Nos. 18-398

In the Supreme Court of the United States

FCA US LLC AND HARMAN INTERNATIONAL INDUSTRIES, INC.,

Petitioners

v.

BRIAN FLYNN, GEORGE & KELLY BROWN, AND MICHAEL KEITH, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondents

On Petition for Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit

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BRIEF OF *AMICI* NATIONAL ASSOCIATION OF MANUFACTURERS AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici have a substantial interest in ensuring that businesses facing class actions are guaranteed their procedural and constitutional protections. As explained herein, *amici* believe the Seventh Circuit's denial of interlocutory review of a clearly erroneous District Court ruling to certify a class of claimants that have sustained no injury violates these protections. If the Petition is denied and the underlying rulings stand, *amici*'s members would be adversely impacted by class actions based entirely on the ever-present risk that a product may fail, leading to unprincipled liability and needless litigation costs.

The National Association of Manufacturers (NAM), the largest manufacturing association in the United States, represents small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

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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 received timely notice of *amici's* intent to file the brief and have consented to the filing of this *amici* brief.

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus* briefs in cases involving important liability issues.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Seventh Circuit's decision denying Petitioner's interlocutory appeal of the District Court's class certification ruling demonstrates the need for the Court to establish proper, consistent guidelines for the implementation of Federal Rule of Civil Procedure 23(f). It has been twenty years since Rule 23(f) was adopted, and broad discrepancies have developed among the Circuits as to the factors to be considered in determining when review is warranted, the process for making these determinations, and how likely a Circuit is to grant review. The Court should clarify that a District Court's manifest error in certifying a class warrants interlocutory review.

Unlike other Circuits, the Seventh Circuit has not recognized manifest error as a cause for review. It has effectively limited Rule 23(f) to three circumstances, namely where: (1) "the denial of class status sounds the death knell of the litigation"; (2) the grant of class status "put[s] considerable pressure on the defendant to settle"; and (3) immediate appeal "may facilitate the development of the law." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999). Rule 23(f), though, was never intended to be so limited. *See Microsoft v. Baker*, 137 S. Ct.

1702, 1710 (2017) (stating that Rule 23(f) gives courts the ability to grant review based on any consideration). Circuits granting review on manifest error alone have recognized their split from the Seventh Circuit. *See*, *e.g.*, *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 958 (9th Cir. 2005).

The Petition provides the Court with the right case for establishing this needed clarity and uniformity. The District Court was manifestly wrong to certify this class. This case is a bald attempt to plead around the Court's well-considered precedent that claimants, suing individually or as a class, have no right to recover if they have no concrete injury and no such injury is imminent. *See*, *e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). Claimants are alleging only a risk their products may fail. No one's product has failed, and no person has sustained any injuries from a product failure. As the Ninth Circuit found in a nearly identical case, the attempt to plead economic loss for the diminution of value based on the *potential* for product failure is neither credible nor compensable. *See Cahen v. Toyota Motor Corp.*, 717 Fed. App'x 720, 723 (2017). Under the Court's rulings, Plaintiffs clearly have no standing in Federal Court and cannot state a claim for damages.

The Court adopted Rule 23(f) to provide interlocutory review in this exact type of situation, namely where justice delayed will be justice denied. No-injury class actions, including diminution of value claims, are disproportionately driven by class counsel seeking attorney fees. There are no aggrieved plaintiffs pushing for justice, and defendants are unlikely to incur the expense, risks, and business interruptions of protracted litigation. Class certification is

merely leverage for settlement. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting on other grounds) (observing when "a class action poses the risk of massive liability unmoored to actual injury," the "pressure to settle may be heightened"). The certification ruling is unlikely to be appealed.

Amici respectfully urge the Court to grant the Petition. The Federal judiciary remains a single court system. Class action litigants should be able to achieve justice in all of the Federal Circuits when a District Court certifies a class action based on its manifest error in assessing the pleadings.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE SEVENTH CIRCUIT'S CRITERIA FOR RULE 23(F) REVIEW IS TOO NARROW AND DOES NOT GIVE PROPER EFFECT TO THE RULE

Rule 23(f) was developed specifically to provide relief in cases like the one at bar. In the 1980s, creative class counsel "bombarded" the judiciary with inventive actions not anticipated in the 1960s when the Court wrote Rule 23. *Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23: Vol. 1*, Admin. Office of the U.S. Courts, May 1, 1997, at ix (introductory memorandum of Civil Rules Advisory Committee Chairman Paul V. Niemeyer) [hereafter "Working Papers"].[2] Certification rulings, which were intended to be procedural in nature, were instead driving liti-

