No. 14-123

In the Supreme Court of the United States

BP EXPLORATION & PRODUCTION INC., ET AL.,

Petitioners,

v.

LAKE EUGENIE LAND & DEVELOPMENT, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE FEDERATION OF GERMAN INDUSTRIES, CONFEDERATION OF BRITISH INDUSTRY, AMERICAN CHAMBER OF COMMERCE IN GERMANY, AND BRITISHAMERICAN BUSINESS IN SUPPORT OF PETITIONERS

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MOTION OF THE FEDERATION OF GERMAN INDUSTRIES, CONFEDERATION OF BRITISH INDUSTRY, AMERICAN CHAMBER OF COMMERCE IN GERMANY, AND BRITISH-AMERICAN BUSINESS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Amici The Federation of German Industries, Confederation of British Industry, American Chamber of Commerce in Germany, and BritishAmerican Business respectfully move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file a brief *amicus curiae* in support of petitioners. All parties, with the exception of the Earl Aaron, *et al.*, respondents, have consented to the filing of this brief and their consents have been filed with the Clerk.

Amici represent the interests of British and German businesses and industries, which are among the United States' most frequent and reliable economic partners. *Amici* explain in their brief why the Fifth Circuit's unwarranted expansion of the class action device to include large numbers of uninjured claimants threatens all companies that do business in the United States and as a result makes the United States a less attractive place in which to invest and conduct business.

The Federation of German Industries—formally, *Bundesverband der Deutschen Industrie e.V*, or BDI —is the umbrella organization for all industrial businesses and industry-related service providers in Germany. It represents 38 industrial-sector federations and has 15 regional offices in Germany and offices abroad in Brussels, London, Tokyo, and Washington, D.C. BDI speaks for more than 100,000

private enterprises employing some eight million people.

Besides its activities on the national and European level, BDI also communicates the interests of German industry to governments internationally. It seeks to maintain the openness and attractiveness to German businesses of important international markets like the United States, in which countless German companies operate. It has regularly sought to vindicate the interests of German business in the courts of the United States. For example, in *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 269 (2010), this Court cited the brief filed by BDI and other international business associations in explaining "the interference with foreign securities regulation that application of § 10(b) abroad would produce."

The Confederation of British Industry ("CBI") is the United Kingdom's leading business organization. The CBI speaks on behalf of 190,000 businesses of all sizes and sectors which together employ around seven million people. It has offices across the UK as well as representation in Brussels, Washington, Beijing, and New Delhi. The CBI seeks to create and sustain the conditions under which businesses in the UK can compete effectively. It has previously participated as an *amicus* before this Court in cases of importance to British businesses, for example in *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct 1659 (2013).

The American Chamber of Commerce in Germany e.V. ("AmCham Germany") is a private, non-profit, bilateral economic organization that represents the interests of its 3,000 American and German members. AmCham Germany's mission

includes promoting trade and investment between Germany and the United States and strengthening transatlantic relations.

BritishAmerican Business is a leading transatlantic business organization headquartered in London and New York City, with a membership that brings together more than 500 of the world's leading multinational and middle-market companies across sectors and geographies and an advisory board that includes more than 100 of the world's most successful CEOs. It provides the Secretariat for the British-American Business Council, the largest single transatlantic business network, with more than 2,000 member companies based in more than 22 major business centers throughout the U.S. and U.K.

British and German industry contributes substantially to the U.S. economy through investment in the U.S. and commercial dealings with U.S. companies. In 2012, the cumulative value of all foreign direct investment in the U.S. was $2.6 trillion —equivalent to fully 16% of the U.S. gross domestic product. Britain is the largest foreign investor in the United States. As of year end 2012, the U.K. had invested $487 billion in the U.S. market. Investment by German business in the U.S. market exceeded $199 billion at the end of 2012.

