No. 21-40720

United States Court of Appeals
for the
Fifth Circuit

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DAMONIE EARL, et al.,

Plaintiffs-Appellees,

– v. –

THE BOEING COMPANY and SOUTHWEST AIRLINES CO.,

Defendants-Appellants,

On Appeal from the U.S. District Court for
the Eastern District of Texas
No. 4:19-CV-00507
Hon. Amos L. Mazzant

BRIEF FOR *AMICUS CURIAE*
THE NATIONAL ASSOCIATION OF MANUFACTURERS
IN SUPPORT OF DEFENDANTS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that—in addition to the persons and entities listed in the appellants' Certificate of Interested Persons—the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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I. INTEREST OF *AMICUS CURIAE*

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

The NAM regularly files *amicus* briefs in cases that raise issues important to manufacturers. Members of the NAM, as well as the broader manufacturing community, have a weighty interest in preventing improperly certified class actions—in particular, no-injury class actions such as this one that aggregate millions of claims. Baseless litigation poses a distinct threat to the competitiveness of American manufacturers.*

* No counsel for a party authored this brief in whole or in part, and no person other than the *amicus*, its members, or its counsel made a

II. SUMMARY OF ARGUMENT

Plaintiffs filed this class action in the wake of two crashes involving Boeing 737 MAX 8 planes operated by non-U.S. carriers in Indonesia and Ethiopia. But the certified classes in this case do not consist of the estates or family members of those who tragically lost their lives on those foreign flights. Nor is the class even limited to those who traveled on a 737 MAX. Instead, the litigants pursuing this case consist of travelers who purchased a ticket for a Southwest or American Airlines flight that *could have* used a 737 MAX. Although 95% of the class members did not board one of these jets, they seek billions of dollars from Boeing and Southwest for the possibility that they could have done so.

This lawsuit is emblematic of class actions run amok, and this Court should decertify the class for several reasons:

A. Federal courts have no roving commission to inquire into product safety. Under Article III of the Constitution, the judicial power is limited to adjudicating a "Case" or "Controversy" initiated by an injured litigant. This threshold requirement is a bulwark of individual liberty. But in recent decades, plaintiffs' theories of liability have

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monetary contribution intended to fund the preparation or submission of this brief. All parties consent to the filing of this brief.

expanded into the realm of pure speculation. Stretching the jurisdiction of federal courts, enterprising counsel seek relief on behalf of thousands or millions of people, many of whom have no awareness that they allegedly suffered an "injury."

A federal court must decide Article III standing when certifying a class for the simple reason that uninjured litigants cannot proceed in federal court. Neither the United States Constitution, the U.S. Code, or the Federal Rules of Civil Procedure recognize exceptions to Article III for class actions. And standing is mandated at every stage, including when the court certifies a class and thereby subjects absent class members to its jurisdiction. Because federal courts do not possess judicial power in the absence of standing, the Constitution does not tolerate a "certify first, confirm later" approach.

B. In this case, the plaintiffs asked the district court to exercise its jurisdiction over millions of claims and to bind millions of absent class members, as well as the defendants, to its judgment. But the plaintiffs failed to show how any of the class members were actually injured by the defendants' conduct. In fact, the record showed that 95% of the class never boarded a 737 MAX airplane. And the remaining 5% that did

travel on a 737 MAX did so safely—the alleged defect never manifested itself in those aircraft.

The district court nonetheless certified four classes on the theory that these travelers paid more for tickets than they otherwise would have if the alleged defects in the 737 MAX had not been "concealed." This Court has already rejected this theory of "no-injury 'damages.'" Plaintiffs who receive the benefit of their bargain (here, a safe flight) cannot undo their purchase after the fact by citing an alleged "defect" that never affected them. And the supposed "overcharge" theory is also far too speculative and attenuated to be fairly traceable to the defendants' conduct. The district court relied exclusively on a conjoint analysis produced by the plaintiffs' expert. At every turn, the report's artificial assumptions about the market inflated the effect on demand while ignoring the effect on supply. Article III cannot be so easily gamed. A plaintiff must show that the defendant's conduct *in fact* caused an actual injury, not that an expert model can estimate an injury under different, purely academic conditions.

