No. 11-740

In the Supreme Court of the United States

ZURN PEX, INC., ET AL., PETITIONERS

v.

DENNIS AND TERRY COX, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (Chamber) is the world's largest federation of business companies and associations. It directly represents 300,000 members and indirectly represents the interests of over 3 million business, trade, and professional organizations of every size, in every business sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, it regularly files briefs as amicus curiae, both in this Court and in other

courts, in cases raising issues of vital concern to the business community.[1]

This case presents a question of enormous practical importance to the Chamber's members: *viz.*, whether the requirements for the admissibility of expert testimony in Federal Rule of Evidence 702 and this Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), apply with full force to expert testimony offered in connection with class certification. In the decision below, the Eighth Circuit held that they do not. That holding directly implicates the interests of the Chamber's members, which are frequently the targets of abusive class actions premised on unreliable junk science. The Chamber filed a brief as an amicus curiae in this Court in *Daubert*. In addition, the Chamber has extensive experience litigating issues relating to class actions and has frequently participated as an amicus curiae in cases presenting those issues. For example, the Chamber recently filed briefs at both the certiorari and merits stages in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). Accordingly, the Chamber has a substantial interest in the question presented here.

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus, its members, or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for all parties received notice of amicus's intent to file this brief at least ten days before the due date. The parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

SUMMARY OF ARGUMENT

As the petition for certiorari explains, the Eighth Circuit's decision implicates a circuit conflict on whether the requirements of Rule 702 and *Daubert* apply with full force to expert testimony offered in connection with class certification. At least two courts of appeals have unambiguously held that those requirements apply equally at the class-certification stage as at trial—and that junk science therefore has no place in federal court, regardless of the stage at which a party seeks to introduce it. See *American Honda Motor Co.* v. *Allen*, 600 F.3d 813, 815-816 (7th Cir. 2010); *Sher* v. *Raytheon Co.*, 419 Fed. Appx. 887, 890-891 (11th Cir. 2011).

The Eighth Circuit's contrary holding is deeply flawed, and, if allowed to stand, will have sweeping and often outcome-determinative consequences. The facts of this case amply illustrate the point, because the district court candidly acknowledged that the expert opinions on which it was relying in granting class certification may flunk the *Daubert* test and thus "may not be admissible" at trial. Pet. App. 57a-59a. If a federal court can certify a class based on junk science that would not withstand full *Daubert* scrutiny, it will "place[] inordinate or hydraulic pressure on defendants to settle" even in meritless cases. *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001).

The approach adopted by the Eighth Circuit effectively outsources a key judicial function—ensuring compliance with the requirements for class certification in Federal Rule of Civil Procedure 23—to experts who have been retained, and are usually being compensated, by the parties. And the consequence of that approach is to lower the bar for class certification, and thus to raise the cost of doing business in the wide variety of industries that find themselves perennial targets of the plaintiffs'

bar. In that regard, the Eighth Circuit's decision is inconsistent not only with Rule 702 and *Daubert* itself, but also with this Court's decisions construing the requirements for class certification—most notably, the Court's recent decision in *Wal-Mart*, which emphasized that a court must "probe behind the pleadings" at the class-certification stage and expressed "doubt" about the very approach adopted by the Eighth Circuit here. 131 S. Ct. at 2551, 2553-2554 (internal quotation marks and citation omitted).

Finally, although the specific question presented itself merits further review, the petition should also be granted to resolve broader uncertainty about whether and how the Federal Rules of Evidence apply outside the specific context of trial. By the plain terms of Rule 101, the Rules of Evidence apply to all proceedings in federal court, subject only to limited enumerated exceptions. But there is no exception either for class-certification proceedings or for the many other types of civil pretrial proceedings (such as preliminary-injunction hearings) at which parties routinely present evidence. As numerous courts have held, the logical conclusion is that the Rules of Evidence apply with full force in pretrial proceedings. Like the Eighth Circuit here, however, numerous other courts have held to the contrary. This Court's guidance is sorely needed on that broader issue, as well as on the specific issue of *Daubert*'s applicability at the class-certification stage. The Chamber therefore respectfully urges the Court to grant review and to reverse the decision below.