British and German investment is highly sought after by state and local governments across the United States, which seek to create well-paid jobs for their citizens. British companies support 943,500 jobs nationwide, while German industry and investment is responsible for the creation of over 581,000 additional positions. In 2011 alone, British jobs in the U.S. accounted for $70 billion in payroll. See The Representative of German Industry and

Trade, *German-American Trade, Investment + Jobs* (2013);[1] CBI, *Sterling Assets 6* (July 2014).[2]

Because the willingness of companies to invest abroad hinges critically on identifying, measuring, and limiting the risk involved, German and British industry has a substantial interest in ensuring appellate review of orders in which district courts and courts of appeals in the United States allow wide-ranging class actions that include many uninjured claimants. Classes with large blocks of claimants who were not injured by a defendant's actions increase already significant defense costs and ratchet-up the pressure for defendants to settle class actions without regard to the merits of the plaintiffs' claims. That a plaintiff's injury was caused by the defendant's conduct is a basic and vitally important constraint on the scope of liability and amount of damages. Without that constraint, the threat of boundless class action liability makes the United States a less attractive place in which to invest and do business.

For these reasons, *amici* believe that their perspective on the importance of the issues raised by the petition will assist the Court in its consideration of this case.

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[1]http://www.rgitusa.com/fileadmin/ahk_rgitusa/media/pdf/2013/RGIT_Trade_Invest_Jobs_2013_Online.pdf.

[2]http://www.cbi.org.uk/media/2847843/sterling_assets_6.pdf

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SEPTEMBER 2014

QUESTION PRESENTED

Whether the court of appeals erred in holding that district courts can, consistent with Rule 23 and Article III, certify classes that include numerous members who have not suffered any injury caused by the defendant.

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BRIEF *AMICUS CURIAE* OF THE FEDERATION OF GERMAN INDUSTRIES, CONFEDERATION OF BRITISH INDUSTRY, AMERICAN CHAMBER OF COMMERCE IN GERMANY, AND BRITISHAMERICAN BUSINESS IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*

The interests of the *amici* are set forth in the foregoing motion for leave to file this *amicus* brief.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Flouting this Court's precedents, the Fifth Circuit endorsed a class composed of numerous members who lack any injury traceable to the defendants' conduct. These settlement-class members are to be compensated "without regard" to whether their injuries were caused by the Deepwater Horizon spill. *Amici* have no objection to the imposition of liability on defendants when consumers are actually harmed by their wrongful conduct. But here the class includes many uninjured consumers who could not have brought suit individually. By exponentially increasing class membership, the Fifth Circuit's approach to class certification threatens European companies doing business in the United States with potentially massive liability for harms that they had no part in causing.

[1]Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief.

The Fifth Circuit erred as a matter of law by certifying a class that created liability to uninjured claimants, disregarding key requirements of Article III of the Constitution and Rule 23. By permitting a class with numerous uninjured members, the Fifth Circuit side-stepped Article III's basic injury-in-fact requirement. By allowing a *procedural* mechanism—the class action—to create *substantive* rights where none existed before, it ran afoul of the Rules Enabling Act, 28 U.S.C. § 2072(b). And by opening the courthouse door to sprawling classes full of uninjured plaintiffs, the Fifth Circuit eviscerated many of Rule 23's core protections against class action abuse recognized in this Court's decisions.

Nor do the rulings below even advance Rule 23's goal of efficiently providing compensation. To the contrary, allowing classes that include a large number of uninjured persons would disserve the interests of claimants who can trace their injury to a defendant and therefore deserve compensation. Those truly injured claimants would often have to share settlement proceeds with numerous class members whose injuries stemmed from other causes. It is a strange view of class actions—one certainly not contemplated by the drafters of Rule 23—that allows those with no valid claims to obtain compensation that reduces the amounts recovered by the truly injured.

The specter of potentially unlimited exposure to class action lawsuits by uninjured plaintiffs poses a serious concern to British and German businesses, which play an important role in the U.S. economy. German and British investment results in jobs for more than 1.5 million workers in the United States, in every state in the nation, with many of those jobs

being in manufacturing. British and German investments in the U.S. total hundreds of billions of dollars. See Motion, *supra*, pp. 3-4. In 2011, British companies spent $6.4 billion in the United States on research and development alone. British and German investment is associated with efficient technologies and well-paying jobs; it is highly sought after by state and local governments across the United States and is a significant contributor, year after year, to the health of the U.S. economy.

