No. 12-113

IN THE
Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED,

Petitioner,

v.

GEORGE MCREYNOLDS ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Product Liability Advisory Council ("PLAC"), and the Chamber of Commerce of the United States of America ("Chamber"), respectfully submit this brief as *amici curiae* in support of petitioner Merrill Lynch, Pierce, Fenner & Smith Inc. ("petitioner" or "Merrill Lynch").[1]

STATEMENT OF INTEREST

PLAC is a non-profit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers.[2] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amici curiae* state that petitioner and respondents, upon timely receipt of notice of PLAC's and the Chamber's intent to file this brief, have consented to its filing.

[2] A list of PLAC's current corporate membership is attached to this brief as Appendix A.

product-liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed more than 800 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. Like PLAC, the Chamber represents the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business. The Chamber has participated as *amicus curiae* in more than 1,800 cases since the founding of the National Chamber Litigation Center in 1977, including briefing before this Court in *Wal-Mart Stores, Inc. v. Dukes*.

The members of PLAC and the Chamber have an interest in the ruling below, which has implications for litigation that extend far beyond the employment-discrimination context. The Seventh Circuit's endorsement of "issues classes" as a back door around the Rule 23(b) requirements for class certification will likely promote an expansion of class-action litigation in numerous other types of cases, including those sounding in product liability. If allowed to stand, the ruling thus has the potential to dramatically and unfairly increase the class-action exposure of *amici*'s members, not to mention all companies doing business in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition presents an important question: in essence, whether this Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), would have been resolved differently if only the plaintiffs had thought to propose certification of a single issue for class treatment rather than seeking class treatment of all issues in the case. As the petition sets forth in detail, the U.S. Court of Appeals for the Seventh Circuit acknowledged that the substance of this case is much the same as *Dukes*; accordingly, the class does not present any common issue and should not have been certified for that reason alone. *See* Pet. at 14-22. Nonetheless, the court thought it could reach a different result by ordering the district court to certify a single "issue" for class treatment: plaintiffs' theory that Merrill Lynch's employment policies have a disparate impact on African-American financial advisers ("FAs").

Even apart from the lack of any common questions, the Seventh Circuit's approach was flawed for three reasons. First, the Seventh Circuit's ruling is contrary to the text, structure and intent of Rule 23, which provides that "[a] class action may be maintained if Rule 23(a) is satisfied *and* if" Rule 23(b)(1), (2), or (3) is met. In particular, class certification under Rule 23(b)(2) is permitted only where "the party opposing the class has acted or refused to act on grounds *that apply generally* to the class" (emphasis added), which ensures the necessary cohesion among class members seeking injunctive relief. The Court of Appeals disregarded this language by crafting a supposedly common phase in which the jury would be

free to ignore all the grounds that did not "apply generally to the class" and that might lead to different conclusions regarding the propriety of injunctive (or other) relief.

Second, an "issue" trial cannot be had without violating the Seventh Amendment. Although the Court of Appeals did not specify whether the first phase would be tried by judge or jury, either approach would violate important jury-trial rights. A bench trial would be improper because any factual findings would impermissibly bind subsequent juries and thereby deprive petitioner of the right to have those juries make controlling findings on issues of fact. A first-phase jury trial, meanwhile, would violate the Reexamination Clause of the Seventh Amendment. Remarkably, the Court of Appeals ignored its own prior admonition that district courts must be careful to "carve at the joint" in slicing up class-action trials into common and individual phases. Otherwise, a subsequent jury may be called upon to reexamine facts decided by prior juries, in violation of the Seventh Amendment. That is likely to happen here. After all, as in *Dukes*, there is not "a single common question," 131 S. Ct. at 2556 (internal quotation marks and citation omitted), in the case; instead, there is merely an abstract theory of disparate impact. Only in subsequent, individualized proceedings would a jury be asked to apply this abstract theory to concrete facts – a task that would almost certainly result in a reexamination of whether that abstract theory of discrimination makes sense under the facts of a particular case.

Third, the Seventh Circuit's loose approach to class certification is an open invitation for plaintiffs'

attorneys across the country to bring class actions involving dissimilar claims under the theory that they raise one or more supposedly common issues that can be resolved in a so-called "issues trial." Rather than promote the resolution of legitimate disputes, certifying such cases places inordinate pressure on defendants to settle cases regardless of merit (and often at great financial harm) because of the inherent unfairness of loose certification standards generally and "issues trials" in particular.