C. The practical consequences of the decision are just as stark as the legal defects. Manufacturers will face the prospect that every

purchaser of an allegedly defective product—even those not injured by the defect—could sue to recover a hypothetical "overcharge" based on the undisclosed risk. And as this case shows, the district court's theory does not stop at every purchaser of *that* product. Even those who did not fly on a 737 MAX can pursue the supposed overcharge, the district court held, because a defect in one product affects the price for everyone in a marketplace, not just consumers who purchase the product.

The possibilities are limited only by the imagination of creative and enterprising lawyers. Car rental patrons could sue over defects in vehicles they *did not* rent. Domestic shoe purchasers could sue over manufacturing practices in countries where their shoes *were not* made. Anyone who bought an index fund could sue over misstated earnings by companies *not* included in the fund. In each case, the theory is the same as the one endorsed by the district court here: If the public knew that the product they bought *could have* incorporated a defective component—even though it actually did not—they would not have paid as much for the product.

This boundless theory poses a threat not only to the separation of powers, but also to the American economy, as class actions place

significant financial pressure on defendants to settle even meritless claims. Manufacturers will become a particularly ripe target for no-injury class actions premised on counterfactual overcharges. The Court should reverse the district court's certification order.

III. ARGUMENT

A. Standing Is A Threshold Requirement To The Certification Of A Class.

Article III of the Constitution limits the jurisdiction of federal courts to resolving "a real controversy with real impact on real persons." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (internal quotation marks omitted). This bedrock principle limits the authority of federal courts "in individual *or* class actions." *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (emphasis added).

Although a class action has been labeled "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (internal quotation marks omitted), it is still a "species" of "traditional joinder" that "enables a federal court to adjudicate claims of multiple parties at once," *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). And "*any* person

invoking the power of a federal court must demonstrate standing to do so." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (emphasis added). Accordingly, an absent class member who requests relief in his own right must prove his standing to proceed in federal court.

Upon certification, every class member "in a properly entertained class action" becomes a party, bound by any judgment entered in the case. *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984); *see Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002). This Court has therefore understood certification as "the critical act" that "renders" class members "subject to the court's power." *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 250 (5th Cir. 2020); *see Flecha v. Medicredit, Inc.*, 946 F.3d 762, 769 (5th Cir. 2020). But a federal court cannot grant class certification—thereby joining new claims to the case—unless the class representatives "demonstrate standing for *each* claim [they] seek[ ] to press," including those of absent class members. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006) (emphasis added).

In the absence of standing, the court does not possess "federal judicial power" over the class members and their claims. *TransUnion*, 141 S. Ct. at 2203. Federal courts cannot ignore this problem at *any* stage

of litigation, "'class action or not.'" *Id.* at 2208 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring)); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). After all, Rule 23 is simply a procedural path for new parties to enter a case that "must be interpreted in keeping with Article III constraints." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612–13 (1997); *cf. Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1648, 1651 (2017) (holding that Article III standing is a "threshold issue" whenever "the plaintiff and the intervenor seek separate money judgments").

These cases make clear that federal courts may exercise Article III judicial power "only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals." *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339 (1892); *see Raines v. Byrd*, 521 U.S. 811, 819 (1997). The district court could not entertain the class members' damages claims as a first resort—all the while punting consideration of standing down the road to summary judgment or trial. The district court accordingly erred in declining to rule on Boeing's and Southwest's arguments regarding the standing of class members at class certification. ROA.3525–29.

B. The District Court Improperly Certified A No-Injury Class.

The district court's certification decision flouted Article III and the precedent of both the Supreme Court and this Court. None of the absent class members were harmed during a flight. As the Supreme Court recently made clear, exposure to a risk that never materializes is not a justiciable injury. *TransUnion*, 141 S. Ct. at 2211 (requiring proof either "that the risk of future harm materialized" or "that the class members were independently harmed by their exposure to the risk itself"). Worse still, the vast majority of the class never even boarded a 737 MAX in the first place. They can at most show *a risk of a risk*—an unrealized possibility that they *could* have come into contact with an allegedly defective product. The class members plainly cannot count themselves "among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972). Indeed, "many of them would first learn that they were 'injured' when they received a check compensating them for their supposed 'injury.'" *TransUnion*, 141 S. Ct. at 2212.