Like all foreign companies contemplating investing abroad, German and British businesses carefully weigh the risks they confront by operating and investing in the United States, including exposure to class action litigation. That exposure is a unique aspect of doing business in the United States, because European legal systems generally have not recognized collective, representative actions by private individuals in the same form or to the same extent as U.S. class actions. See Harald Koch, *Non-Class Group Litigation Under EU and German Law*, 11 DUKE J. COMP. & INT'L L. 355, 358 (2001). Even recent proposals to expand collective actions in the European Community's member nations contain protections for defendants that are unknown in the United States. See *Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law* (2013/396/EU) (requiring opt-in and barring punitive damages awards, among other limitations).

It is fair to say that the United States class action system is by far the most expansive system of collective redress by litigation anywhere in the

world. European businesses must weigh the potential for class action lawsuits in the U.S.—suits that are costly to defend, costly to settle, and virtually impossible to defend on the merits because of the risk of a massive jury award of damages—when determining whether to operate or otherwise invest here. European businesses—especially small and medium sized enterprises—regularly cite U.S. tort risk as a reason for declining to invest in the U.S.

Unfortunately, the Fifth Circuit's decisions in this case exacerbate these litigation risks. By permitting classes to include members who were not injured by the defendant's conduct, the decisions below make the risks of doing business here larger and far more amorphous. The threat of open-ended and unpredictable liability to a class not bounded by causation requirements diminishes the attractiveness of doing business in the United States and, left uncorrected, may deter foreign investment here. For example, if a product liability action can be brought not only by a few customers who can prove they were injured by the product, but also by the vast majority of uninjured purchasers of the product, exponentially increasing litigation risks, a manufacturer may simply decide not to sell the product to U.S. consumers—to the detriment of those consumers as well as to every U.S. company and worker in the product chain.

This Court should grant review and reaffirm the principle that only those who were injured and who can trace their injuries to the defendant belong in a class certified pursuant to Rule 23.

ARGUMENT

I. Certifying A Class Full Of Uninjured Claimants Disregards This Court's Standing Requirements And Permits The Class Action Device To Modify Substantive Rights In Violation Of The Rules Enabling Act.

The Fifth Circuit's decisions endorse the district court's expansion of the class to include numerous claimants who have no injury caused by the oil spill. Without an injury traceable to the spill, these class members lack standing to sue in their own right. Although these uninjured members fail to satisfy a fundamental requirement of Article III, the Fifth Circuit nevertheless permitted them to bring suit as members of the class. This extraordinary expansion of the class action device not only violates Article III, but also enlarges uninjured claimants' substantive rights in violation of the Rules Enabling Act.

A. A class composed of numerous uninjured members violates Article III.

This Court repeatedly has explained that certification cannot provide individuals a right to relief in federal court that the Constitution would deny them if they sued individually. Accordingly, a class action can aggregate only claims that could be presented individually (setting aside jurisdictional amounts and the like). As this Court has admonished, "Rule 23's requirements must be interpreted in keeping with Article III constraints." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 612-613 (1997).

Accordingly, this Court has required a rigorous analysis of standing in the class action context. This

includes a showing of injury-in-fact, a fundamental requirement of Article III jurisdiction that "cannot be removed." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009). To satisfy this requirement, a plaintiff must plead and prove a "distinct and palpable" injury fairly traceable to the defendant. *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475, 482-483 (1982); see also *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1434 (2013) (rejecting a "methodology that identifies damages that are not the result of the wrong"). This Court recently recognized in *Clapper* v. *Amnesty International USA* that "allegations of *possible* future injury are not sufficient" to create standing because "threatened injury must be *certainly impending* to constitute injury in fact." 133 S. Ct. 1138, 1147 (2013) (emphasis in original). It follows that a plaintiff's complete inability to show injury caused by the defendants deprives that plaintiff of any standing to bring suit.

