No. 11-

IN THE

Supreme Court of the United States

ZURN PEX, INC. AND ZURN INDUSTRIES, LLC,
Petitioners,

v.

DENISE AND TERRY COX, KEVIN AND CHRISTA HAUGEN, ROBERT AND CARRIE HVEZDA, MICHELLE OELFKE, AND JODY AND BRIAN MINNERATH, on behalf of themselves and all others similarly situated,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

RICHARD B. GOETZ
CARLOS M. LAZATIN
O'MELVENY & MYERS LLP
400 S. Hope St.
Los Angeles, Cal. 90071
(213) 430-6000

JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
LOREN L. ALIKHAN
DEANNA M. RICE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Petitioners

(*Additional counsel listed on inside cover*)

JAMES A. O'NEAL
JOHN P. BORGER
DANIEL J. CONNOLLY
AMY R. FITERMAN
DAVID A. SNIEG
FAEGRE & BENSON LLP
90 S. 7th Street, Suite 2200
Minneapolis, Minn. 55402
(612) 766-7000

ROBERT C. CARLSON
JAY M. BULGER
KOELLER, NEBEKER,
CARLSON & HALUCK LLP
225 Broadway, 21st Floor
San Diego, Cal. 92101
(619) 233-1600

QUESTION PRESENTED

When a party proffers expert testimony in support of or in opposition to a motion for class certification, may the district court rely on the testimony in ruling on the motion without conducting a full and conclusive examination of its admissibility under Federal Rule of Evidence 702 and this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Zurn Pex, Inc. and Zurn Industries, LLC, defendants below.

Respondents are Denise and Terry Cox, Kevin and Christa Haugen, Robert and Carrie Hvezda, Michelle Oelfke, and Jody and Brian Minnerath, named plaintiffs below.

Zurn Pex, Inc. is a wholly owned subsidiary of OEP, Inc., which is not a publicly held corporation. OEI, Inc. is the grandparent of Zurn Pex, Inc., and Zurn Industries, LLC is the great-grandparent of Zurn Pex, Inc.

Zurn Industries, LLC is a limited liability company that is wholly owned by Rexnord-Zurn Holdings, Inc., which is not a publicly held corporation.

No publicly held corporation owns 10% or more of either petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Zurn Pex, Inc. and Zurn Industries, LLC (collectively, "Zurn") seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at 644 F.3d 604, and is reprinted in the Appendix hereto ("App.") at 1a-50a. The order of the court of appeals denying rehearing and rehearing en banc is unreported, but is reprinted at App. 88a-89a. The district court's class certification order is reported at 267 F.R.D. 549, and is reprinted at App. 51a-87a.

JURISDICTION

The court of appeals issued its decision on July 6, 2011. A timely petition for rehearing and rehearing en banc was denied on September 16, 2011. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED

The full texts of Federal Rule of Civil Procedure 23 and Federal Rule of Evidence 702 are reprinted at App. 90a-97a.

STATEMENT OF THE CASE

This case presents an important question left open by this Court in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553-54 (2011): whether expert testimony, proffered in support of (or in opposition to) class certification under Rule 23 and challenged by the opposing party, must undergo and satisfy the complete reliability analysis required by Federal

Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

That question is the subject of an acknowledged circuit conflict, and it recurs frequently in class-action litigation, as the even broader controversy among district courts shows. Given the high stakes at issue in class action litigation—and the significance of the threshold certification decision—clarity in the rules governing class certification is especially critical. This Court should grant certiorari to resolve the conflict and make clear that *Daubert* applies fully to expert testimony proffered and challenged at the class certification stage.

A. Factual Background

Zurn designs, manufactures, and sells plumbing products, including cross-linked polyethylene ("PEX") plumbing systems. App. 52a. Zurn's PEX systems use brass fittings to connect the pipes; the brass fittings are secured with a special tool that crimps rings around the outside of the PEX tubing, creating a seal between the tubing and the fittings. *Id.* at 52a-53a. Zurn's PEX systems are covered by a 25-year limited warranty. *Id.* at 3a.