[2] http://www.uscourts.gov/sites/default/files/workingpapers-vol1.pdf.

gations outcomes. In many cases, waiting for final judgment in order to access appellate review proved too late to correct injustices. *See id.*

Providing litigants an avenue for interlocutory appeal of class certification rulings was studied extensively and generated broad support in the legal community. *See* American Bar Ass'n Sec. of Litig., Report and Recommendations of the Special Committee on Class Action Improvements, 110 F.R.D. 195, 210-11 (1986) (recommending interlocutory appeal for class certification rulings); Complex Litigation: Statutory Recommendations and Analysis, American Law Inst. (1994), at 134-35 (discussing benefits of immediate review of class certification decisions). In 1992, Congress enacted the Federal Courts Administration Act in bipartisan fashion, giving the Court authority to "prescribe rules . . . to provide for an appeal of an interlocutory decision to the courts of appeals." Pub. L. No. 102-572, § 101 (1992) (codified at 28 U.S.C. § 1292(e)).

A. The Court Was Purposeful In Not Limiting Access to Rule 23(f)

The Court oversaw an eight-year process for promulgating Rule 23(f). In 1990, the Advisory Committee on Civil Rules began an in-depth study of class action practice and procedures. *See* Working Papers at ix. In 1996, it published for public comment the proposed amendments to Rule 23, including for Rule 23(f). *See id.* The Advisory Committee held conferences and hearings to solicit testimony from practitioners, judges and academics. *See id.* The Court adopted the final rule in 1998.

It was the considered judgment of the Federal Rules Advisory Committee, and ultimately this Court, that no reason for granting interlocutory appeals should be foreclosed. "[A]ny consideration that the court of appeals finds persuasive" should lead to review. Fed. R. Civ. P. 23(f) Advisory Committee's Note. The Committee also recognized the creative, evolving nature of class litigation. It cautioned that courts should remain "flexible" so that their rulings would adequately reflect the dynamic nature of class litigation. *Id.* The Court recently observed "the drafters of Rule 23(f) sought to provide 'significantly greater protection against improvident certification decisions than'" under traditional rules for appeal. *Microsoft*, 137 S. Ct. at 1709 (quoting Judicial Conference of the United Sates, Advisory Committee on Civil Rules, Minutes of November 9-10, 1995).

After the Court adopted Rule 23(f), the Seventh Circuit became the first federal appellate court to issue guidance for when it will grant interlocutory review. It effectively limited Rule 23(f) to three circumstances: where (1) "the denial of class status sounds the death knell of the litigation"; (2) the grant of class status "put[s] considerable pressure on the defendant to settle"; and (3) immediate appeal "may facilitate the development of the law." *Blair*, 181 F.3d at 834-35. The well-respected Judge Wood, who has served on the Seventh Circuit since the advent of this Rule, explained in an open forum that the Circuit generally does not grant review to determine whether a class action is meritless or unsupported by the law, as in the case at bar. *See FTC Workshop Protecting Consumer Interests in Class Actions*, 18 GEO. J. LEGAL ETHICS 1197, 1213 (2005). Rather, she stated, the Seventh Circuit generally grants review

only when a case helps "clarify class action law," *i.e.*, whether a case should "qualify as a class action or should it be handled in individual litigation." *Id.*

It is not surprising then that the Seventh Circuit denied review here. No-injury claims are meritless, whether brought individually or as a class. The Court should grant the Petition to clarify that the Seventh Circuit has improperly limited Rule 23(f)'s intended relief. It denies the rights of litigants the full range of interlocutory appeals this Court and Federal Rules Advisory Committee have provided.

B. A District Court's Manifest Error Warrants Rule 23(f) Review

Other federal circuits have properly found that manifest error in a class certification ruling is a central reason for interlocutory appeal. Soon after *Blair*, the Eleventh Circuit split from the Seventh Circuit, stating the *Blair* tests were not "conclusive." *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000) (adopting a totality of the circumstances test for review). In all, the Third, Fourth, Sixth, Ninth, Tenth, and DC Circuits now explicitly recognize manifest error as a reason for Rule 23(f) review.[3] They have concluded the Court did not intend interlocutory review to be cabined by the three *Blair* factors and should be allowed when a class certification

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[3] *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001); *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138 (4th Cir. 2001); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005); *Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009); *In re Lorazapam & Clorazepate Antritrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002); *see also In re Delta Air Lines*, 310 F.3d 953 (6th Cir. 2002) (allowing review based on the totality of the circumstances).

ruling is manifestly erroneous. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001).