The district court's interpretation of the settlement agreement ignored this essential requirement of Article III, resulting in a class composed of numerous members who lack an injury fairly traceable to BP's alleged actions. As Judge Garza explained without contradiction in his dissent, many members of the settlement class "could never truthfully allege or establish standing, at any stage of the litigation." Pet. App. 66a. And yet the Claims Administrator awarded an astounding $76 million to entities whose injuries were wholly unrelated to the oil spill. Pet. App. 418a, 420a. In one instance, for example, a Louisiana attorney was awarded $172,000 despite the fact that his business license was revoked *before* the spill occurred—making it all

but impossible that he suffered losses *as a result of* the spill. See Pet. App. 420a.

Class members whose injuries cannot reasonably be traced to the spill fail to satisfy the fundamental requirements of Article III because their injuries, if any, were not caused by the defendants. Despite the fact that these class members therefore lack standing to sue BP in their own right, the Fifth Circuit affirmed their inclusion in the class. It should not have permitted that end run around Article III requirements.

As Judge Clement explained, the settlement agreement here, "as implemented, is using the powers of the federal courts to enforce obligations unrelated to actual cases or controversies." Pet. App. 106a. Contorting the jurisdiction of the federal courts to allow recovery by plaintiffs who "have no injury traceable to BP's actions," and who "would not have standing to maintain a suit individually," raises "constitutional principles [that] are important because they assure the vigorous and fair resolution of disputes and respect the limitations on the power of the federal judiciary." Pet App. 107a.

B. Allowing a class full of uninjured members violates the Rules Enabling Act.

Certification of a class whose members lack standing to sue in their own right also would violate the Rules Enabling Act because it would "abridge, enlarge or modify" a "substantive right" solely as a result of the case being brought as a class action under Rule 23. See *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011) (quoting 28 U.S.C.

§ 2072(b)); accord *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999); *Amchem*, 521 U.S. at 612-613.

The analysis under the Rules Enabling Act is simple. An individual claimant whose injury was not traceable to defendants' conduct would lack standing under Article III and the claimant's suit would accordingly be dismissed. The Rules Enabling Act requires that this claimant not fare any better—not have his or her rights "enlarge[d]"—just because the suit is brought as a class action instead of an individual suit. And the use of class actions to create claims where there would otherwise be none "abridge[s]" the substantive rights of defendants to have suits dismissed when the plaintiffs cannot establish standing. Simply put, the Act forbids the use of Rule 23 class actions to make viable claims that otherwise would promptly fail.

Article III of the Constitution and the Rules Enabling Act are important structural protections that prevent the proliferation of meritless lawsuits. *Amici* request that the Court grant certiorari in this case to re-establish that class certification cannot be used to evade those limits. Indeed, it is even more important that courts rigorously enforce standing requirements when class certification is sought than when a plaintiff brings an individual action, for the costs to defendants and to the economy of overbroad class litigation are far greater, and it is well understood that once a class is certified most defendants "will be pressured into settling questionable claims." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011). It is inconceivable, given this Court's recent warning that Rule 23's "stringent requirements" "in practice exclude *most* claims," that Rule 23 authorizes claims

like these in which many class members' injuries are not the result of the defendants' actions. *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013) (emphasis added).

II. The Fifth Circuit's Approach Frustrates The Objectives Of Rule 23 And Results In Classes With No Relation To The Defendant.

A. A class composed of numerous uninjured members does not satisfy Rule 23's requirements.

A Rule 23(b) class cannot be certified unless the plaintiffs prove commonality and predominance. Commonality requires the plaintiff "to demonstrate that the class members 'have suffered the same injury.'" *Dukes*, 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 157 (1982)). The predominance requirement, which is "far more demanding" than commonality (*Amchem*, 521 U.S. at 623-624), requires that common questions "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). To warrant certification under Rule 23(b)(3), plaintiffs must offer "a theory of liability that is * * * capable of classwide proof." *Comcast*, 131 S. Ct. at 1434. And courts must "conduct a 'rigorous analysis'" to determine whether these Rule 23 requirements have all been satisfied, including any necessary "inquiry into the merits of the claim." *Id.* at 1433 (quoting *Dukes*, 131 S. Ct. at 2551-2552).