Respondents, named plaintiffs below, are individuals who each own a home installed with a Zurn PEX plumbing system. They seek recovery for damage to their homes allegedly caused by failures in Zurn's PEX plumbing systems. App. 53a.[1] Respond-

[1] Initially, several plaintiffs filed independent actions in assorted venues, but on August 21, 2008, the Judicial Panel on Multi-District Litigation transferred all of the cases to the District of Minnesota for coordinated and consolidated pretrial proceedings. Even though the cases filed by plaintiffs in other

ents sought to represent a class of all Minnesota homeowners with Zurn PEX systems utilizing brass fittings in their homes. *Id.* at 60a. Respondents assert that the brass fittings are inherently defective, in that they are susceptible to a condition known as "stress corrosion cracking" ("SCC"), which is caused by a combination of pressure and corrosion. *Id.* at 3a. Respondents contend that SCC begins to affect the brass fittings as soon as they are installed and exposed to water, eventually causing the fittings to leak, resulting in water damage to the home. *Id.* Respondents allege that Zurn knew or should have known that the fittings were susceptible to SCC and would fail within the warranty period. *Id.* at 53a. Some of the Zurn plumbing systems in respondents' homes have already leaked; the vast majority have not. *See id.* at 3a.

B. Class Certification Proceedings

1. In support of their motion for class certification—specifically, to establish that common legal and factual issues predominated over individualized issues and defenses—respondents offered evidence from two experts purporting to show that all Zurn products at issue are inherently defective. According to respondents' experts, the brass fittings were "doomed to leak within warranty" because they were prone to SCC. *See* App. 3a-5a. As the district court recognized, the expert testimony was essential to respondents' theory that they could prove an inherent defect—and hence breach of warranty—on a class-

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states have all been consolidated in Minnesota, this case concerns claims bought by Minnesota homeowners only. App. 54a; *see id.* at 2a & n.1.

wide basis. *Id.* at 76a; *see also infra* at 8.

Zurn opposed the motion for class certification and moved to strike the testimony of both experts as unreliable under the standards of Rule 702 and *Daubert*. App. 3a; *see also* Dist. Ct. D.E. 120, 126. Zurn also presented its own expert testimony in support of its motion to strike, and respondents did not challenge the admissibility of that evidence. *See* Dist. Ct. D.E. 124, 132.

a. Respondents' first expert, Dr. Wallace Blischke (a statistician), evaluated Zurn's warranty claims data to analyze the failure rate of Zurn PEX systems with brass fittings. App. 56a-57a. Blischke used the claims data to perform a "Weibull analysis," which is a conventional means of obtaining a product's mean time to failure. *See* Blischke Dep. at 77-78. The analysis Blischke performed using the data reflecting actual installation dates and reported failures yielded a mean time to failure of 3,500 years. *Id.* at 79. Blischke dismissed this result as "ridiculous," *id.* at 79-80, and instead simply *assumed* the mean time to failure for the brass fittings was 40 years, *see* App. 5a; *see also* Blischke Dep. at 126-28; Blischke Report at 20, 22. Applying that fictional figure, and further assuming—with no supporting data—that the average home plumbing system contained about 50 brass fittings, Blischke calculated that 99% of homes with Zurn PEX plumbing systems would experience at least one leak within the 25-year period covered by Zurn's warranty. App. 5a; *see also* Blischke Report at 25.

Zurn challenged Blischke's testimony on the ground that his assumed mean time to failure figure

had no basis in fact and was thus inadmissible under *Daubert*. App. 56a. Blischke himself conceded that the usual statistical technique for obtaining a mean time to failure is to calculate it based on existing claims data. *See id.* at 57a. Blischke also admitted that, although he had performed a reliability analysis similar to that required in this case on over one hundred prior occasions, he could not recall ever having simply *assumed*, rather than actually calculated, a mean time to failure. *See* Blischke Dep. at 18.

b. Respondents' other key expert, Dr. Roger Staehle, performed a series of tests on Zurn brass fittings to evaluate their susceptibility to SCC. In his first round of experimental testing, Staehle conducted a "bent-beam" test using specimens cut from actual Zurn brass fittings. Staehle Dep. at 103-05; *see also* App. 58a. In the bent-beam test, Staehle applied a strain value of 1-2%, which he considered a reasonable estimate of the strain put on the fittings due to the crimping process. *See* Staehle Dep. at 107-08. None of the fitting specimens used in this test cracked. *See id.* at 110; *see also* App. 58a.

Staehle then conducted a "U-bend" test, an experiment in which metal samples from the fittings were bent into a "U" shape to see whether they would crack. *See* App. 4a, 58a-59a. To conduct the U-bend test, Staehle chose a new value to estimate the strain that the crimp sealing process placed on the fittings—20%. Staehle Dep. at 146, 156-57. With 10 to 20 times more strain applied, the fitting specimens cracked. Staehle admitted that he had not attempted to confirm his new strain estimate using scientifically accepted techniques, such as coordinate

measurement machine inspections or finite element analysis. *See* Staehle Dep. at 134-35, 146, 280-81; *see also* Stevenson Aff. ¶¶ 5-7. Staehle was also unable to replicate the calculations by which he arrived at the new strain estimates. Staehle Dep. at 163-72. In fact, when Zurn's expert attempted to replicate Staehle's calculations using the equation Staehle described in his deposition, *see id.* at 141-42, the equation yielded a strain estimate even lower than the 1-2% used in the bent-beam test, in which none of the specimens exhibited any cracking, *see* Stevenson Aff. ¶7. Nonetheless, Staehle concluded that there is no evidence that the fittings can perform reliably for the 25-year period covered by Zurn's limited warranty, because, he asserted, SCC begins to compromise the fittings immediately upon their exposure to water. App. 4a.