Manifest error, also called "clear error," is a criterion the Advisory Committee suggested "should undergird a grant of permission under Rule 23(f)." Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1575-76 (2000). It is a high bar not intended for routine issues. It requires a District Court to have shown "complete disregard of the controlling law or the credible evidence in the record." Black's Law Dictionary 660 (10th ed. 2014). And, it is a standard "familiar to federal courts." *Sawyer v. Whitley*, 505 U.S. 333, 372 (1992) (Stevens, J., concurring).

Accordingly, the appellate courts have invoked Rule 23(f) for manifest errors "sparingly." *Chamberlan*, 402 F.3d at 959. They have found manifest error, as here, where a District Court overlooks controlling law. *See Prado-Steinman*, 221 F.3d at 1275. In other cases, District Courts applied the wrong Rule 23 standard, *see id.*, or incorrectly applied the substantive law of the claims. *Cf. Regents of Univ. of Cal. v. Credit Suisse First Boston (USA) Inc.*, 482 F.3d 372, 380 (5th Cir. 2007). In these situations, as with the *Blair* criteria, there is "no reason for a party to endure the costs of litigation when a certification decision is erroneous and inevitably will be overturned." *Chamberlan*, 402 F.3d at 958. Such litigants should equally be allowed "to avoid a lengthy and costly trial that is for naught once the final judgment is appealed." *In re Lorazepam & Cloraza-*

pate Antitrust Litig., 289 F.3d 98, 105) (D.C. Cir. 2002).

When District Courts have clearly erred, appellate courts should provide them with needed guidance. In the first decade of Rule 23(f), there was a four-fold increase in published appellate court decisions on the grant or denial of class certification. *See* Richard D. Freer, *Interlocutory Review of Class Action Certification Decisions: A Preliminary Empirical Study of Federal and State Experience*, 35 WESTERN STATE L. REV. 13 (2007) (looking at data from 1998 through 2007). These rulings created a useful body of case law for litigants and courts to follow. Granting the Petition, therefore, will facilitate a more consistent, competent judiciary without concern that Rule 23(f) review will become commonplace.

C. The Circuit Split on Manifest Error Facilitates Forum Shopping for Baseless Class Actions

The discrepancies among the courts in applying Rule 23(f), along with the Seventh Circuit's reticence to review cases for manifest error, have facilitated forum shopping, particularly for abstract class actions such as the one at bar that can be filed in any jurisdiction. *See* Charles R. Flores, *Appealing Class Action Certification Decisions Under Federal Rule of Civil Procedure,* 4 SETON HALL CIR. REV. 27 (2007) ("[I]f the disparate Rule 23(f) standards among circuits remain, sophisticated litigants should expect to evaluate Rule 23(f) appealability as part of strategic forum shopping during class action litigation."). Studies have shown that some circuits are "more willing to grant Rule 23(f) petitions" and, unlike the Seventh Circuit, they will assess the "merits of the

appeal" when granting review. Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 288 (2008).

The first major study of Rule 23(f) review was conducted by Barry Sullivan and Amy Trueblood. They looked at reported data on Rule 23(f) petitions from December 1, 1998 through October 30, 2006. This study found a wide range in the percentage of petitions granted, from zero in the Tenth Circuit to 100 percent in the Fourth Circuit. The other Circuits granted the following percentages of Rule 23(f) petitions: 16, 22, 25, 26, 28, 31, 36, 39, 54, 58, and 86. Thus, there was no consistency among the Circuits as for how often Rule 23(f) review was granted.

Several years ago, well-respected class action attorneys continued this study, looking at reported data from October 31, 2006 through December 31, 2013. *See* John H. Beisner, et al., *Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings* (2014). Their study showed a decline in acceptances, which suggests lower courts followed the provided guidance. But, there was still a wide range of acceptance rates, with courts accepting review in the following percentages of cases: 5, 10, 14, 19, 20, 25, 25, 25, 28, 33, 36, and 46. *See id.* In both studies, a District Court's ruling to certify a class was reversed about 70 percent of the time. As here, federal appellate review has been consistently needed to curb improper certifications.