ARGUMENT

I. THE EIGHTH CIRCUIT'S DECISION IS ERRONEOUS

This case lies at the intersection of two core judicial duties: a court's duty, when considering class certification, to ensure "actual, not presumed, conformance with Rule 23[]," *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 160 (1982), and its separate duty, when considering expert testimony, to "exclud[e] expertise that is *fausse* and science that is junky," *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 159 (1999) (Scalia, J., concurring). Put simply, a court cannot satisfy the first duty without also fulfilling the second. Where a court certifies a class based on evidence that may not withstand full *Daubert* scrutiny, as the district court did here, it effectively allows certification based on something less than full compliance with the requirements of Rule 23. The practical effect is substantially to lower the threshold for class certification and thereby to increase the potential for coercive settlements in meritless class actions. Although decisions about the admissibility of expert testimony under *Daubert* may be difficult in particular cases, there is no valid justification for punting on those decisions at the class-certification stage and deferring them until trial. This Court should grant review to correct the Eighth Circuit's erroneous approach.

A. The Expert Testimony Offered By Plaintiffs In This Case Would Fail The Requirements Of *Daubert*

In seeking to satisfy the requirements for class certification—specifically, the requirements that there be common issues and that the common issues predominate over individual issues—plaintiffs in this case submitted expert evidence purporting to show, first, that the plumbing systems manufactured by defendants would fail at some point during the warranty period, and

second, that the systems are inherently defective. Although much of the evidence was submitted under seal, the broad contours of the evidence are clear from the lower courts' opinions. As to the first contention, plaintiffs offered expert testimony by a statistician, Dr. Wallace Blischke, who opined that 99% of the class would experience a system failure during the warranty period. Pet. App. 5a. By his own admission, however, Dr. Blischke based his calculation not on hard data or accepted industry standards, but rather on a series of unsubstantiated assumptions about defendants' systems: in particular, the assumption that the systems had a useful life of 40 years. *Ibid.*

As to the second contention, plaintiffs submitted evidence that was equally suspect. Specifically, plaintiffs offered expert testimony by a metallurgist, Dr. Roger Staehle, who conducted a stress analysis to determine whether defendants' systems would fail when used under normal operating conditions. Pet. App. 58a-59a. But rather than first determining how much stress is typically placed on the systems and then determining whether the systems would hold up under those conditions, Dr. Staehle appears to have conducted the test by working backwards: he subjected a sample of the key material used in the systems to stress testing, determined that the material cracked at a particular level of stress, and then concluded that this stress level reasonably approximated the stress level present under normal operating conditions. Pet. 5-6; Pet. App. 15a, 58a-59a.

It would be hard to imagine clearer examples of the type of opinion evidence that *Daubert* was intended to exclude—"opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Electric Co.* v. *Joiner*, 522 U.S. 136, 146 (1997). Indeed, the district court's own misgivings about the testimony of

plaintiffs' experts are evident on the face of its opinion. Although the district court ultimately relied on the experts' testimony in granting class certification, it expressly declined to hold that they would withstand full *Daubert* scrutiny. See, *e.g.*, Pet. App. 57a-58a (noting that Dr. Blischke's testimony on the systems' useful life "may or may not be admissible"); *id.* at 59a (declining to strike Dr. Staehle's testimony "at this stage of the proceedings"). The Eighth Circuit, too, stopped well short of blessing the experts' testimony. See, *e.g.*, *id.* at 18a (noting only that "[t]here is nothing in the record at this stage to show that Dr. Blischke's opinions are so fundamentally unsupported as to require exclusion") (internal quotation marks and citation omitted); *id.* at 15a-16a (same as to Dr. Staehle).

B. The Eighth Circuit's Approach Dramatically Lowers The Bar For Class Certification

The problems with the testimony of plaintiffs' experts in this case reflect the fundamental problem with the Eighth Circuit's legal rule: as a practical matter, it dramatically lowers the threshold for class certification. At the outset, it is important to remember that the familiar *Daubert* factors—whether an expert's theory has been tested, has been subjected to peer review, has a known or potential rate of error, and enjoys general acceptance, see 509 U.S. at 593-594—do not require absolute perfection. A trial court applying *Daubert* must simply ensure that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152. An expert's opinion may therefore be admissible under *Daubert* "even if the judge thinks that [an expert's] methodology has some flaws such that if they had been corrected, the [expert] would have reached a differ-

ent result." *In re Paoli Railroad Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994), cert. denied, 513 U.S. 1190 (1995). The lower courts' evident doubts about whether the testimony of plaintiffs' experts would be admissible under *Daubert* amply demonstrate just how low those courts set the bar for class certification in this case.

