In the Supreme Court of the United States

PACIFIC INVESTMENT MANAGEMENT COMPANY LLC AND PIMCO FUNDS,

Petitioners,

v.

RICHARD HERSHEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In large-scale class actions alleging securities, antitrust, or commodities violations, the class certification determination under Federal Rule of Civil Procedure 23 is typically pivotal because, regardless of the merits of the underlying claims, certification creates an inexorable pressure on defendants to settle given the costs of defending against such actions and the risk of potentially devastating liability. This case involves a class action under the Commodity Exchange Act alleging price manipulation and seeking more than $600 million in damages. The Seventh Circuit upheld the certification of a class that sweeps up numerous plaintiffs who actually benefited from the alleged misconduct, as well as plaintiffs who were on opposite sides of the same trading activity and thus have diametrically opposed interests on how the evidence should be shaped. The questions presented are:

1. Whether or to what extent Rule 23 permits the certification of a class that includes uninjured plaintiffs who actually benefited from the alleged misconduct.

2. Whether or to what extent Rule 23 permits the certification of a class beset by inherent conflicts of interest that affect how the evidence should be shaped.

3. Whether or to what extent a court may certify a class without resolving questions of material fact and finding that plaintiffs have met their burden of proving that each element of Rule 23 is met.

LIST OF PARTIES

1. Petitioner Pacific Investment Management Company, LLC was a defendant in the district court and an appellant in the court of appeals.

2. Petitioner PIMCO Funds was a defendant in the district court and appellant in the court of appeals.

3. Respondents Breakwater Trading LLC and Richard Hershey were plaintiffs in the district court and appellees in the court of appeals.

RULE 29.6 STATEMENT

Pacific Investment Management Company LLC is owned by its employees and Allianz Global Investors of America L.P. Allianz Global Investors of America L.P. is an indirect subsidiary of Allianz AG, a publicly-held company.

PIMCO Funds does not have a parent corporation, and no publicly-held corporation owns 10% or more of PIMCO Funds' stock.

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JURISDICTION

The Seventh Circuit entered its opinion and judgment on July 7, 2009. PIMCO filed a timely petition for panel rehearing or rehearing *en banc* on July 21, 2009. The Seventh Circuit denied PIMCO's petition on July 31, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix hereto. Pet.App.54a-58a.

STATEMENT OF THE CASE

The class action is an important procedural device that both facilitates the litigation of complex cases and presents an enormous potential for abuse. Large-scale class actions alleging securities, antitrust, or commodities violations are a particularly fertile ground for plaintiffs' lawyers seeking to extract huge settlements. Class certification is typically the pivotal event in these cases because, regardless of the merits of the underlying allegations, the certification of a putative class creates an "inordinate or hydraulic pressure on defendants to settle" lest they "bet the company" at trial. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001). This case presents the Court with a timely opportunity to resolve multiple circuit conflicts and provide much needed guidance on the proper procedures and standards for class certification under Rule 23.

At issue is the certification of a class of traders alleging price manipulation under the Commodity Exchange Act ("CEA"), 7 U.S.C. §1 *et seq.* and seeking more than $600 million in damages. The district court certified a class without resolving key factual questions as to whether the inclusion of uninjured plaintiffs in the proposed class or conflicts of interest among class members defeated Rule 23. The Seventh Circuit affirmed, holding that the acknowledged presence of uninjured plaintiffs did not present a problem because *defendants* failed to prove that the "extent" of the overbreadth precluded certification, Pet.App.11a-14a; and that the inherent conflicts of interest among class members on different sides of the *same* trades were merely "hypothetical" and could be addressed later in the case, Pet.App.14a-16a. Like the district court, the Seventh Circuit simply assumed that plaintiffs' bare allegations were sufficient to prove that each element of Rule 23 was met. That decision conflicts with the decisions of this Court and other circuits in several fundamental respects, and warrants plenary review.

The Commodities Futures Market

A futures contract is a promise to deliver a particular quantity of a commodity at a certain price on a certain future date. The party contracting to sell the underlying commodity is said to "sell" the futures contract and is called the "short." *See generally* 1 Philip McBride Johnson & Thomas Lee Hazen, *Derivatives Regulation* §1.02[3] (2004). The party contracting to buy the underlying commodity is said to "buy" the futures contract and is called the "long." *Id.* To satisfy a futures contract, a trader may either deliver or take delivery of the underlying commodity or "offset" or "liquidate" the contract by acquiring an

equal opposing position. *Id.* §§1.02[3]-[4] & n.97. The commodities futures market has been called "volatile and esoteric." *Dunn v. CFTC*, 519 U.S. 465, 468-69 (1997) (internal quotation marks omitted).

Whether a trader realizes a gain or loss on a particular offsetting transaction "depends on the nature of his first contract and the direction in which market prices have moved in the period between the first and second transactions." Johnson & Hazen, *supra*, §1.02[4]. For example, a short trader who later offsets by buying back the position will make money if the contract price has fallen but lose money if the price has risen. "Since every long position comes into being only if there is a countervailing short position (and vice versa) and since one position's gain is necessarily the other position's loss, the gains and losses at any given time net out to zero." *Id.* §1.02[13] n.535.

