici's* members manufacture products, including automobiles. Class actions alleging product defects typically involve a product that may have malfunctioned for a few people, including the named plaintiffs, but has not caused any problem for the vast majority of consumers. *See id.* at 628-48. Rather than represent only those harmed by the defective product, counsel create novel class claims, for example, by alleging all consumers, including those fully satisfied with their products, experienced some theoretical economic loss. This situation is comparable to the case at bar: a named plaintiff alleging a concrete, measurable injury is improperly deemed "typical" of a class of people who suffered only risks or abstract harms. The atypical aspects of the named plaintiffs' claims infect the entire case, including the outcome.

Some courts have been rightly skeptical of these class actions. The Fifth Circuit characterized these claims as, "you sold it, I bought it, there was a defect in the product's design or warnings, other patients were injured, pay me." *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 321 (5th Cir. 2002). This is not a proper liability theory. In automotive class actions, plaintiffs often allege that an alleged defect poses grave safety concerns, but then disclaim any personal injury claims, and shy away from proposing any technical solutions. *See* Schwartz & Silverman, *supra*, at 633-41 (discussing cases). Because there is no "typical" actual harm, they focus on the *risk of harm*, which they argue is uniform, like in the case here. *See Ramirez,* 951 F.3d at 1025. Doing so allows them

to improperly claim a "common issue," and improperly call an atypical representative "typical" of the injury claimed on behalf of the class.

Similarly, plaintiffs' lawyers leverage statutes such as the Telephone Consumer Protection Act (TCPA), which awards statutory damages without requiring a showing of injury. *See* 47 U.S.C. § 227(b)(3)(B) (awarding the greater of $500 or actual monetary loss). In order to create a certifiable class of uniform claims, plaintiffs in these class actions will "trim" any actual damages from the proposed class, but drive the narrative of the case through the few class members who might have such injuries. *See* Scott J. Hyman & Rebecca Snavely Saelao, *The Effect of Claim-Trimming on Class Certification in TCPA Cases,* 71 CONSUMER FIN. L.Q. 83, 88 (2017) (discussing waiver and preclusion of actual injuries). The same scenario could arise with other privacy-related statutes, including the Biometric Information Privacy Act or the Stored Communications Act.

Circuit courts have increasingly grappled with whether to certify such mixed-injury classes. Both the First Circuit and the D.C. Circuit have recently held that certification is not appropriate where it was clear significant percentages of the class members had not been injured, let alone in the same way as the named plaintiffs had. *See, e.g., In re Asacol Antitrust Litig.*, 907 F.3d 42, 58 (1st Cir. 2018); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F. 3d 619, 624 (D.C. Cir. 2019). These courts focused on Rule 23's predominance requirement, but an evidence-based inquiry into typicality would reveal the deficiencies in more cases because the courts would focus on the differences in injuries between the actu-

ally-injured named plaintiffs and the significant percentage of uninjured class members. When broadening the scope of a lawsuit into a class action, plaintiffs cannot pull the lens so far back that facts and elements lack any definition.

B. Proper Typicality Inquiries with Respect to Injury Would Expose Meritless Abstract-Harm Cases.

A rigorous assessment of typicality of the alleged injury would also expose cases where the injury suffered by anyone is abstract at best, but class counsel nevertheless has identified a plaintiff to front the class. In these cases, the harm alleged is akin to most of those here—it is based on risk, not actual injury. No one's product has actually failed or caused any harm. So they develop alternative theories that would not make sense if brought individually, such as the "benefit of the bargain" or diminution of value based on a potential failure. *See Cahen v. Toyota Motor Corp.*, 717 Fed. App'x 720, 723 (2017).

