NO. 17-798

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GLEN GRAYSON, DOREEN MAZZANTI, DANIEL LEVY, DAVID MEQUET, and **LAUREN HARRIS,** individually and on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

v.

GENERAL ELECTRIC COMPANY,

Defendant-Petitioner.

Appeal from the United States District Court
for the District of Connecticut
Civil Action No. 3:13-cv-1799 (WWE)
Hon. Warren W. Eginton

BRIEF OF *AMICI CURIAE* THE ASSOCIATION OF HOME APPLIANCE MANUFACTURERS AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANT-PETITIONER

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FEDERAL RULE OF APPELLATE PROCEDURE 26.1
CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* the Association of Home Appliance Manufacturers ("AHAM") and the National Association of Manufacturers ("NAM") hereby certify that each is a non-profit corporation, has no parent corporation, and there is no publicly held corporation owning 10% or more of its stock. Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, PC is the only law firm whose partners and associates are appearing or are expected to appear on behalf of AHAM or NAM in this proceeding.

Dated this 28th day of March, 2017.

/s/ Scott A. Rader
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INTERESTS OF THE AMICI CURIAE

Amici Curiae Association of Home Appliance Manufacturers ("AHAM") and National Association of Manufacturers ("NAM") respectfully submit this brief in support of Defendant-Petitioner General Electric Company ("GE").[1] The potential impact of the decision below extends far beyond GE's exposure in this action and will adversely impact U.S. manufacturers as a whole and the home appliance industry in particular in consumer products class actions nationwide.

The AHAM is a not-for-profit trade association, representing over 150 manufacturers of residential appliances, including microwave ovens, and suppliers to these manufacturers. Approximately 10 of AHAM's members, including GE, are headquartered or incorporated in states within the appellate jurisdiction of the Second Circuit. The home appliance industry—with approximately 65,000 direct industry employees in the United States and tens of thousands more supplier member U.S. employees—contributes significantly to American jobs and economic security.

The NAM is the nation's largest manufacturing association, representing small and large manufacturers in every industrial sector and in all 50 states.

[1] In compliance with Federal Rules of Appellate Procedure 29(a) and 29(c)(5), *Amici Curiae* state that GE consents to the filing of this brief and, upon request, Plaintiffs take no position; no party's counsel in this case authored this brief in whole or part; and that no entity or person, aside from *Amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Manufacturing employs over 12 million people, contributes more than $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

ARGUMENT

I. Immediate Review of the Decision is Imperative.

Under Rule 23(f), an appeal is particularly appropriate where "the certification order implicates a legal question about which there is a compelling need for immediate resolution," especially one of "fundamental importance" to class action law, or the order otherwise "presents special circumstances that militate in favor of an immediate appeal." *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139-40 (2d Cir. 2001). The district court's decision raises pivotal issues in this Circuit that warrant immediate review by this Court: (1) certification of a class consisting predominantly of uninjured class members; and (2) certification of a "liability-only" class under Rule 23(c)(4). The decision below also undermines fundamental tenants of federalism, which were central to the enactment of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2 (2005).

Review of this order certifying a class of predominantly unharmed purchasers is particularly timely as the Supreme Court has signaled the "great importance" of deciding issues concerning the presence of "uninjured class members." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016). Additionally, the question of whether plaintiffs properly may pursue multi-state consumer-protection class actions is of increasing importance due to the burgeoning use of these class actions to assert product related claims. *See* Amanda Bronstad, *Consumer Class Actions Usurping Personal Injury Claims*, Nat'l Law J., Jul. 11, 2007, at 1 ("Plaintiffs' lawyers are filing an increasing number of class actions under state consumer-protection laws in conjunction with, or in place of, traditional personal injury class actions.").

Certification of this appeal prior to a final judgment is imperative at this juncture of the litigation. Increased proliferation of meritless class action litigation designed to pressure defendants into settlements is the natural consequence of a precedent certifying multi-state classes. The potential for such coercion is substantial. *See Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) ("[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight."). "[S]ettlements induced by a small probability of an immense judgment in a class

action" have even been called "blackmail settlements." *In the Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

If appeal is not granted, this case will encourage class counsel to pursue in federal court precisely the kind of "blackmail settlement" class actions that CAFA was intended to prevent. If this Court endorses certification of "liability" subclasses absent classwide injury, the resulting sea change will invite a flood of coercive class litigation. The resulting flood would wash over *Amici's* membership, who are frequent targets of no-injury class actions. A decision that removes a legitimate barrier to the certification of unfairly coercive multi-state class actions would inappropriately tip the balance in every case that is already under way, and spur even more such actions to be filed. For these reasons, review of the district court's class certification decision is immediately warranted and cannot await review until after—if ever—a final judgment is entered.