Other courts have paid heed to similar considerations and rejected the use of issue classes in similar cases.[3] In light of this split in authority – and particularly because the Court of Appeals in this case is on the wrong side of that split – the Court should grant review.

ARGUMENT

I. The Seventh Circuit's Decision Is Contrary To The Language And Intent Of Rule 23.

The Seventh Circuit's ruling that a class may be certified as to certain purportedly common issues – even where Rule 23(b)(2)'s requirements are otherwise unmet – is premised on a fundamental misreading of the relevant Rules. The plain language of Rules 23(b) and (c)(4) supports the view of the majority of courts that Rule 23(c)(4) is a mere "housekeeping rule" to be applied, if at all, once the requirements of Rule 23(b) are satisfied as to the entire cause of action. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996);

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[3] The petition elaborates on this longstanding and festering split. *See* Pet. at 22-30.

Henry v. St. Croix Alumina, LLC, No. 1999-0036, 2008 U.S. Dist. LEXIS 43755, at *15 (D.V.I. June 3, 2008) (similar).

Although many of these decisions applied Rule 23(b)(3), which expressly requires that common issues predominate over "*any* questions affecting only individual members," Fed. R. Civ. P. 23(b)(3) (emphasis added), Rule 23(b)(2) similarly restricts class certification to cases in which the "*final*" injunctive or declaratory relief sought would be "appropriate respecting *the class as a whole*," Fed. R. Civ. P. 23(b)(2) (emphases added). As this Court recently made clear, "the indivisible nature of the injunctive or declaratory remedy" sought is essential to class treatment. *Dukes*, 131 S. Ct. at 2557 (internal quotation marks and citation omitted).

Issues classes that would purport to resolve only one abstract "issue" make little sense under the language of Rule 23(b)(2). After all, resolution of an isolated issue would not constitute "final" relief; and the individualized nature of the remaining issues would ensure that any relief ultimately fashioned would not be "indivisible in nature." Accordingly, the only sensible reading of Rule 23(b)(2) is that class treatment is appropriate only where uniform relief could be fashioned after a unitary class trial.

The text of Rule 23(c)(4) does not purport to modify these substantive requirements; to the contrary, it provides for issues trials only "[w]hen appropriate." Nor does it purport to establish a separate set of requirements to guide the "appropriate[ness]" inquiry, strongly implying that issues trials are only "appropriate" where the other requirements of Rule 23 are satisfied. After all, had the drafters of Rule 23 in-

tended to provide a stand-alone basis for class certification, they would have included the provision alongside the other Rule 23(b) subsections intended to do precisely that. *Cf. Gunnells v. Healthplan Servs.*, 348 F.3d 417, 447 (4th Cir. 2003) (Rule 23(c)(4) does not provide "a fourth avenue" to class certification "on equal footing with Rule[] 23(b)."") (Niemeyer, J., dissenting).

The Seventh Circuit's construction of the Rule ignores its plain language and clear intent, providing a free pass for every class action that contains a conceivably common question, regardless of whether it satisfies the strictures of Rule 23(b). If this were the correct rule, it would mean "automatic certification in every case where there is a common issue, a result that could not have been intended." *Castano*, 84 F.3d at 745 n.21; *Henry*, 2008 U.S. Dist. LEXIS 43755, at *15 ("A more expansive reading would enable a court to sever any common issue for class certification in a case otherwise dominated by individual issues, a result entirely at odds with the limiting provisions of Rule 23(b)(3)."). And as a number of courts have observed, abandonment of the strict requirements of Rule 23(b) in service of issue certification results in trials that do not advance the ball in any meaningful way. *See, e.g.*, *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, MDL No. 1967, 2011 U.S. Dist. LEXIS 150015, at *28 (W.D. Mo. Dec. 22, 2011) (refusing to certify issue class under Rule 23(c)(4) in consumer-fraud case involving allegedly defective baby bottles because "key [individualized] questions regarding liability, such as consumers' knowledge of BPA before purchasing products and their extent of using the products, will be left unanswered even after a trial on the four issues above."); *True v.*

Conagra Foods, Inc., No. 07-00770-CV-W-DW, 2011 U.S. Dist. LEXIS 6770, at *29-30 (W.D. Mo. Jan. 4, 2011) (denying motion for class certification under Rule 23(c)(4) in suit arising out of defendant's bacteria-laden food; "'It would be possible to have a common issues trial on the issue of, for example, Can eating peanut butter that is contaminated with the bacteria listed above cause illness? But why bother having a trial on issues of such abstract generality?'") (citation omitted).