These principles requiring a high degree of cohesion among class members to ensure that they truly do all have the same claim are just as important when a case settles as when it is tried. As

this Court has explained, parties can no more agree to settle a suit for a class that does not satisfy Rule 23 than they can agree to try a class action that lacks commonality, typicality, or predominance of common issues. The need for "court surveillance under Rule 23's certification criteria" to "bloc[k] unwarranted or overbroad class definitions" is "undiluted, even heightened * * * in the settlement context." *Amchem*, 521 U.S. at 618, 620. Concomitantly, a court may not interpret a settlement agreement in a way that would make the certified class run afoul of Rule 23, by introducing a large number of class members whose harm was not caused by any act of the defendant.

In settlement no less than at trial, the presence of a significant number of claimants not injured by any act of the defendant is a "fatal dissimilarity among class members" that "would make the use of the class-action device inefficient [and] unfair." *Amgen, Inc.* v. *Connecticut Retirement Plans*, 133 S. Ct. 1184, 1197 (2013). By definition, those claimants fail to satisfy the key requirement that "class members 'have suffered the same injury.'" *Dukes*, 131 S. Ct. at 2551. "The disparity between the currently injured and exposure-only categories of plaintiffs" that so "undermin[ed] class cohesion" in *Amchem* as to prevent class certification there pales in comparison to the disparity in this case, where claimants whose injuries were caused by defendants' actions have been lumped together with claimants who can identify no such causal connection at all. 521 U.S. at 624-626. *Amchem* rejected class certification because of "'factor[s] that complicat[e] the causation inquiry.'" *Id.* at 624. Here, the courts below simply *eliminated that inquiry altogether*. Because causation is one of the "factual questions

that qualify each class member's case as a genuine controversy, questions that pre-exist any settlement," they are highly "pertinent to the predominance inquiry" and may not be brushed aside in this way. *Id.* at 623.

Under *Amchem*, the class settlement, as interpreted below, did not satisfy Rule 23. Indeed, the drafters of the 1966 revision of Rule 23 fully understood that because of significant causation questions mass tort cases like this one "are 'ordinarily not appropriate' for class treatment." 521 U.S. at 625 (quoting Adv. Comm. Notes to Rule 23, 1966 Revision). Here as in *Amchem*, "certification cannot be upheld, for it rests on a conception" of the commonality and predominance requirements so lax as to be "irreconcilable with the Rule's design." *Ibid.*

Further, as the petition explains, the decisions below deepen an already existing circuit split regarding the treatment of no-injury class actions. While some circuits view the presence of numerous uninjured class members as fatal to class certification, other circuits permit the class to be certified on the theory that absent class members' lack of injury should be dealt with at the liability phase. See, *e.g.*, *Avritt* v. *Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (injured persons may not bring a class action on behalf of persons who lack Article III standing); *Cole* v. *Gen. Motors Corp.*, 484 F.3d 717, 730 (5th Cir. 2007) (no predominance where most class members could not recover for an unmanifested defect); cf. *Daffin* v. *Ford Motor Co.*, 458 F.3d 549, 550, 553 (6th Cir. 2006) (whether a warranty permits vehicle owner to recover for unmanifested defects is a merits inquiry).

This Court's guidance is needed to establish a uniform national rule governing these sprawling and unmanageable classes.