The plaintiffs thus try to transform a risk they never faced into a speculative pocketbook injury. They argue that latent defects in the 737 MAX caused them monetary harm at the time they purchased their

tickets, even though the risks never materialized during their flights (95 percent of which used other aircraft). The mere presence of such planes in an airline's fleet, they say, "would have diminished the demand (and price) for those tickets." ROA.3530. In other words, they would have paid less for all flights whose routes have ever been flown using a MAX if they had known about the undisclosed risks of flying with airlines that own such a plane.

This attempt to circumvent the injury-in-fact requirement of Article III would eviscerate any reasonable limits on federal court jurisdiction in class actions. Moreover, this Court already rejected this boundless theory in *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002). In that case, a purchaser, despite suffering no physical or emotional injury, sued to get "her money back" from a manufacturer that sold a painkiller that had allegedly caused *others* to go into liver failure. *Id.* at 317. This Court held that there was no case—the plaintiff "paid for an effective pain killer, and she received just that." *Id.* at 320. A plaintiff who receives the "benefit of her bargain" cannot assert a monetary injury without showing a "concrete injury" from the defect itself. *Id.* at 320–21. Without such a harm, the plaintiff seeks nothing

more than "no-injury 'damages.'" *Id.* at 321.

The district court here correctly recognized that *Rivera* foreclosed the argument that the plaintiffs never would have purchased a ticket had they known about the alleged defects. ROA.663–66. The court erred, however, by allowing the plaintiffs to proceed on an "overcharge" theory that they would have purchased a ticket *at a lower price* if they knew about the alleged defects. ROA.666–69. Standing depends on the concreteness of the injury suffered by the plaintiff, not on the cause of action invoked or the measure of damages demanded. *See TransUnion*, 141 S. Ct. at 2206. For purposes of Article III, a no-injury case brought under the Racketeer Influenced and Corrupt Organizations Act—like this one—is no different from a "no-injury products liability case." *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 455 n.4 (5th Cir. 2001).

Here, the named plaintiffs and unnamed class members are equally uninjured whether they want *all* or only *some* of their money back. Each person who purchased a ticket received "the benefit of [the] bargain"—a safe trip from Point A to Point B. *Rivera*, 283 F.3d at 320. This case simply does not concern class members who were "promised one thing but were given a different, less valuable thing." *Coghlan*, 240 F.3d at 455

n.4. The class members bought plane tickets and received exactly what they were promised.

What is worse, the district court's theory of monetary injury fails even on its own terms. One of the "most basic doctrinal principles" of standing is that Article III demands a "fairly traceable connection between the alleged injury in fact and the alleged conduct by the defendant." *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008) (alterations omitted). But here, the plaintiffs presented no reliable evidence of a fairly traceable connection between the alleged ticket overcharge and the alleged concealment of defects in the 737 MAX.

The district court grounded the purported overcharge in a conjoint analysis—typically used in product marketing research—by the plaintiffs' expert, Dr. Allenby. But as the defendants explain, his analysis was plagued with flaws that produced irrational results. *See* Boeing Opening Br. 38–39; Southwest Opening Br. 21–28. By artificially isolating a change in subjective demand and then artificially ignoring the change in supply, the expert report ceased to be evidence of injury and became an invention of one. Because it is "unclear" that the challenged conduct "in fact" increased the price of the tickets, the alleged overcharge

is not only barred as a legal matter under *Rivera*, but also too "'conjectural or hypothetical'" as a factual matter to be a concrete injury. *DaimlerChrysler*, 547 U.S. at 344 (quoting *Defenders of Wildlife*, 504 U.S. at 560).

The district court was apparently motivated by the concern that Boeing and Southwest would be "immuniz[ed]" from wrongdoing if the "counterfactual nature" of the overcharge "makes proving the fact of injury impossible." ROA.3557. No doubt, "the indirectness of the injury" can "make it substantially more difficult to meet" the traceability requirement. *Warth v. Seldin*, 422 U.S. 490, 505 (1975). But the fear that "no one would have standing" if the plaintiffs lack standing is certainly not "a reason to find standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013).

The district court's certification of the classes in this case therefore violated Article III. When standing is properly considered, as it must be, *see* Section III.A, not one of the class members was harmed by the alleged defect in the 737 MAX.