A number of commentators have similarly recognized that Rule 23(c)(4) should not be used as an end-run around the plain mandates of Rule 23. *See* Joel S. Feldman, *Attempting to Manufacture Predominance: Practical and Legal Concerns with Issue Certification Under Rule 23(c)(4)*, Class Action Litigation 2007: Prosecution & Defense Strategies 71 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. 11372 (2007)); Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. 709, 712 (2003). Rather, these commentators have explained, strict enforcement of Rule 23(b)'s requirements is necessary to ensure that class actions are conducted consistent with their purposes and with the substantive rights of the parties involved. After all, the class action procedure was devised to allow a single plaintiff to represent other individuals only when the representative plaintiff's claims have so much in common with all the other claims that the defendant's liability – or lack thereof – to the entire class can be fairly decided in a single proceeding. *See Developments in the Law – Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 877, 936-38 (1958); *see also* Barbara J. Rothstein & Thomas E. Willging,

Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges 10 (2d ed. 2009).

In sum, Rule 23(c)(4) was intended to be a mere "procedural tool" to sever common issues – not a "vehicle to reach certification." *Blain v. Smithkline Beecham Corp.*, 240 F.R.D. 179, 190 (E.D. Pa. 2007). The Seventh Circuit's decision runs afoul of that intent and of the plain language of Rule 23 by welcoming through the "issues class" back door the very result that the Rule is supposed to bar at the front: certification of a class in which liability ultimately turns on individualized factual issues.

II. The Court Of Appeals' Ruling Threatens To Violate The Seventh Amendment.

The Seventh Circuit's approach to "issues classes" not only contravenes Rule 23 but also threatens to compromise the litigants' core constitutional rights.

Because class actions often cannot be segmented into distinct issues, the facts and law that are relevant to a supposedly "common" issue will frequently overlap with the remaining issues that are to be tried individually. This overlap produces distinct Seventh Amendment problems depending on whether the proposed first phase would be tried by a judge or a jury.

The Court of Appeals did not specify the approach it envisioned for this case, but the respondents argued below that because the first phase would purportedly decide entitlement to injunctive relief, it should be a bench trial. *See* Pet. at 31-32. This approach would violate petitioner's right under the Seventh Amendment to a trial by jury because the district court judge would potentially make binding

factual findings in the course of resolving the issue presented in that phase that would bind juries in subsequent phases of litigation.

It is well established that the Seventh Amendment safeguards the right to have a jury decide legal issues. *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473, 476-77 (1962). As this Court has made clear, the right to a jury trial of all "factual issues related to" legal claims cannot "be lost through prior determination of equitable claims." *Id.* at 473. Thus, in cases presenting both legal and equitable issues, this Court has "emphasiz[ed] the importance of the order in which legal and equitable claims . . . would be resolved." *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550 (1990). "'[I]f an issue common to both legal and equitable claims was first determined by a judge, relitigation of the issue before a jury might be foreclosed by res judicata or collateral estoppel.'" *Id.* (citation omitted); *see also, e.g.*, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508 (1959) ("Whatever permanent injunctive relief Fox might be entitled to on the basis of the decision in this case could, of course, be given by the court after the jury renders its verdict.").

Here, it cannot be disputed – and the Court of Appeals appeared to acknowledge – that at least some phase-two trials might involve claims for damages based on allegations of intentional discrimination, clearly a legal issue. *See* Pet. App. 19a. And because these allegations would almost certainly depend in part on facts decided in the phase-one proceeding, trying that phase to a judge would violate the Seventh Amendment's right to trial by jury.

Nor would the problem be fixed if both phases were tried to a jury.