B. The Fifth Circuit's flawed Rule 23 analysis results in greatly inflated class membership.

Decisions such as the Fifth Circuit's which render the injury and standing of absent class members irrelevant inflate the size and settlement value of disputes. And their adverse consequences range far beyond potential liability for the sort of environmental hazard that is the subject of this litigation. In the retail context, for example, the approach taken by the Fifth Circuit would permit plaintiffs whose products suffered a defect to bring suit on behalf of every purchaser of the product—even if the vast majority of consumers never experienced the defect. Non-injury classes thereby open the federal courthouse doors to plaintiffs seeking monetary compensation for conduct that did not cause concrete harm to numerous class members. To be clear, *amici* do not object to the imposition of liability on companies when consumers are actually harmed by a product; instead, they challenge the notion that consumers who have not suffered an injury and so could not sue individually may nevertheless bring suit against a defendant simply by participating in a class action.

These problems are not theoretical for German and British companies doing business in the United States. For example, in *Tait* v. *BSH Home Appliances Corp.*, 289 F.R.D. 466 (C.D. Cal. 2012), the district court certified consumer class actions alleging that Bosch and Siemens front-loading washers have a design defect giving rise to the

development of moldy odors, even though the vast majority of washer purchasers never experienced any such odors. Indeed, *every* manufacturer of front-loading washers, U.S. or foreign, has been hit with nearly identical suits in U.S. courts, which have certified classes totaling tens of millions of washer buyers, most of whom never had any odor problem. As a result the entire appliance industry worldwide is battling enormously costly U.S. class actions predicated on a tiny percentage of washer owners who—for a multitude of varying reasons wholly unsuited to class resolution—experienced some moldy odors.[2]

III. The Fifth Circuit's Decisions Would Have Material Adverse Consequences For German And British Businesses Operating In The United States.

If the Fifth's Circuit approach stands uncorrected, it will result in large classes full of absent class members whose injuries, if any, are unconnected to the defendant's conduct. When causation drops out of the analysis, everyone in the vicinity of an environmental hazard may be part of a litigation class. And every consumer or purchaser of a product—regardless whether they experienced a problem as a result of using the product—may bring

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[2] See, *e.g.*, *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 844-845 (6th Cir. 2013); *Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796, 802 (7th Cir. 2013); *Spera* v. *Samsung Elecs. Am.*, 2:12-cv-05412 (D.N.J.); *Fishman* v. *Gen. Elec. Co.*, 2:12-cv-00585 (D.N.J.); *Montich* v. *Miele USA, Inc.*, 3:11-cv-02725 (D.N.J.); *Terrill* v. *Electrolux Home Prods., Inc.*, 1:08-cv-00030 (S.D. Ga.); *Harper* v. *LG Elecs. USA. Inc.*, 2:08-cv-00051 (D.N.J.).

suit against the product's manufacturer. Recoveries that may be modest as to each consumer, and even modest in the aggregate if applied only to consumers who actually experienced an injury, could soon reach gigantic proportions. This will give plaintiffs' lawyers the ability to exact compensation and fees far exceeding the amount of damages to actually injured class representatives.

Consequently, no-injury classes would substantially contribute to the already overwhelming pressure on defendants to settle after a class is certified, even if many of the plaintiffs lack meritorious claims because they were not harmed by the defendant. As this Court has repeatedly recognized, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC*, 131 S. Ct. at 1752; *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims"); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009) ("With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial").

Allowing no-injury class actions therefore has the potential greatly to increase the costs to British and German businesses of operating in the United States. Due to permissive rules of personal jurisdiction, the impact of the Fifth Circuit's rulings will be felt by businesses operating anywhere in the United States. Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 483, 491-493 (2011). And because the no-injury class model opens the courthouse door to plaintiffs unconnected to the defendant, it can "be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

German and British businesses have to take these litigation risks into account. They may be less likely to operate in the United States when even lawful business conduct could expose them to class action abuse and the potential for massive damages awards. The costs of doing business in the United States also would be difficult to predict and measure if unharmed consumers are permitted to join suit. The Fifth Circuit's rulings threaten to have a chilling effect on the thriving German and British commerce and industry in the United States and be a deterrent to any foreign corporation investing here or otherwise participating in the U.S. market. That can be avoided if the strictures of Article III and Rule 23, and this Court's class action precedents, are carefully followed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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