Zurn objected to Staehle's testimony on the ground that the reliability of his U-bend testing was undermined—to say the least—by his use of an assumed, artificially inflated level of strain. Since any fitting will fail if enough stress is applied, imposing an unrealistically high level of stress produces inherently unreliable test results, Zurn argued. App. 59a; *see also* Dist. Ct. D.E. 122, at 10-11.

2. In addressing Zurn's motion to strike the proffered expert testimony on *Daubert* grounds, the parties sharply disputed the appropriate standard to be applied. App. 5a. Zurn argued that the court should conduct a full *Daubert* analysis in determining whether to certify a class where, as in this case, the challenged expert testimony is critical to establishing that Rule 23's certification requirements have been met. *See id.* at 55a. Respondents disagreed,

contending that the district court could exclude the testimony only if it was "so flawed it cannot provide any information as to whether the requisites of class certification have been met." *Id.* (quotation omitted).

3. The district court agreed with respondents in part and declined to engage in a full and determinative *Daubert* inquiry. At the class certification stage, the court explained, the *Daubert* inquiry must be "tailored to the purpose for which the expert opinions are offered, e.g., Plaintiffs' claim that the action is capable of resolution on a class-wide basis and that the common defect in Zurn's brass fittings predominates over the class members' individual issues." App. 56a. Applying this "tailored" inquiry, the court refused to strike the challenged testimony. *Id.* at 58a, 59a. The court emphasized, however, that its view as to the admissibility of the challenged expert testimony could change in later stages of the case. *Id.* at 57a-58a; *see also id.* at 59a.

The district court went on to find that respondents had satisfied the requirements of Rule 23(a) and (b)(3) as to their breach of warranty and negligence claims and certified classes accordingly. App. 79a, 84a.[2] The court recognized that the "question of predominance" under Rule 23(b)(3) "constitutes the core dispute between the parties." *Id.* at 67a. This was so because, while respondents insisted that the

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[2] As to respondents' negligence claims, the district court certified a class encompassing only those persons whose Zurn PEX plumbing systems had actually failed and caused damage to their property. App. 84a. The class certified on the breach of warranty claims was broader—it did not require any actual failure or damage. *See id.* at 79a.

brass fittings used in Zurn PEX systems are inherently defective, Zurn countered that SCC is not an inherent defect, but instead is caused by various individualized factors, including improper installation and overly-corrosive water conditions in particular locales. *See id.* at 68a.

The court concluded that common issues predominate over the individualized issues identified by Zurn only because "Plaintiffs intend to prove by expert testimony that Zurn's brass fittings are inherently defective and will fail during [their] useful life irrespective of water conditions or installation problems." App. 76a. The court reasoned that "[i]f Plaintiffs can ultimately prove that their fittings were not merchantable *at the time of purchase*, evidence regarding differences in water quality or improper installation is not relevant to Plaintiffs' breach of warranty claim." *Id.* In other words, respondents' expert testimony was critical to their ability to show that a single central issue—the alleged inherent defect in Zurn's brass fittings—predominated over individual issues relating to installation and local water conditions, and thus that the proposed breach of warranty class satisfied Rule 23(b)(3).

C. Court Of Appeals' Opinion

On Rule 23(f) review, a divided panel of the Eighth Circuit affirmed. App. 2a.

The majority found that "the district court did not err by conducting a focused *Daubert* analysis which scrutinized the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence." App. 14a. In so holding, the court of appeals expressly rejected the ap-

proach adopted by the Seventh Circuit in *American Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010), on which Zurn relied in arguing for a full *Daubert* inquiry. App. 9a-11a. The majority emphasized that "class certification 'is inherently tentative,'" *id.* at 12a (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978)), and that, in its view, *Daubert*'s "main purpose" is to protect juries from dubious scientific testimony, a function that is not implicated in the class certification setting where a judge, rather than a jury, evaluates the proffered evidence, *id.* The court reasoned that "[b]ecause a decision to certify a class is far from a conclusive judgment on the merits of the case, it is of necessity not accompanied by traditional rules and procedures applicable to civil trials." *Id.* at 13a-14a (quotation omitted).