Circuit precedent suggests that the Court of Appeals might have envisioned a jury trial for the first phase in order to avoid jury-trial-right problems. *See Allen v. Int'l Truck & Engine*, 358 F.3d 469, 471-72 (7th Cir. 2004) (concluding that "[c]ertifying a class for injunctive purposes, while handling damages claims individually, does not transgress the seventh amendment" because a jury could "resolve common factual disputes, and its resolution will control when the judge takes up the request for an injunction"). But having a jury decide the first-phase issue would create a separate Seventh Amendment problem because the overlapping issues in the first and second phases would force second-phase juries to reexamine the findings of the first jury. *See* U.S. Const. amend. VII ("[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States.").[4]

This Court's landmark opinion in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), cautioned that under the Seventh Amendment, a partial retrial limited to particular issues "may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500. In *Gasoline Products*, the First Circuit found error in the district court's jury charge on the issue of damages as to the

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[4] Use of a jury in phase one would also create significant logistical difficulties; because legal relief might be claimed in some second-phase suits, the court and the parties would likely be mired in debates about which findings would be binding and which would be advisory.

defendant's counterclaim and remanded for a partial new trial on damages only. This Court reversed, explaining that "the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.*

The courts of appeals have properly extended the principle annunciated in *Gasoline Products* to the bifurcation of class actions. Indeed, the Seventh Circuit has previously exhorted district courts to be careful to "carve at the joint" when setting out to certify isolated issues for class treatment, while leaving individualized issues for later resolution by subsequent juries. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995); *accord Castano*, 84 F.3d at 751 (quoting *Rhone-Poulenc*, 51 F.3d at 1302, with approval). Otherwise, juries considering overlapping issues in individual proceedings tried after a common phase will inevitably reach their own, potentially divergent findings on identical facts. *See, e.g.*, *Rhone-Poulenc*, 51 F.3d at 1303; *Castano*, 84 F.3d at 750-51; *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 225 (W.D. Mich. 1998) (warning that "the second jury could find itself impermissibly reconsidering the findings of the first jury"). Commentators have echoed these concerns and recognized the applicability of *Gasoline Products* to the class-action context. W. Russell Taber, *The Reexamination Clause: Exploring Bifurcation in Mass Tort Litigation*, 73 Def. Counsel J. 63, 64 (2006) ("Yet perhaps the most significant obstacle to [issues classes] is the Constitution itself"); Feldman, *supra*, at 71 ("Perhaps the most significant problem with issue certification

is the fact that it runs afoul of the Seventh Amendment's Reexamination Clause [where it] . . . causes a second jury to reexamine the findings of the jury that determined any common issues").

Application of the *Gasoline Products* rule in the class-action context furthers two important goals of the Seventh Amendment's bar on reexamination. First, overlapping factual and legal issues may confuse subsequent juries. *See Gasoline Prods.*, 283 U.S. at 500 ("Here the question of damages . . . is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial."). Second, there is a risk of inconsistent jury verdicts. *See Castano*, 84 F.3d at 750-51 ("[I]f separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each jury could be inconsistent"); *Rhone-Poulenc*, 51 F.3d at 1303 ("How the resulting inconsistency between juries could be prevented escapes us.").

Contrary to its careful approach in *Rhone-Poulenc*, the Seventh Circuit's approach in this case throws caution to the wind, sacrificing these important constitutional protections for the sake of imaginary expediency. Issues classes are fraught with reexamination risks – particularly where, as here, cohesiveness is lacking as to the case as a whole. *See In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Relevant Prods. Liab. Litig.*, 275 F.R.D. 270, 278-79 (S.D. Ill. 2011) (rejecting plaintiffs' proposal for issue class action in case concerning allegedly defective drugs because "many – if not all – of the proposed common issues cannot be certified

without triggering the Seventh Amendment concerns discussed in *Rhone-Poulenc*"; "multiple juries in follow-up trials would have to examine such issues as comparative negligence and proximate cause").

In this case, for instance, the Court of Appeals has instructed the district court to limit the first trial to consideration of plaintiffs' theory that Merrill Lynch's employment policies had a disparate impact on its FAs. But the contours of this "issue" are ill-defined and elusive. Indeed, this Court's central holding in *Dukes* was that such abstract questions are not really "common questions" at all. *See* 131 S. Ct. at 2551 (explaining that "the mere claim by employees of the same company that they have suffered a Title VII injury, *or even a disparate-impact Title VII injury*, gives no cause to believe that all their claims can productively be litigated at once").