In holding that *Daubert*'s requirements for the admissibility of expert testimony do not apply with full force at the class-certification stage, the Eighth Circuit reasoned that "an exhaustive and conclusive *Daubert* inquiry" would be incompatible with the "inherently preliminary" nature of a class-certification decision. Pet. App. 12a. To begin with, the class-certification decision in this case occurred at an advanced stage of the litigation—almost two years after the Judicial Panel on Multidistrict Litigation initially transferred this case to the District of Minnesota, see *id.* at 54a, and only after the parties had conducted substantial discovery on the issues relating to class certification, see *id.* at 3a.

More broadly, describing any class-certification decision as "inherently preliminary" considerably downplays its significance. The class-certification decision will often be the most important decision a trial court makes in a class action; indeed, one commentator has described it as "the whole shooting match." David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN's Prod. Liab. L. & Strategy 10 (Feb. 2009). That is true for a familiar reason this Court has repeatedly recognized: "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978).

Rather than bearing the often asymmetric costs of litigation and risking even a marginal chance of defeat at

trial, most rational defendants will succumb to what Judge Friendly aptly termed "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). That intuition, moreover, has amply been borne out in practice: a recent study found that, once certification has been granted, approximately 90% of class actions settle. Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (2005). And the pressure to settle even meritless class actions results in windfalls for the plaintiffs' bar—and ultimately results in higher prices for consumers, as defendants pass along the costs of those settlements. See, *e.g.*, *Ronconi* v. *Larkin*, 253 F.3d 423, 428 (9th Cir. 2001). As a practical matter, there can be no dispute that the Eighth Circuit's approach will exacerbate that pressure, by making it easier for plaintiffs with meritless claims to pass through the class-certification gateway.

C. The Eighth Circuit's Approach Is Inconsistent With The 'Rigorous Analysis' Required At The Class-Certification Stage And Delegates The Class-Certification Decision To Party-Appointed Experts

Recognizing the significance of class-certification decisions, this Court has stressed that trial courts should undertake a "rigorous analysis" of whether the requirements for class certification have been met. *General Telephone*, 457 U.S. at 161. It is often appropriate for courts to consider expert testimony at the class-certification stage—and it is not uncommon for that testimony to go to the heart of one or more of the Rule 23 requirements, as the expert testimony did here. Accepting an expert's conclusions without an independent assessment of his methodology, however, is inconsistent with the "rigorous analysis" required at the class-certification stage; instead, it bespeaks undue passivity

at best and a bias toward class certification at worst. And the practical effect of such lax scrutiny is to "hand[] off to experts"—who have been retained, and are usually being compensated, by the parties—the task of ensuring compliance with the requirements for class certification. Kermit Roosevelt, III, *Defeating Class Certification in Securities Fraud Actions*, 22 Rev. Litig. 405, 425 (2003).

Mindful of the need for "rigorous analysis," the Seventh Circuit has adopted what one commentator describes as a "*Daubert*-plus" approach to expert testimony at the class-certification stage. Heather P. Scribner, *Rigorous Analysis of the Class Certification Expert*: *The Roles of 'Daubert' and the Defendant's Proof*, 28 Rev. Litig. 71, 99 (2008). Under that approach, not only must a trial court apply *Daubert* in determining the admissibility of an expert's testimony; it must go further and resolve any factual disputes *between* experts at the class-certification stage. See, *e.g.*, *West* v. *Prudential Securities, Inc.*, 282 F.3d 935, 938 (7th Cir. 2002). In applying that approach, the Seventh Circuit explained that the failure to weigh competing expert testimony would "amount[] to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *Ibid.*[2]

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[2] More recently, the Ninth Circuit has also held that a trial court must do more than simply determine whether expert testimony in support of class certification is admissible under *Daubert*. See *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 970, 982 (2011) (reasoning that the district court "correctly applied the evidentiary standard set forth in *Daubert*" to expert evidence at the class-certification stage, but adding that, "to the extent the district court limited its analysis of whether there was commonality to a determination of whether [p]laintiffs' evidence on that point was admissible, it did so in error").