Judge Gruender dissented. App. 27a. The standard embraced by the majority, he warned, was in tension with this Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). App. 42a-43a. Judge Gruender also pointed to the 2003 amendments to Rule 23, which removed the provision that class certification "may be conditional." *Id.* at 45a. That change, he argued, indicated that class certification is only appropriate after the court has closely scrutinized whether the Rule 23 requirements have in fact been satisfied. *Id.* at 45a-46a. In his view, "[r]equiring a full *Daubert* analysis is a natural extension" of the directive that district courts carefully examine evidence offered to establish Rule 23's requirements. *Id.* Judge Gruender further observed that under the majority's approach, "the case will proceed beyond class certification on

the basis of *inadmissible*, unreliable expert testimony." *Id.* at 49a. In Judge Gruender's view, the Eighth Circuit should "join the Seventh and Eleventh Circuits … by requiring district courts to conduct a full *Daubert* analysis before certifying a class whenever an expert's opinion is central to class certification and the reliability of that opinion is challenged." *Id.* at 45a.

Zurn's petition for rehearing and rehearing en banc was denied. Three judges voted to grant rehearing en banc. App. 88a-89a.

REASONS FOR GRANTING THE PETITION

There is substantial, acknowledged confusion among the lower courts as to the evidentiary standard governing expert testimony proffered and challenged at the class certification stage. *See Am. Honda*, 600 F.3d at 815; *Smith v. Ceva Logistics U.S., Inc.*, 2011 WL 3204682, at *6 (C.D. Cal. July 25, 2011) ("The appropriate scope of the Court's inquiry into an expert's testimony at the class certification stage is murky."). The Eighth Circuit held in this case that expert testimony proffered by parties seeking or opposing class certification need not undergo a full and conclusive *Daubert* analysis, but rather may undergo only a provisional and more "focused" analysis. That decision conflicts directly with decisions of the Seventh and Eleventh Circuits holding that a court must conduct a full and conclusive *Daubert* analysis of expert testimony challenged at the class certification stage. It is also inconsistent with decisions of this Court concerning the class certification process and the admissibility of expert evidence, most notably *Wal-Mart Stores, Inc. v. Dukes*, 131 S.

Ct. 2541 (2011).

While the conflict in the lower courts is itself sufficient grounds for certiorari, the high stakes nature of class action litigation underscores the need for this Court's review. And this case presents an ideal vehicle for resolving the question presented. Certiorari should be granted.

I. THE QUESTION PRESENTED DIRECTLY IMPLICATES A SQUARE CONFLICT AMONG THE CIRCUITS AND LOWER COURTS

Both the majority and dissenting opinions below (App. 9a & n.4, 43a-45a) acknowledge a conflict among the circuits on the question whether expert testimony challenged at the class certification stage must undergo a full and conclusive determination of admissibility under Federal Rule of Evidence 702 and *Daubert*. District courts, too, are divided. This Court should grant certiorari to resolve the conflict.

A. The Seventh Circuit Has Held That *Daubert* Applies Fully To Class Certification, And An Eleventh Circuit Panel Has Agreed

1. In *American Honda*, the Seventh Circuit confronted a question identical to the one before the court of appeals in this case: "[W]hether the district court must conclusively rule on the admissibility of an expert opinion prior to class certification," where "that opinion is essential to the certification decision." 600 F.3d at 814. The defendant in *American Honda* had moved to strike an expert report heavily relied on by the plaintiffs to establish predominance under Rule 23(b)(3), and the district court, despite

"definite reservations about the reliability" of the methods used in formulating the expert's report, "decline[d] to exclude the report in its entirety at this early stage of the proceedings." *Id.* at 815 (quoting *Allen v. Am. Honda Motor Co.*, 264 F.R.D. 412, 428 (N.D. Ill. 2009)). The district court then granted the plaintiffs' motion for class certification. *See id.*

On Rule 23(f) review, the Seventh Circuit reversed. Noting "the uncertainty surrounding the propriety of conducting a *Daubert* analysis at the class certification stage, and the frequency with which this issue arises," the court provided a clear and unequivocal answer: "[W]hen an expert's report or testimony is critical to class certification … a district court must conclusively rule on any challenge to an expert's qualifications or submissions prior to ruling on a class certification motion." *Id.* at 815-16.

The court of appeals then reviewed the challenged report under Rule 702 and *Daubert*, concluding that the proffered evidence was insufficiently reliable under those standards and therefore was inadmissible. *Id.* at 818-19. With the proffered report properly excluded, the court held that the plaintiffs failed to satisfy the Rule 23(b)(3) requirement that common issues predominate. The court accordingly vacated the order certifying a class. *Id.* at 819.