Jury confusion – and reexamination of the disparate-impact "issue" – would thus be a certainty in follow-on trials. Even assuming a first jury could conclude that Merrill Lynch's policies produced a disparate impact firmwide, the task of the second jury would be extremely difficult to assign. The second jury would be required to assume that Merrill Lynch's policies had a disparate impact on the class, but at the same time decide whether the policies *actually* did have an impact on the class member before it. For example, even if there were a phase-one finding that the challenged policies had a disparate impact across the class, the discretion vested in managers means that a second-phase jury could well find that a particular manager's implementation of the policies did not result in any disparate impact. Moreover, a particular class member's compensation

may have been affected by any number of factors unrelated to the challenged policies. Perhaps the class member's compensation was the product of poor performance. Or maybe the compensation was the result of the individual's failure to obtain as many industry certifications as the next FA. These questions cannot be answered without revisiting the first jury's findings.[5] In other words, the proposed first- and second-phase issues are inherently "interwoven," *Gasoline Prods.*, 283 U.S. at 500, making any division in their resolution both impractical and nonsensical.

Ultimately, "[n]o matter how carefully a judge attempt[s] to structure an issue class or craft special jury interrogatories to avoid overlap between factual issues, the sheer number of individual issues present in the absence of predominance as to the cause of actions as a whole [] create[s] confusion and uncertainty among jurors in the second (and subsequent) juries as to their proper role." Feldman, *supra*, at 74. Thus, in this case – and the many certain to follow – an "issues" trial could not be held without an unconstitutional reexamination of facts.

III. Loose Class-Certification Standards Create Grave Risks For American Business.

Finally, review is needed because the relaxation of class-certification requirements contemplated by the

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[5] Alternatively, there is a substantial risk that a second jury would simply assume that because the first jury found that the policies violated Title VII, every class member's compensation was adversely affected by the policies. That would be grossly unfair to the defendant, further highlighting the inherent problems of loosening certification standards for "issues" classes.

Seventh Circuit's ruling in this case will incite potential plaintiffs – and their counsel – to file frivolous suits in the district courts of the Seventh Circuit (and beyond), creating a new opportunity for abusive class actions. This, in turn, will have widespread negative repercussions on American businesses and industries.

Even before this case, the issue-class device "present[ed] a tempting solution to the seemingly intractable shortcomings of" aggregate litigation. *See* Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 Ind. L.J. 567, 609-10 (2004). The Seventh Circuit's decision is sure to invite an even greater volume of issues-only class proposals. *See, e.g.*, Mark Casciari & Gerald L. Maatman, Jr., *Thoughts About Issue Certification Under Rule 23(c)*, Seyfarth Shaw LLP, The Workplace Class Action Blog, May 29, 2012, http://practiceview.muzeview.com/links/index.php?id=3772585 ("Some in the plaintiffs' class action bar are taking up the [mantle] of 'issues certification' as a new approach to litigating workplace class actions. They base their tactics in part on the Seventh Circuit's recent decision in *McReynolds*."); *Seventh Circuit Authorizes an "Issue Class Action" in Response to Dukes*, Crowell & Moring, May 3, 2012, http://www.crowell.com/NewsEvents/AlertsNewsletters/Labor-Employment-Law-Alert-US/Seventh-Circuit-Authorizes-An-Issue-Class-Action-in-Response-to-Dukes (*McReynolds* "shows that courts will continue to be receptive to creative class action theories. Indeed, a second reading of *McReynolds* suggests that class action litigation . . . may be poised for a dramatic, and worrisome, change in focus.").

Lest there be any doubt, prior history reveals that the invitation will be accepted. As one commentator has noted, "Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings . . . . If you build a superhighway, there will be a traffic jam." Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997). By allowing meritless class actions to hide behind the veil of "issues classes," the Seventh Circuit is thus poised to become a destination for sprawling employment-discrimination, consumer-fraud and other class actions that would have been rejected under prior class certification standards. The onslaught of baseless suits, moreover, will crowd out legitimate legal grievances, raising the overall costs of litigation and jeopardizing the fairness of the legal system. *See Schweitzer v. Consol. Rail Corp.*, 758 F.2d 936, 942 (3d Cir. 1985) (noting that "windfalls" awarded to plaintiffs bringing frivolous claims may cause those who actually suffered injury to receive "insufficient compensation").