Even if a trial court is not required conclusively to resolve disputes between experts at the class-certification stage, however, it is hard to see how a court could rigorously analyze the class-certification requirements without determining whether expert testimony pertinent to those requirements meets the minimum standards for helpfulness and reliability under *Daubert*. After all, the key teaching of *Daubert* is that evidence that is not scientifically valid is unhelpful—*i.e.*, it does not "assist the trier of fact to understand the evidence or to determine a fact in issue," as Rule 702 requires. See *Daubert*, 509 U.S. at 591; *Dukes* v. *Wal-Mart Stores, Inc.*, 603 F.3d 571, 640 n.16 (9th Cir. 2010) (Ikuta, J., dissenting), rev'd, 131 S. Ct. 2541 (2011). In this case, by crediting the testimony of plaintiffs' experts for purposes of the class-certification decision, the lower courts effectively determined that the testimony was helpful, even though it "may or may not" be scientifically valid and therefore satisfy the *Daubert* standard. See, *e.g.*, Pet. App. 58a.

The lower courts' decisions in this case appear to have been motivated by a desire to defer difficult decisions on the admissibility of expert testimony until a later point in the litigation. See, *e.g.*, Pet. App. 11a-12a, 55a-56a. Such a desire, however, does not justify a legal rule that contemplates anything less than a full-fledged *Daubert* inquiry at the class-certification stage. To be sure, the *Daubert* inquiry routinely requires courts to make difficult decisions on complex scientific matters that may be outside their comfort zone. But those difficulties do not abate after class certification, and it is a court's affirmative obligation to ensure "actual, not presumed, conformance with Rule 23[]" even where the Rule 23 analysis is difficult. *General Telephone*, 457 U.S. at 160. There is no valid justification for relaxing that

obligation simply because the Rule 23 analysis turns in whole or in part on expert testimony.

D. The Eighth Circuit's Approach Conflicts With This Court's Decision In *Wal-Mart*

The legal rule adopted by the Eighth Circuit not only is inconsistent with this Court's decisions construing the requirements for class certification more generally; it also cannot be reconciled with the Court's recent decision in *Wal-Mart*. In its opinion, the Court expressed "doubt" about the district court's conclusion in that case that *Daubert* does not apply at the class-certification stage. 131 S. Ct. at 2554. Remarkably, the Eighth Circuit brushed aside the Court's statement in a footnote. See Pet. App. 10a n.5.

More broadly, however, the conclusion that *Daubert* applies with full force to expert testimony offered in support of class certification flows directly from one of *Wal-Mart*'s central holdings: namely, that, in order to demonstrate actual compliance with the commonality requirement of Rule 23(a), the named plaintiff must satisfy the court that it will be possible to use classwide proof to prove the class members' claims at trial. In *Wal-Mart*, the Court explained that "[w]hat matters to class certification * * * is not the raising of common 'questions'—even in droves—but[] rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." 131 S. Ct. at 2551 (internal quotation marks and citation omitted). For that reason, the Court concluded, with respect to the commonality requirement, that the named plaintiff must demonstrate that it will be possible at trial to "resolve an issue that is central to the validity of each one of the [class members'] claims *in one stroke*." *Id.* (emphasis added).

If a named plaintiff seeks to satisfy the commonality requirement at the class-certification stage with evidence that would be inadmissible at trial, he has not demonstrated that it will be possible to resolve the class members' claims at trial "in one stroke," and certification must therefore be denied. See *Behrend* v. *Comcast Corp.*, 655 F.3d 182, 215 n.18 (3d Cir. 2011) (Jordan, J., dissenting in part) (noting that "[a] court should be hard pressed to conclude that the elements of a claim are capable of proof through evidence common to a class if the only evidence proffered would not be admissible as proof of anything"). Were the rule otherwise, it would greatly increase the risk that a trial would become an unwieldy spectacle of the type Rule 23 is designed to guard against—a risk posed by this very case as a result of the Eighth Circuit's decision.

Plaintiffs contend that the claims at issue here are appropriate for resolution on a classwide basis on the ground that defendants' plumbing systems are inherently defective. But their only evidence of an inherent defect comes in the form of the expert testimony discussed above—expert testimony that the district court acknowledged "may or may not be admissible" at trial. Pet. App. 58a. If that testimony is ultimately excluded, there is no reason to believe that plaintiffs will be able to prove *any* element of their claims on a classwide basis, resulting in a trial that is little more than an aggregation of individualized proofs. That sort of unmanageable proceeding is surely not what the framers of Rule 23 contemplated—nor what this Court contemplated when it interpreted Rule 23's requirements in *Wal-Mart*.