2. An Eleventh Circuit panel subsequently endorsed the *American Honda* approach in *Sher v. Raytheon Co.*, 419 F. App'x 887 (11th Cir. 2011) (unpublished). In *Sher*, the court of appeals held that the district court had erred in refusing to "conduct a *Daubert*-like critique of the proffered experts'[] qualifications" before certifying the class. 419 F. App'x at

890-91. The *Sher* court described the Seventh Circuit's reasoning in *American Honda* as "persuasive" and applied the decision in requiring a full application of *Daubert* in that case. *Id.* at 890. The court remanded the case for the district court to conduct the appropriate inquiry. *Id.* at 891.

B. The Eighth Circuit Has Held, And The Ninth Circuit Has Indicated, That Courts Need Not Conduct A Full And Conclusive *Daubert* Analysis At The Class Certification Stage

1. In direct conflict with the Seventh and Eleventh Circuit decisions discussed above, the Eighth Circuit majority in this case held that a full and conclusive *Daubert* inquiry is unnecessary at the class certification stage, even where the challenged expert testimony provides the sole basis upon which plaintiffs' ability to satisfy Rule 23 rests. *See supra* at 8-9. The court cited and expressly rejected the *American Honda* approach (App. 9a-11a), reasoning that a conclusive *Daubert* determination is not required because "a decision to certify a class is far from a conclusive judgment on the merits of the case," and thus "traditional rules and procedures applicable to civil trials" do not apply. App. 13a-14a (quotation omitted). Requiring a full *Daubert* analysis, the majority asserted, would be "impractical" and not sufficiently "workable in complex litigation" compared to a more truncated inquiry. *Id.* at 11a.

Judge Gruender sharply disagreed. He argued in dissent that evidentiary and procedural rules *do* apply to evidentiary and procedural rulings necessitated by a class certification motion. *See* App. 46a-47a.

And "[r]equiring a full *Daubert* analysis," he explained, "is a natural extension of the concept that class certification should not be conditional and should be permitted only after a rigorous application of Rule 23's requirements." *Id.* at 45a-46a (citing *Dukes*, 131 S. Ct. at 2551). Judge Gruender also emphasized the conflict between the majority's holding and the Seventh and Eleventh Circuit decisions discussed above. *Id.* at 43a-45a.[3]

While expressly rejecting *American Honda*, the majority also sought to distinguish it, observing that the case involved "expert conclusions based on flawed methodology and a sample size of one." App. 9a. That factual difference, however, has nothing to do with the completely opposite *legal holdings* of the two decisions concerning the standard applicable to review of expert testimony proffered at the class certification stage. The Eighth Circuit held below that a district court *need not* conduct a full and conclusive *Daubert* analysis, because the class certification determination itself is "tentative, preliminary, and limited." *Id.* at 13a (quotations omitted). The Seventh Circuit held exactly the opposite—a district court *cannot* conduct anything less than a *full and conclusive Daubert* inquiry where disputed expert evidence is critical to the class certification decision. *Am. Honda*, 600 F.3d at 815-16. The factual record before the Seventh Circuit was relevant only to the question whether the proffered evidence actually sat-

[3] A state court decision has also recognized the conflict. *See Jackson v. Unocal Corp.*, 262 P.3d 874, 886 (Colo. 2011) (rejecting approach of *American Honda* and acknowledging that its "holding differs from at least two federal appellate court cases").

isfied the full *Daubert* analysis. It was irrelevant to the court's antecedent ruling as to the legal standard that must be applied when reviewing the record. On that question—the question at issue here—the Seventh and Eighth Circuits adopted squarely opposing rules.

2. The en banc Ninth Circuit has indicated its agreement with the Eighth Circuit's approach and its disagreement with the Seventh Circuit's decision in *American Honda*. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 602 n.22 (9th Cir. 2010) (en banc), *rev'd on other grounds*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Referring to the Ninth Circuit's decision in *Dukes*, the majority below observed that "at least one court sitting en banc has rejected" *American Honda*. App. 9a n.4 (citing *Dukes*, 603 F.3d at 602 n.22). The Ninth Circuit in *Dukes* said this:

> We are not convinced by the dissent's argument that *Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial. However, even assuming it did, the district court here was not in error. Thus we need not resolve this issue here.