Flynn v. FCA US LLC, 327 F.R.D. 206 (S.D. Ill. 2018) provides a valuable example. *Flynn* was a class action alleging FCA's Uconnect infotainment system was susceptible to hacking by malicious third parties. *See id.* None of the plaintiffs had ever been hacked. The Uconnect system had been penetrated once under controlled conditions in a laboratory. *See id.* at 215. An article in *WIRED* magazine about the flaw led to a voluntary recall that addressed the issue. *See id.* at 213. Nonetheless, the plaintiffs filed a class action asserting breach of implied warranty, unjust enrichment, and various fraud-based claims on the grounds that they had overpaid for vehicles

susceptible to hacking, and asserted without proof that the problem was not fully fixed. *See id.* at 214.

As part of its defense, FCA filed summary judgment against each named plaintiff. The trial court dismissed the unjust enrichment claims, but preserved implied-warranty and statutory-fraud claims, finding factual disputes over whether the plaintiffs changed their driving habits (indicating the vehicles were not merchantable), and whether susceptibility to hacking had been material to any of their decisions to buy their vehicles (necessary to prove fraud). *See id.* at 217, 220. Then, despite the presence of these individualized factual disputes, the court certified a nationwide implied-warranty class and several statewide statutory-fraud classes. It found the named plaintiffs were typical of the proposed class in a single boilerplate paragraph, without making any factual findings whatsoever. *See id.* at 223. The Seventh Circuit declined to review certification under Rule 23(f). The case was ultimately assigned to a different judge, and dismissed on standing grounds. *See Flynn v. FCA US LLC,* No. 15-cv-855-SMY, 2020 WL 1492687 (S.D. Ill. Mar. 27, 2020).

The *Flynn* certification had industry-wide implications. Connected devices are at the forefront of major innovations across society. In the auto industry alone, "[n]early 100% of cars on the market include wireless technologies." *Cahen*, 717 F. App'x at 723. No wonder plaintiffs' counsel in *Flynn* had previously told a cybersecurity law conference that lawyers were "salivating" over the case and that a "tidal wave" of cases is "about to be triggered." Ben Kochman, *A Deluge of Suits Over Connected Devices*

Could be Coming, Law360, Aug. 24, 2018.[3] Some lawyers reportedly set up forensic labs to find security gaps in products to leverage the *Flynn* ruling for more cases. *See id.*

Like *Flynn,* abstract-harm lawsuits are largely lawyer-driven and designed to leverage lax class certification analyses. These cases are often perversely filed *after* a company has reported a potential problem, undertaken a voluntary recall or repair program under the warranty, and offered to fix the problem free of charge. Also, any asserted value of such private enforcement of risk regulation is not reliable, tends to over-deter legitimate behavior, and can hamstring governmental attempts to effectively regulate public risks. *See* David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 633-37 (2013).

Requiring a rigorous typicality finding in *Flynn*, based on an affirmative factual showing, and examining the likelihood that the class's fate would have rested on disputed facts about the plaintiffs' driving habits and purchasing decisions, might have resulted in recognition that the case would not result in a fair class-wide trial, and saved two years of litigation.

Another popular genre of abstract harm cases do not involve damages at all. For example, recent food-labeling class actions often rest on a named plaintiff alleging he or she bought the product based on a misperception of a product's size or ingredients even though the label was accurate. *See, e.g., Berni v. Barilla, S.P.A.,* 964 F.3d 141 (2d Cir. 2020) (plaintiff al-

[3] https://www.law360.com/articles/1076358/a-deluge-of-suits-over-connected-devices-could-be-coming.

leged he was deceived by the size of a pasta box, even though the label accurately described amount of pasta in the box). The remedy sought to try to justify the lawsuit may be an injunction requiring disclosures to warn future purchasers of the potential confusion, even though the named plaintiff has no ongoing misunderstanding about the product. A proper typicality inquiry would reveal that the named plaintiff is not typical of the absent class members and should not be able to convert any such misunderstanding into a novel, speculative class action.