These studies, along with the experiences of other practitioners, have generated calls for the Court to provide more clarity and uniformity among the circuits for Rule 23(f) review. *See, e.g.*, Theodore M.

Grossman & Todd R. Geremia, *That's Why They're 'Supreme,'"* Nat'l L. J. (May 14, 2007). The Petition provides the Court with the opportunity to do so and to facilitate access to justice in all Federal Circuits.

II. CERTIFYING A CLASS IN CIRCUMVENTION OF THIS COURT'S PRECEDENT IS MANIFEST ERROR

This case represents an effort to broadly expand class litigation, much like those that spurred the creation of Rule 23(f) in the 1980s and 1990s. Here, two researchers in a laboratory identified a flaw in Petitioner's cybersecurity protocols in its vehicle's Uconnect infotainment system. Petitioners recalled the product and closed the port the researchers found. *See* Dkt. #317-1, ¶¶ 117-18 (stating Petitioners "eliminated vulnerabilities that might allow a remote actor to impact vehicle control systems"). Nobody's vehicle was actually hacked, and no consumer was injured. From a liability perspective, this should have been a non-event.

The District Court recognized the Court's precedent that where individuals have no injury, and no injury is imminent, no right to sue exists. *See* Pet. at 12a. Yet, it allowed Plaintiffs to plead around this case law; it approved an injury theory based entirely on the *perceived* risk of future harm. In short, because a flaw was found in the product when sold, there is a perception, rightly or wrongly, that there is now an identifiable risk the product could fail, making it not worth the original sale price. Under this theory, Plaintiffs suggest, it is irrelevant whether they were exposed to or experienced any harm, or whether they are satisfied with their purchase. Allowing a Rule 23(f) appeal for manifest error pro-

vides a safeguard against such creative attempts to sidestep precedent.

A. Mere Risk of a "Hack" Is Not a Violation of a Manufacturer's Standard of Care

This litigation directly conflicts with the legal obligations on manufacturers to protect their consumers from cyber threats. Companies cannot make cyber products "hack proof." *See* Hearing on "Data Security and Breach Notification Reform," House Financial Services Subcommittee on Financial Institutions and Consumer Credit, Mar. 7, 2018 (statement of Jason Kratovil, Vice President The Financial Services Roundtable) ("[N]o business or industry segment is immune to hackers."). It is impossible to anticipate every way a criminal intent on committing a crime will be able to do so. *See* Start with Security: A Guide for Business – Lessons Learned from FTC Cases, Federal Trade Commission (June 2015), at 10 ("There is no way to anticipate every threat.").[4]

Consequently, a manufacturer is not subject to liability whenever a hack occurs. *See* Comments of the Staff of the Federal Trade Commission's Bureau of Consumer Protection, *In the Matter of The Internet of Things and Consumer Product Hazards*, No. CPSC-2018-007, June 15, 2018, at 2 n.13 [hereafter "FTC Staff Comments"][5] ("[T]he mere fact that a breach occurred does not mean that a company has

[4] https://www.ftc.gov/system/files/documents/plain-language/pdf0205-startwithsecurity.pdf (emphasis added).

[5] https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-federal-trade-commissions-bureau-consumer-protection-consumer-product-safety/p185404_ftc_staff_comment_to_the_consumer_product_safety_commission.pdf.

violated the law."). Diminution in value claims also seek to create liability regardless of whether the flaw was not indicative of a design defect or the manufacturer met the standard of care in designing the security system. Requiring connected devices to have perfect security is unrealistic and "would deter the development of devices that provide consumers with the safety and other benefits." *Id.*

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. Overall, there are more than 8 billion connected devices in circulation, which will rise to more than 20 billion in the next two years. *See* FTC Staff Comments, at 1. No wonder Plaintiffs' counsel in this case told a cybersecurity law conference that lawyers are "salivating" over the case at bar 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).[6] Some lawyers are reportedly setting up forensic labs to find security gaps in products in order to leverage this ruling for more litigation. *See id.*

B. Risk of a Future Hack Is Not a Compensable Harm Under Traditional Tort Law

The deficiencies in this case are clear when compared with the traditional tort law requirement for compensable injury in cybersecurity and data claims. A data breach or "hack" has certain parallels to toxic chemical exposure. Attempts to expand liability

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

have generally focused on monetizing the latency period *after* the claimants were exposed to the breach or chemical, but before injury occurs. These lawsuits are already highly controversial, seeking liability for medical or credit monitoring, fear of cancer or identity theft, or increased risk of injury. In addition to the jurisdictional concerns expressed in *Clapper*, many states have held that actionable injury has yet to occur during the latency period.[7]