II. This Unprecedented Decision Significantly Impacts Consumer Class Actions.

The decision below certified a class of all purchasers of approximately 68,000 GE-branded microwave ovens that allegedly contained a defect causing the glass door in **very rare** instances to break. Class Certification Order ("Ord.") at 16-17. All parties agree that 99% of the microwaves experienced no breakage and that over 98% of them never will. The district court certified two Rule 23(c)(4) classes on the issue of "liability": (1) a subclass asserting claims under the

consumer protections laws of 19 jurisdictions on the issue of whether the "microwaves all contained a defect that could cause glass shattering"; and (2) a subclass asserting implied warranty claims under Texas law on the issue of "whether consumers . . . receive[d] the benefit of their bargain." Ord. at 3, 12-14, 16-17.

A. Certification of a Primarily Uninjured Class Is Unprecedented.

Certification of a class in which 99% of members have suffered no injury implicates fundamental issues of standing under Article III and the proper application of Rule 23, thereby artificially inflating class membership and allowing a windfall recovery to product purchasers who received exactly what they bargained for. Certification of classes involving significant numbers of uninjured class members warrants immediate review by the Second Circuit, just as it has warranted acceptance of Rule 23(f) appeals in sister circuits. *See, e.g.*, *In re Nexium*, 777 F.3d 9 (1st Cir. 2015); *In re Rail Freight*, 725 F.3d 244 (D.C. Cir. 2013).

The standing requirements of "Article III do[ ] not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (internal quotation marks and citations omitted). Nor does Rule 23 authorize federal courts to give plaintiffs "different rights in a class proceeding than they

could have asserted in an individual action," but that is precisely what the district court did by certifying a class in which 99% of the members have never (and will never) suffer any injury—economic or otherwise. *Id.* at 1048. If a class member brought an individual action, he or she would be required to establish an injury for purposes of both standing and proof of liability. Yet, the district court permitted Plaintiffs to ignore this requirement as it pertains to **nearly 99%** of the certified class.

The rule in this Circuit is clear: "[t]he class must . . . be defined in such a way that anyone within it would have standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). The unprecedented nature of the district court's holding and the importance of this issue to the Supreme Court warrants immediate appellate review.

The certified class also fails to satisfy the Supreme Court's "cohesiveness" requirement because it contains a large number of uninjured class members. "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997). A class is not cohesive when a substantial number of its members are unaffected by the alleged misconduct. *See Gregory v. Stewart's Shops Corp.*, 2016 U.S. Dist. LEXIS 89576, at *69 (N.D.N.Y. July 8, 2016) ("[A] class may not be defined too broadly, such that it would contain a great many persons

who have suffered no injury at the hands of the defendant.") (quotations omitted). As the Supreme Court has observed, "a class representative must . . . possess the same interest and suffer the same injury as the class members." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (citations omitted).

B. The District Court Misused Rule 23(c)(4) to Certify "Liability" Only Classes.

1. Discordant Second Circuit Jurisprudence May Result in Unprecedented Expansion of Consumer Class Actions.

Ordinarily, certification of classes including significant numbers of uninjured members is limited by Rule 23(b)(3)'s predominance requirement. The district court agreed that the predominance requirement thwarted Plaintiffs' proposed Rule 23(b)(3) classes because they "present[ed] damages issues requiring an individualized inquiry based on the remedial scheme of each state statute and the varying degrees of harm at issue." Ord. at 12. To circumvent this obstacle, the district court relied on this Court's unpublished opinion in *Jacob v. Duane Reade, Inc.*, 602 F. App'x 3 (2d Cir. 2015), which, in turn, relied on the analysis from *In re Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006), permitting certification of a Rule 23(c)(4) class "as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement." *Id.* at 227; *see* Ord. at 10-12.

This Court's guidance on the proper relationship between Rule 23(b)(3)'s predominance requirement and Rule 23(c)(4)'s endorsement of issue classes is paramount in view of potentially incongruent decisions in *In re Nassau County* and *McLaughlin v. American Tobacco Co.,* 522 F.3d 215 (2d Cir. 2008). The opinion in *In re Nassau County* does indeed state that a district court may "certify a class on a designated issue regardless of whether the claim as a whole satisfies the predominance test." But, just two years later, in *McLaughlin*, this Court reversed the certification of a class of smokers who alleged that they had been deceived into smoking "light" cigarettes. Despite a common issue of whether the defendants had a scheme to defraud, the Court held that a class could not be certified under Rule 23(c)(4) because of individual issues of reliance, injury, and damages. *McLaughlin*, 522 F.3d at 234.

Similarly, in *Myers v. Hertz Corp.,* 624 F.3d 537 (2d Cir. 2010), the Court held that *Nassau* did not justify class certification because the affirmative defenses were weightier: "the predominance requirement requires a district court to consider '*all* factual or legal issues' to determine whether the issues subject to generalized proof are more 'substantial' than those subject to individual inquiry." *Id.* at 550 (internal citation omitted).