C. Atypical and No-Injury Cases Lead to Settlements Fraught with Conflicts.

Certifying class actions inflated with uninjured or highly differently injured members also hinders the ability of federal courts to generate sound results. Certification is often the decisive turn in class action litigation. *See, e.g., Marcus v. BMW of N. Am.,* 687 F.3d 583, 591 n.2 (3d Cir. 2012) ("As a practical matter, the certification decision is typically a game-changer, often the whole ballgame for plaintiffs and plaintiffs' counsel."). "[It] 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). 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., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting).

It is difficult to value a class action where many class members have not suffered any injury, or entirely dissimilar injuries from each other. *See gener-*

ally Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements,* 60 L. & CONTEMPORARY PROBLEMS 97 (1997). There often is little interest among absent class members to claim an award in these cases because they do not feel aggrieved. *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 Andrew Pincus on behalf of the U.S. Chamber of Commerce) (reporting on empirical analysis by his law firm).

Compounding this problem, settling attorneys often turn to questionable injunctive relief, as in the food slack-fill cases discussed above, and *cy pres* relief to counteract the lack of the class's engagement. Their goal is to create enough apparent value in the case to justify releasing the claims and the awarding of attorney fees. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (Posner, J.) (discussing incentives behind problematic settlements). As a result, the bulk of the money in these cases does not go to injured individuals, but third parties and attorneys (and sometimes, uninjured class members). These tactics have led to concrete grounds for public objections. In the last few years alone:

- In *Chapman v. Tristar Prods., Inc.,* 940 F.3d 299 (6th Cir. 2019), a class action alleging certain pressure cookers had defective lids "which exposed the user to possible injury" resulted in a settlement offering coupons and warranty extensions worth $1.02 million to the class, and $1.98 million in attorneys' fees. The settlement was so lopsided it drew a rare objection from the

Arizona Attorney General. *See id.* at 302. (The Sixth Circuit dismissed the Attorney General's appeal as lacking standing. *See id.* at 307.)

- In *Berni* (discussed above), a settlement of a "slack fill" class action that alleged that Barilla had put its pasta into deceptively large boxes despite accurately describing the amount for sale resulted in a settlement where the class received only a disclaimer, while attorneys pocketed $450,000 in fees. *See* 964 F.3d at 141. The Second Circuit ultimately reversed the settlement because the disclaimer offered no relief to many class members, namely past purchasers of Barilla pasta. *See id.* at 148.
- In *Chambers v. Whirlpool Corp.,* No. 16-5666, 2020 WL 6578233 (9th Cir. Nov. 20, 2020), a settlement of a class action alleging that dishwashers had a propensity to overheat resulted in a settlement with relief worth only $4.2 million to class members, but $14.8 million in attorneys' fees. The reason for the disparity is that only 0.2% of the dishwashers had actually experienced overheating. *See id.* at *2. The Ninth Circuit vacated the attorneys' fee because the relief offered had been a rebate with so many restrictions it was tantamount to a manufacturer's coupon. *See id.* at *7. Plaintiffs' counsel had claimed a fee based on $116.7 million of "available" relief, even though actual payments to class members totaled only $4.2 million.

In each case, the attempt to settle a mixed- or no-injury case resulted in terms favorable to attorneys but not the members of the class. A more rigorous,

evidence-based typicality inquiry would have stopped these settlements in their tracks.

* * *

"In an era of frequent litigation [and] class actions . . . courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011). The same is true for certification. American businesses spent $2.64 billion on class action litigation last year. *See* Carlton Fields, *2020 Carlton Fields Class Action Survey*, at 4 (2020).[4] About 54.9% of major companies are engaged in class actions, with the average number of class matters per company rising from 7.8 in 2018 to 10.2 in 2019. *See id.*

As can be seen here, certifying class actions and allowing class-wide recoveries fronted by those with severe injuries but inflated with largely uninjured class members hinders the ability of federal courts 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. Thus, these class actions do not provide "access to justice," but open the courthouse doors for unprincipled litigation.

CONCLUSION

For these reasons, *amici curiae* respectfully request that the Court reverse the ruling below.

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[4] https://classactionsurvey.com/.

Respectfully submitted,

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Dated: February 8, 2021