Dukes, 603 F.3d at 602 n.22 (internal citation omitted). That statement has been interpreted by district courts within the Ninth Circuit as a directive to defer a conclusive determination on the admissibility of expert testimony until after certification. *See Rix v. Lockheed Martin Corp.*, 2011 WL 890744, at *2 (S.D. Cal. Mar. 14, 2011); *Hovenkotter v. SAFECO Ins. Co. of Ill.*, 2010 WL 3984828, at *4 (W.D. Wash.

Oct. 11, 2010); *see also Fosmire v. Progressive Max Insur. Co.*, 2011 WL 4801915, at *3 (W.D. Wash. Oct. 11, 2011) (noting that "the Supreme Court recently suggested that a full *Daubert* analysis may be required even at class certification" (citing *Dukes*, 131 S. Ct. at 2553-54), but nevertheless endorsing the approach taken by the Eighth Circuit and *Hovenkotter*).

C. District Courts Are Broadly Divided

The disagreement among circuit court decisions has led to even broader conflict and uncertainty among district courts. Some courts have held that *Daubert* has no application *at all* in the class certification stage. *See*, *e.g.*, *Serrano v. Cintas Corp.*, 2009 WL 910702, at *2 (E.D. Mich. Mar. 31, 2009); *In re NetBank, Inc. Sec. Litig.*, 259 F.R.D. 656, 670 n.8 (N.D. Ga. 2009); *Cole v. ASARCO Inc.*, 256 F.R.D. 690, 696 n.3 (N.D. Okla. 2009).

Others have embraced a rigorous, full application of *Daubert* in the class certification context, consistent with the Seventh Circuit's *American Honda* decision. *See*, *e.g.*, *Reed v. Advocate Health Care*, 268 F.R.D. 573, 594 n.20 (N.D. Ill. 2009); *see also DeRosa v. Mass. Bay Commuter Rail Co.*, 694 F. Supp. 2d 87, 99 (D. Mass. 2010) ("[C]lass certification decisions must be made based on admissible evidence.").

Still other district courts have charted a middle course, adopting some type of modified "*Daubert*" analysis, similar to the Eighth Circuit's decision here. *See* 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 3:14, at 437-38 (7th ed. 2011) ("Some courts continue to discharge their gatekeeper func-

tion at the class certification stage by conducting a modified, limited *Daubert* analysis of proffered expert evidence to determine its admissibility ….”). Some of these courts have expressly stated that challenged expert testimony is measured against a more lenient standard at class certification than it is at trial. *See, e.g., Williams v. Lockheed Martin Corp.*, 2011 WL 2200631, at *15 (S.D. Cal. June 2, 2011); *LaBauve v. Olin Corp.*, 231 F.R.D. 632, 644 (S.D. Ala. 2005); *Midwestern Mach. v. Nw. Airlines*, 211 F.R.D. 562, 565-66 (D. Minn. 2001). Others have used a limited version of the traditional *Daubert* inquiry that is not expressly less stringent, but instead considers expert evidence only insofar as it relates to the court’s Rule 23 analysis. *See*, *e.g.*, *In re NYSE Specialists Sec. Litig.*, 260 F.R.D. 55, 65-66 (S.D.N.Y. 2009). But as the district court’s analysis in this case illustrates, a court purporting to examine challenged expert testimony in terms of its relevance to the Rule 23 inquiry often tests it in fact against a more lenient yardstick for admissibility. *See* App. 56a-59a.

The multiple approaches adopted by district courts around the country demonstrate not only the conflict and confusion over the question presented, but also its recurring nature, and hence the need for review here. *See infra* Part III.

II. THE EIGHTH CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S PRECEDENTS INTERPRETING F.R.C.P. 23 AND F.R.E. 702

The Eighth Circuit's opinion in this case is inconsistent with this Court's jurisprudence on class certification, particularly the recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). It also conflicts with the Court's precedents governing the admissibility of expert testimony, including *Daubert* itself.

A. The Court Of Appeals' Decision Cannot Be Reconciled With This Court's Precedents Interpreting Rule 23

In *Dukes*, this Court noted the question presented here, and suggested an answer at odds with the decision below: "The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so." 131 S. Ct. at 2553-54 (internal citation omitted). But because the expert testimony proffered in *Dukes* would have made no difference, the Court did not need to answer the question decisively. *See id.* at 2554 ("even if properly considered" under *Daubert*, plaintiffs' proffered expert testimony "does nothing to advance [their] case").

The Court's suggestion in *Dukes* that *Daubert* applies to class certification was not idle, but follows directly from the analysis and holding of the decision. *Dukes* reiterates that a plaintiff seeking to represent a class under Rule 23 must "affirmatively demonstrate" that the proposed class "compli[es] with the Rule—that is, he must be prepared to prove

that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 131 S. Ct. at 2551; *see also Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228 (5th Cir. 2009); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 40 (2d Cir. 2006).