Beyond these judicial costs, the Seventh Circuit's embrace of loose certification standards will have serious repercussions for American businesses. It is broadly recognized that loose certification requirements raise the stakes of litigation and the risk of gargantuan verdicts – not to mention bankruptcy. Mark Moller, *The Anti-Constitutional Culture of Class Action Law,* Regulation 50, 53 (Summer 2007) ("[L]oose certification standards are vulnerable to trial judges' political biases. A populist trial judge with a strong aversion to large corporations might, for example, want to punish big corporate interests, 'sending a message' that they must respect the little

guy. Inaugurating a large class action, triggering reams of negative press and sending the defendant's stock price through the floor, is a good way to do so."). This is so regardless of the merits of the case; "[f]ollowing certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ." Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition). For this reason, "certification is the whole shooting match" in most cases, and defendants faced with improvidently certified, meritless lawsuits feel "intense pressure to settle" before trial, culminating in "judicial blackmail." *See* David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN's Product Liability Law & Strategy (Feb. 2009); *Rhone-Poulenc*, 51 F.3d at 1298 (stating that defendants in a class action lawsuit "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."); *Castano*, 84 F.3d at 746 ("These settlements have been referred to as judicial blackmail."). Abrogation of the Rule 23(b) requirements substantially increases these risks to American business.

While this case concerns allegations of employment discrimination, the debilitating consequences for American businesses described above will no doubt extend beyond the employment context into the consumer-product industry as well. Indeed, even

before *McReynolds*, the Seventh Circuit had already applied its lax approach to Rule 23(c)(4) in one product case. *See Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 998 (2011). In *Pella*, the Court of Appeals certified two classes of purchasers of allegedly defective windows – despite agreeing that individual issues predominated on the questions of causation and injury. Brushing aside these individualized issues, the Seventh Circuit applied Rule 23(c)(4) to affirm class certification with respect to the following single "common issue": "whether the windows suffer from a single, inherent design defect leading to wood rot." *Id.* at 393. Thus, *McReynolds* is not an anomaly; rather, it represents a continuing, misguided approach by the Seventh Circuit to "issues classes," one that will undoubtedly fuel additional filings of similar cases in Seventh Circuit district courts.

For this reason too, the Court should grant certiorari, lest Seventh Circuit courts become the next haven for class action abuse, to the detriment of our judicial system, our economy and American consumers.

CONCLUSION

For the foregoing reasons, and those stated by petitioner Merrill Lynch, Pierce, Fenner & Smith, the Court should grant the petition for a writ of certiorari.

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August 24, 2012

APPENDIX A

Corporate Members Of The Product Liability Advisory Council

3M

A.O. Smith Corporation

ACCO Brands Corporation

Altec Industries

Altria Client Services Inc.

Anheuser-Busch Companies

Arai Helmet, Ltd.

Astec Industries

Bayer Corporation

Beretta U.S.A Corp.

BIC Corporation

Biro Manufacturing Company, Inc.

BMW of North America, LLC

Boeing Company

Bombardier Recreational Products

BP America Inc.

Bridgestone Americas Holding, Inc.

Brown-Forman Corporation

Caterpillar Inc.

Chrysler LLC

Continental Tire the Americas LLC

Cooper Tire and Rubber Company

Crown Equipment Corporation

Daimler Trucks North America LLC

The Dow Chemical Company

E.I. duPont de Nemours and Company

Eli Lilly and Company

Emerson Electric Co.

Engineered Controls International, Inc.

Environmental Solutions Group

Estee Lauder Companies

Exxon Mobil Corporation

Ford Motor Company

General Electric Company

General Motors Corporation

GlaxoSmithKline

The Goodyear Tire & Rubber Company

Great Dane Limited Partnership

Harley-Davidson Motor Company

Hawker Beechcraft Corporation

Honda North America, Inc.

Hyundai Motor America

Illinois Tool Works, Inc.

International Truck and Engine Corporation

Isuzu Motors America, Inc.

Jaguar Land Rover North America, LLC

Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic

Pella Corporation

Pfizer Inc.

Porsche Cars North America, Inc.

Purdue Pharma L.P.

Remington Arms Company, Inc.

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc.

Segway Inc.

Shell Oil Company

The Sherwin-Williams Company

Smith & Nephew, Inc.

St. Jude Medical, Inc.

Stanley Black & Decker, Inc.

Subaru of America, Inc.

Synthes (U.S.A.)

Techtronic Industries North America, Inc.

Terex Corporation

TK Holdings Inc.

The Toro Company

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

Vermeer Manufacturing Company

The Viking Corporation

Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.