Diminution in value claims fall far below any of these attempts to lower traditional jurisdictional or tort law lines. Plaintiffs in these cases are trying to monetize the mere risk that an exposure or breach may occur. Nothing has happened, but it might. Here, class counsel argues that the mere existence of a flaw in Petitioner's cybersecurity system when the car was sold should cost Petitioners $440 million in liability in just three states. A nearly identical case against Toyota in the Ninth Circuit demonstrates the proper response to these claims. *See Cahen*, 717 F. App'x at 720. There, the District Court dismissed the case for lack of Article III standing, which was upheld by the Ninth Circuit. The Ninth Circuit called this liability theory "speculative," "not credible," and "conclusory." *Id.* at 723.

Such abstract class actions are the exact types of claims the Federal Rules Advisory Committee cautioned against when drafting Rule 23(f). Rule 23(f)

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[7] The New Jersey Supreme Court, for example, dismissed a Vioxx-related class action, finding that a plaintiff who has not experienced "a personal physical injury" cannot bring what is essentially a product liability claim through asserting a medical monitoring or consumer protection claim. *Sinclair v. Merck & Co.*, 948 A.2d 587, 595 (N.J. 2008).

was specifically promulgated to guard against class action theories where "every member of society is a litigant represented by some representative seeking to redress the claims of all class members." Working Papers at xiii (Niemeyer Memorandum). Because risks that a product may fail are ever-present, particularly in the cybersecurity arena, the ability to file class actions based on such risks would be endless. Every consumer would be in multiple class actions.

These actions also provide little benefit to class members. Studies have shown that when these lawsuits result in settlement, there is little interest among class members to participate; 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 an empirical analysis conducted by his law firm). Class counsel will structure their settlements to allocate money to non-class members through *cy pres* awards to try to justify their fees and releasing the claims against the defendant.

Thus, these lawsuits are largely lawyer-driven to leverage class certification to collect attorney fees. After a manifestly erroneous class certification ruling, defendants will want to avoid litigation costs and class counsel will seek to avoid an appeal. There will be no opportunity to correct this error.

C. Abstract Consumer Class Actions Should Not Overtake Products Liability

The basis for the District Court's error here can be tied to its false assertion that this is "a typical products liability lawsuit for damages." Pet. at 17a. It is not. This case may reflect product liability themes, but its novel liability theory is predicated on consumer protection law. The District Court certified classes under Illinois's implied warranty of merchantability law, Missouri's Merchandising Practices Act, and Michigan's Consumer Protection Act. This shift from product liability to consumer protection laws reflects an intentional effort in recent years to avoid traditional elements and defenses of product liability law. *See* Sheila B. Scheuerman, *Against Liability for Private Risk-Exposure*, 35 HARV. J.L. & PUB. POL'Y 681, 691 (2012).

In most other product-turned-consumer cases, it is typical that at least some individuals actually experienced the alleged harm. 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 recognized liability theory. In another case, a car owner testified in deposition that after the manufacturer fixed his anti-lock brakes, he was "happy" and the car was "working fine." *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales Practices & Prods. Liab. Litig.*, 915 F. Supp. 2d 1151, 1154, 1159 (C.D. Cal. 2013). Yet, he sought to represent a class of purchasers alleging they did not receive the benefit of the bargain. The court dismissed the case, refusing to allow consumers to fabricate

consumer protection claims: "Merely stating a creative damages theory does not establish the actual injury that is required to prevail on [these] product liability claims." *Id*. at 1157-58.

These faux consumer actions also deter beneficial behavior. They are perversely filed after a company reports a problem or undertakes a repair program, as with the anti-lock brakes above or closing the cyber port in the case at bar. The Court should grant the Petition to ensure that consumer class actions do not undermine traditional product liability principles that have been developed to incentivize appropriate corporate conduct. Litigation against manufacturers should not be allowed to extrapolate theoretical damages to thousands or millions of people, potentially including statutory damages, treble damages, and attorneys' fees. *See* Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation. Where Should Tort Law Draw the Line?*, 80 BROOK. L. REV. 599 (2015). Such liability is unsustainable, and appellate courts should be encouraged to review such manifestly erroneous class certification rulings if and when they occur.

CONCLUSION

For these reasons, *amici curiae* respectfully request that this Court grant the Petition.

Respectfully submitted,

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