II. THIS CASE IMPLICATES BROADER UNCERTAINTY ABOUT WHETHER AND HOW THE FEDERAL RULES OF EVIDENCE APPLY OUTSIDE THE TRIAL CONTEXT

Finally, this case also warrants further review because it implicates broader uncertainty about whether and how the Federal Rules of Evidence apply outside the specific context of trial.

Federal Rule of Evidence 101(a) provides that "[t]hese rules apply to proceedings in United States courts." Although Rule 1101(d) contains certain enumerated exceptions to that general rule, it contains no exception for class-certification proceedings, or for the many other types of civil pretrial proceedings (such as preliminary-injunction hearings) at which parties routinely present evidence. And with specific regard to the requirements of *Daubert*, Rule 702 requires the "trier of fact"—whether a judge or a jury—to determine whether the proffered expert opinion is helpful and reliable. As a logical matter, therefore, the conclusion that the Federal Rules of Evidence apply with full force in class-certification proceedings is seemingly inescapable.

Applying the plain language of the rules, numerous courts have held that the Federal Rules of Evidence apply with full force in the class-certification context. See, *e.g.*, *DeRosa* v. *Massachusetts Bay Commuter Rail Co.*, 694 F. Supp. 2d 87, 95 (D. Mass. 2010); *Lewis* v. *First American Title Insurance Co.*, 265 F.R.D. 536, 544 (D. Idaho 2010); cf. *Mars Steel Corp.* v. *Continental Bank, N.A.*, 880 F.2d 928, 938 (7th Cir. 1989) (fairness hearing under Federal Rule of Civil Procedure 23(e)). Like the courts below, however, other courts have held that the Rules of Evidence either do not apply at all or apply in a substantially relaxed manner. See, *e.g.*, *Fisher* v. *Ciba Specialty Chemicals Corp.*, 238 F.R.D. 273, 279 (S.D.

Ala. 2006); *Bell* v. *Addus Healthcare, Inc.*, No. C06-5188, 2007 WL 3012507, at *2 (W.D. Wash. Oct. 12, 2007). Lower courts have specifically disagreed on questions such as whether the prohibition against hearsay applies in class-certification proceedings. Compare, *e.g.*, *DeRosa*, 694 F. Supp. 2d at 99 (noting that hearsay evidence may not be used to show commonality), with *Paxton* v. *Union Nat'l Bank*, 688 F.2d 552, 562 n.14 (8th Cir. 1982) (noting that hearsay evidence may be used to show typicality), cert. denied, 460 U.S. 1083 (1983). And confusion reigns on the applicability of the Rules of Evidence to other types of pretrial proceedings as well. Compare, *e.g.*, *Pass & Seymour, Inc.* v. *Hubbell Inc.*, 532 F. Supp. 2d 418, 436 (N.D.N.Y. 2007) (noting that the Rules apply to preliminary-injunction proceedings), with *Heideman* v. *South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (noting that the Rules do not apply).

In the decision below, the Eighth Circuit made no effort to come to terms with the language of the applicable Federal Rules of Evidence. Instead, the court reasoned that the key concern animating *Daubert*—"protect[ing] juries from being swayed by dubious scientific testimony"—was "not implicated at the class certification stage where the judge is the decision maker." Pet. App. 12a. But just as Rule 101 draws no distinction between class-certification proceedings and trials, Rule 702 draws no distinction between judges and juries. Instead, it applies whenever the "trier of fact" is confronted with an expert opinion. Accordingly, several courts of appeals have confirmed that *Daubert* applies not just at jury trials, but at bench trials as well. See *Metavante Corp.* v. *Emigrant Savings Bank*, 619 F.3d 748, 760 (7th Cir. 2010), cert. denied, 131 S. Ct. 1784 (2011); *Attorney General* v. *Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009); *Seaboard Lumber Co.* v. *United States*, 308 F.3d 1283, 1302

(Fed. Cir. 2002). Whatever flexibility courts may have in fashioning context-specific procedures to determine whether the requirements of *Daubert* have been met, there is no valid justification for relaxing the standard of admissibility altogether in the class-certification context, as the Eighth Circuit has done.

* * * * *

Junk science should have no more impact on a judge's decision to certify a class than it does on a jury's resolution of the underlying claims. The question of how to determine the admissibility of expert testimony at the class-certification stage is one of enormous importance to the Chamber and its members. The Court should grant review to resolve that question and reverse the Eighth Circuit's erroneous decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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