C. The Decision Below Would Permit Baseless No-Injury Class Actions Against Manufacturers.

The district court certified a no-injury class of staggering

dimensions on the flimsiest of rationales. Standing cannot be ignored at class certification because prolonging the unconstitutional exercise of judicial power puts defendants in an untenable position. Nowhere is this danger greater than for no-injury theories like this one that permit litigants to amass thousands or even millions of claims into a single action. The decision below is a playbook for turning unmaterialized risks into speculative pocketbook injuries. If affirmed, these dynamics will supercharge the ability of plaintiffs' lawyers to extract "'in terrorem' settlements" from any manufacturer in the country that can be hauled into federal court in Mississippi, Louisiana, or Texas. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also Shady Grove*, 559 U.S. at 445 n.3 (Ginsburg, J., dissenting).

Start with the conjoint analysis. The "real impact" of an alleged defect depends on how products are actually manufactured, distributed, and priced. *TransUnion*, 141 S. Ct. at 2203. But according to district court, an expert can pick and choose what features to include in the survey, break new ground in applying the technique to product defects, and include calculations that wave away supply-side considerations because "doing so is standard in a conjoint analysis." ROA.3480–81.

That holding is a recipe for made-to-order expert reports on counterfactual monetary injuries.

Similarly troubling is the district court's theory that the plaintiffs were harmed at the time of the purchase. Breathtaking in its scope, this theory of standing would permit any class of plaintiffs to sue over injuries they never personally experienced. Everyone, for example, who took a Lyft ride could sue over an alleged defect in a Kia—even those who never rode in a Kia. The plaintiff would need only hire an expert to advance the same theory the district court adopted here: that people would be less inclined to use Lyft if they knew they *could* have ended up riding in a defective vehicle. No matter that the revelation of a defect also would decrease the *supply* of vehicles on the Lyft app—leaving the net effect ambiguous. According to the district court, such speculation is a matter for the jury (or even the claims administrator). ROA.3545.

Nor is the district court's reasoning confined to product defects. *Anything* that affects a ticket price is fair game. If an airline's "kosher" meals turned out to include pork, the district court would allow everyone who flew the airline to sue—even those who never bought the kosher meal (or even wanted one). Demand would drop, plaintiffs would say, so

long as *some* customers would be less willing to fly with the airline. Or a gambler who discovers a casino is playing with rigged dice could sue—even if she won every dice throw—on the theory that other, less lucky patrons would be less willing to frequent the casino. Still more, workout aficionados could sue a gym for technical violations that admittedly did not directly injure them by asserting that demand would be lower if the customers knew the gym contracts were unlawful—even if the gym delivered "exactly what they paid for: access to a gym." *Wendt v. 24 Hour Fitness USA, Inc.*, 821 F.3d 547, 550 & n.10 (5th Cir. 2016) (finding no injury because the "benefits fully offset Plaintiffs' costs" within the same transaction).

Opening the courthouse doors to every purchaser of a product will stifle innovation across the manufacturing industry. There will always be an expert available to testify that an alleged problem in an earlier stage of a vast supply chain impacted all further links. Whatever consumers do not know about a product will be a basis for reconfiguring prices after the fact in response to counterfactual changes in demand. The legal system produces tailored incentives to innovate when those who were harmed by a defect can seek compensation for their injuries.

But if every purchaser is entitled to compensation even when a product functions properly for them, manufacturers may wisely steer clear of developing or using innovative products given the risk of such expansive liability.

A butterfly flaps its wings, as the saying goes, so all is fair game when standing devolves into "an ingenious academic exercise in the conceivable." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973). This Court declined to allow plaintiffs to show injury through a Rube Goldberg mash-up of inferences in *Rivera*, and should reaffirm that decision by rejecting the theory of standing in this case.

IV. CONCLUSION

The decision below conflicts with bedrock principles of Article III and this Court's precedent. If affirmed, the decision will open the door to massive no-injury classes—the sort that will coerce manufacturers to settle even baseless claims. The Court should therefore dismiss this case for lack of standing or, in the alternative, reverse the district court's certification order and remand for further proceedings.

Dated: January 14, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,501 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)(A) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, New Century Schoolbook font.

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