The *Nassau* analysis is further undermined by the opinion's heavy reliance on a clause of Rule 23(c)(4) that was *eliminated* a year later. Prior to the 2007 amendment, Rule 23(c)(4) read:

> When appropriate (A) an action may be brought . . . with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, *and the provisions of this rule shall then be construed and applied accordingly.*

Fed. R. Civ. P. 23(c)(4) (emphasis added). This Court reasoned that the italicized clause of Rule 23(c)(4) above, modified the predominance analysis by requiring a court to "first identify the issues potentially appropriate for certification [under subsection (c)(4)] 'and [ ] then' apply . . . subsection (b)(3) and its predominance analysis." *Nassau*, 461 F.3d at 226. Thus, *Nassau*'s analysis suggests that the deletion of the italicized clause in 2007 should have rendered the holding obsolete because the current Rule 23(c)(4) does not contain any language modifying (b)(3). The vast implications of any uncertainty surrounding "issue" subclasses urgently warrant further clarification on the application of Rule 23(c)(4).

2. The District Court's Analysis Improperly Eliminates Elements that Plaintiffs are Required to Prove.

The district court's analysis (1) conflates damages with injury and causation; and/or (2) conflates a determination of liability with proof of a defect. Both interpretations contravene Second Circuit precedent. Under the first theory, the district court assumes that "damages issues"—which the district court agrees

would require "an individualized inquiry"—necessarily include a determination of injury and causation subsequent to trial on the "issue of liability." Ord. at 12. However, *McLaughlin* prohibits the use of Rule 23(c)(4) in this manner when "issue certification would not reduce the range of issues and promote judicial economy" because of "the number of questions that would remain for individual adjudication." 522 F.3d at 234 (internal quotations omitted). "Certifying, for instance, the issue of defendants' scheme to defraud, would not materially advance the litigation because it would not dispose of larger issues such as reliance, injury, and damages." *Id.* Likewise, the district courts' use of a "liability-only" class would not "dispose of larger issues" of damages, injury, causation, reliance, and *scienter* without requiring individualized proof. *Id.*

Alternatively, the district court's approach ignores that the question of liability in consumer products cases does not begin and end with the existence of a defect. *See* Ord. at 13. The district court's application of Rule 23 would require an individual plaintiff to prove **substantially more** to establish liability than a class plaintiff. By failing to analyze the elements of the claims and Plaintiffs' classwide evidence (or lack thereof) for each element, the district court's decision is the type of "arbitrary" and "speculative" certification approach that the Supreme Court has rejected. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013).

3. The Decision Erodes Fundamental Principles of Federalism.

In order to certify a multi-state class, the district court consequently found the absence of any substantive differences in the consumer protection statutes of 19 different jurisdictions. Product purchasers who reside and purchase products in different states generally need to proceed under materially different consumer-protection laws in each state, which should have defeated Plaintiffs' request for certification of a multi-state class. *See In re Grand Theft Auto Video Game Consumer Litig.,* 251 F.R.D. 139, 146 (S.D.N.Y. 2008) ("In analyzing putative, nationwide, consumer-protection class actions . . . courts have determined that the law of the state where each plaintiff resides and purchased the relevant product should apply.") (citation omitted). "[M]ost of the courts that have addressed the issue have determined that the consumer-fraud . . . laws in the fifty states differ in relevant respects." *In re Grand Theft Auto,* 251 F.R.D. at 147 (refusing to certify a nationwide class for this reason); *Mazza v. Am. Honda Motor Co.,* 666 F.3d 581, 589-90 (9th Cir. 2012) (reversing certification because class members purchased the product in jurisdictions with materially different consumer protection laws).

Rather than yield to fundamental legal principles inherent in federalism, the district court substituted a hybrid federal legal standard to certify a multi-state class on the issue of liability. By conflating liability with the existence of a defect, the district court essentially read injury, causation, and reliance requirements out of the

relevant state statutes so as to create the appearance of commonality. As a result, an individual who could not pursue a claim in his home state's courts can pursue such claims in federal court through improper use of the Rule 23 procedure. The district court has thereby altered the parties' substantive legal rights in a manner that (a) deprives manufacturers of notice as to what laws will apply in the states in which they do business; (b) appropriates the authority of states to develop their own substantive laws in violation of the *Erie* doctrine and the purpose of CAFA; and (c) unfairly expands consumers' rights of action and defendants' exposure to claims in violation of the Rules Enabling Act. The district court's approach is the antithesis of the fundamental and long recognized concept of federalism applied in federal courts and must be rejected.

CONCLUSION

For the reasons stated in GE's brief and herein, *Amici* urge this Court to grant GE's petition to appeal the district court's class certification order.

Dated: March 28, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 29(a)(5). This brief contains 2,600 words.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically via the Court's ECF system, which caused one copy to be delivered via electronic mail to counsel of record.

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