In *Dukes*, as in this case, the plaintiffs relied on expert testimony to establish that the requirements of Rule 23 had been met. *See* 131 S. Ct. at 2549. This Court explained that, in order to determine whether a plaintiff has made a sufficient showing under Rule 23, courts must at times "probe behind the pleadings" before ruling on class certification. *Id.*; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (Rule 23(b)(3) "invites a close look at the case before it is accepted as a class action." (quotation omitted)). That this inquiry may require the court to examine the merits of the plaintiff's claims does not relieve the court of its duty to ensure that the plaintiff has made a concrete showing of compliance with Rule 23. *See Dukes*, 131 S. Ct. at 2551-52; *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982); *Coopers & Lybrand*, 437 U.S. at 469. In particular, this Court emphasized in *Dukes*, Rule 23(b)(3)'s predominance requirement will often compel plaintiffs to prove at the class certification stage issues that they would again be required to prove at trial. 131 S. Ct. at 2552 n.6.

The Eighth Circuit's decision in this case cannot be reconciled with the foregoing principles. Specifically, the decision relieves plaintiffs of their burden to fully satisfy *Daubert* on the ground that class certification is only a preliminary determination that

does not require plaintiffs to meet the proof standard necessary at the merits stage. But *Dukes* squarely holds that plaintiffs cannot avoid proving issues required to meet Rule 23 requirements merely because class certification is a threshold inquiry. 131 S. Ct. at 2551-52 & n.6. Expert testimony that has not been shown to be reliable enough to be admitted at trial cannot suffice to satisfy the rigorous analysis a court must conduct to determine whether each and every element of Rule 23 is satisfied.

B. The Court Of Appeals' Decision Is Inconsistent With Federal Rule Of Evidence 702 And *Daubert*

Although styled a "focused *Daubert*" inquiry (App. 6a), the Eighth Circuit's rule permitting a tentative *Daubert* assessment is also inconsistent with the core principles that govern federal courts' handling of expert evidence. In the trial setting, the admissibility of expert testimony is regulated by the framework set out in Federal Rule of Evidence 702, as elucidated by this Court's decisions in *Daubert* and its progeny. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999). That framework instructs courts to undertake a three-part inquiry to determine (i) that the witness is qualified as an expert; (ii) that the reasoning or methodology underlying his testimony is scientifically reliable and that the testimony is based on sufficient facts or data; and (iii) that the testimony proffered will assist the trier of fact in understanding the evidence or determining an issue of fact in dispute. *See* Fed. R. Evid.

702.[4]

Although some district courts have suggested that the Federal Rules of Evidence do not apply with full force at the class certification stage, *see, e.g.*, *Keilholtz v. Lennox Hearth Prods. Inc.*, 268 F.R.D. 330, 337 n.3 (N.D. Cal. 2010); *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 616 (C.D. Cal. 2008); *Fisher v. Ciba Specialty Chems. Corp.*, 238 F.R.D. 273, 279 (S.D. Ala. 2006), the Rules themselves provide no exception to their application during class certification proceedings, *see* Fed. R. Evid. 1101; *see also Lewis v. First Am. Title Ins. Co.*, 265 F.R.D. 536, 544 (D. Idaho 2010) (concluding that Federal Rules of Evidence apply in class certification proceedings).

In *Daubert*, this Court held that "under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589. Interpreting Federal Rule of Evidence 702, this Court explained that "the word 'knowledge' connotes more than subjective belief or unsupported speculation." *Id.* at 590. The wider range of latitude afforded to expert witnesses "is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.* at 592. In practice, this means that a court must conduct "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or

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[4] The text of Federal Rule of Evidence 702 was amended effective December 1, 2011. This amendment was "intended to be stylistic only" and accordingly does not affect the analysis relevant to this case. *See* Fed. R. Evid. 702 Advisory Committee Notes (2011 Amends.).

methodology properly can be applied to the facts in issue." *Id.* at 592-93. *Daubert* outlines a non-exhaustive list of factors that a court may consider when making this determination.[5]

This Court has explained that *Daubert*'s gloss on Rule 702 imposes "exacting standards of reliability" on expert evidence. *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000). Any test that deviates from this high standard cannot meaningfully be called a *Daubert* analysis. To be sure, the Rule 702 inquiry prescribed by *Daubert* is intended to permit flexibility in its application to different types of cases or evidence. *See Kumho Tire*, 526 U.S. at 152 ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."); *see also Daubert*, 509 U.S. at 594 ("The inquiry envisioned by Rule 702 is … a flexible one."). But this Court has never suggested that the inquiry is to be flexibly applied to different *stages* of a case, such that a court may rely initially on evidence that would be deemed inadmissible at some later stage. *Cf. Kumho Tire*, 526 U.S. at 159 (Scalia, J., concurring) (discretion in applying *Daubert* standard "is not discretion to perform the function inadequately").

Daubert is intended to "make certain that an expert … employs in the courtroom the same level of intellectual rigor that characterizes the practice of

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[5] Although the holding of *Daubert* was initially limited to "scientific" testimony, this Court later extended its applicability to reach other forms of expert evidence. *Kumho Tire*, 526 U.S. at 141.

an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152. A "limited" or "focused" *Daubert* analysis that permits reliance on expert evidence that does not satisfy that demanding standard for admissibility is not, in fact, a *Daubert* analysis at all. It is illogical and inefficient to allow junk science to establish the course of litigation at the critical class certification stage when it would be excluded later in the process.

III. THE APPLICABILITY OF *DAUBERT* AT THE CLASS CERTIFICATION STAGE IS AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW

The question presented here is exceedingly important to the administration of class action litigation in federal courts. As the proliferation of competing standards in the lower courts suggests, the question arises frequently in class actions. *See Am. Honda*, 600 F.3d at 815. And its resolution can be outcome-determinative, where plaintiffs rely solely on expert reports to satisfy a requirement for certification under Rule 23, as is common in class litigation. *See* 1 McLaughlin on Class Actions § 3:14, at 435.[6]

The decision to certify a class, in turn, often is a decisive point in the course of litigation. This Court

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[6] This case exemplifies the point—no class would have been certified here but for the expert testimony proffered by respondents. As the district court expressly recognized, the expert testimony was the foundation upon which respondents were able to convert a minuscule failure rate of Zurn's fittings into a massive class action based on breach of warranty for essentially all fittings Zurn sold, on the theory that they were all inherently defective, even though so few had actually failed. *See* App. 76a; *see also supra* at 3-4, 8.

and others have long recognized that class certification can put tremendous pressure to settle on a defendant, even where plaintiffs' likelihood of success on the merits is slight. *Coopers & Lybrand*, 437 U.S. at 476 ("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."); *see also CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 723 (7th Cir. 2011) ("Certification as a class action can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit."); Fed. R. Civ. P. 23 Advisory Committee Notes (1998 Amends.) ("An order granting certification … may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

This case is no exception to the general rule that class certification can impose enormous pressure to settle, even without regard to the merits of the underlying claims. More than 260 million fittings have been sold, with a reported national failure rate of only about one thousandth of one percent. Yet the certification of a class asserting claims for non-failed fittings raises the specter of a remedy that includes re-plumbing potentially 4 to 5 million structures across the country if the certification is extended to other states, and hundreds of thousands in Minnesota alone, even though more than 99 per cent of the structures have not experienced a failure. The exorbitant cost of such a potential class remedy creates obvious incentives to settle with respondents—and, more to the point, their lawyers—rather than to de-

termine the actual validity of respondents' claims by litigating them through to judgment.

To avoid distorting the litigation process by creating artificial settlement pressure, it is imperative that Rule 23's requirements be applied—here and elsewhere—with the rigor demanded by the Rule's drafters and this Court's precedents. *See Dukes*, 131 S. Ct. at 2551-52. As the Fifth Circuit has put it, given the "extraordinary leverage" plaintiffs can obtain from a certification order, Rule 23's "bite should dictate the process that precedes it." *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007), *abrogated on other grounds by Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011). If the lower courts are permitted to apply a "*Daubert* lite" analysis—which is to say a *non-Daubert* analysis—to expert evidence submitted in support of class certification, then courts will certify classes that should not be certified, and defendants will settle cases that should not be settled. This Court should not tolerate such unjust and inefficient results.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD B. GOETZ
CARLOS M. LAZATIN
O'MELVENY & MYERS LLP
400 S. Hope St.
Los Angeles, Cal. 90071
(213) 430-6000

JAMES A. O'NEAL
JOHN P. BORGER
DANIEL J. CONNOLLY
AMY R. FITERMAN
DAVID A. SNIEG
FAEGRE & BENSON LLP
90 S. 7th Street, Suite 2200
Minneapolis, Minn. 55402
(612) 766-7000

JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
LOREN L. ALIKHAN
DEANNA M. RICE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ROBERT C. CARLSON
JAY M. BULGER
KOELLER, NEBEKER,
CARLSON & HALUCK LLP
225 Broadway, 21st Floor
San Diego, Cal. 92101
(619) 233-1600

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