Statutory Background

Section 9(a) of the CEA makes price manipulation in the commodities markets unlawful. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 394-95 (1982), this Court held that the CEA contained an *implied* private right of action but left open its contours. On the heels of *Merrill Lynch*, and in response to this Court's observation that there were potentially significant "interstices" to be filled for the newly created cause of action, *id.*, Congress amended the CEA to include an express private right of action. But Congress explicitly limited that right to individuals who suffered "actual damages" from the alleged CEA violation. Futures Trading Act of 1982, Pub. L. No. 97-444, §235, 96 Stat. 2294, 2322-23 (1983) (codified as amended at 7 U.S.C. §25).

Factual Background

Petitioner PIMCO is an investment management firm that has focused since 1971 on fixed-income investments. PIMCO manages the retirement assets for employees of private and public institutions. PIMCO also manages the bond portfolios of many governments, endowments, charitable entities, corporations and mutual funds, including petitioner PIMCO Funds.[1]

Plaintiffs Breakwater Trading LLC and Richard Hershey ("Plaintiffs") purport to represent a class of investors who established short positions in the June 2005 10-year Treasury note futures contract ("June 2005 Contract" or "the Contract") trading on the Chicago Board of Trade. Plaintiffs claim that PIMCO is responsible for trading losses allegedly suffered when they liquidated short positions at allegedly inflated prices, and seek more than $600 million in damages. Plaintiffs assert that PIMCO artificially increased the price of the Contract from May 9, 2005 to June 30, 2005 ("the class period"). Pet.App.7a.

District Court Proceedings

In August 2005, Plaintiffs filed a class action in the District Court for the Northern District of Illinois, alleging that PIMCO violated Section 9(a) of the CEA

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[1] Petitioner PIMCO Funds is a series of mutual funds that is registered under the Investment Company Act of 1940, 15 U.S.C. §80a-1, *et seq.*, and is governed by its own board of trustees (the majority of whom are not affiliated with PIMCO). As a registered investment company, PIMCO Funds engages PIMCO as its independent investment advisor to manage its pool of assets. Although PIMCO and PIMCO Funds are separate and distinct entities, the arguments presented herein are identical to both, and they are collectively referred to herein as "PIMCO."

by manipulating the price of the Contract. Pet.App. 18a. Plaintiffs sought certification under Rule 23 of a class of "'[a]ll persons who purchased [during the class period] a June 10-year Treasury note futures contract in order to liquidate a short position, or who delivered on the June 2005 futures contract in order to satisfy a short position.'" Pet.App.24a (citation omitted).

The evidence indicated that the proposed class was overbroad and suffered from serious internal conflicts of interest that precluded certification. For example, PIMCO demonstrated that—according to artificiality "ribbons" created by plaintiffs' own experts, purportedly showing fluctuating levels of inflation in the Contract price—a majority of the class members for whom there is trading data in the record actually benefited from the alleged manipulation, making them "net gainers" and therefore unable to show "actual damages" as required to state a claim under the CEA. Pet.App.62a-63a; *see* Seventh Circuit Court of Appeals Separate Appendix of Appellants ("CASA") 206-08, 219-20, 255-71, 340-68, 409-42. Indeed, PIMCO demonstrated that the class is replete with sophisticated institutional traders who switched back and forth between long and short positions throughout the class period, while artificiality (as alleged by plaintiffs' experts) jigged up and down on a daily basis. CASA 124-25, 327-31, 340-68. Accordingly, there are many purported class members who, while they may have liquidated short positions during the class period, actually benefited from the alleged artificiality.

In addition, the trading data in the record showed that class members frequently were on opposite sides of the same trading activity during the relevant period. For example, class representative Hershey held a long

position on days when Breakwater Trading, the other class representative, alleges price artificiality peaked and it suffered damages. CASA 163-65. Similarly, Hershey's long position put him on the opposite side of trading from another class member, Josef Kohen, who initiated and closed a short position at the same time. CASA 164. PIMCO showed that such class members have diametrically opposed interests in characterizing the degree of alleged price artificiality at particular times (or whether there was any artificiality at all), and therefore would have conflicting interests about how the evidence should be shaped, including evidence related to whether there was any wrongful conduct by PIMCO. *See, e.g.*, CASA 129-35, 329-30.

In July 2007, the district court granted Plaintiffs' certification motion. Without resolving these serious factual issues, the court rejected PIMCO's arguments that certification was improper because the defined class included numerous plaintiffs who suffered no economic injury under the loss causation rules recognized in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005),[2] Pet.App.23a-26a, 35a-39a, and because the class was beset by inherent conflicts of interest among class members, Pet.App.33a-35a. Rather, the court simply assumed for purposes of class certification that "all members of the class have suffered injury," Pet.App.26a, and held that, "[a]t this stage of the litigation, it would be premature to deny plaintiffs the opportunity to unify in their task to prove

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[2] In *Dura*, this Court held that whether a plaintiff who has both bought and sold a security at an inflated price has suffered economic loss must be determined by examining *both sides* of his transactions. 544 U.S. at 342-43, 347. As the Seventh Circuit recognized, the same analysis governs here. Pet.App.14a.

that defendants engaged in a common course of conduct that negatively affected all members of the proposed class," Pet.App.25a.

Seventh Circuit Proceedings

After one panel of the Seventh Circuit granted PIMCO's petition for interlocutory review pursuant to Rule 23(f), Pet.App.50a-51a, a different panel of the court affirmed. Pet.App.1a-16a.

The court of appeals recognized that even Plaintiffs acknowledged that the class included traders who actually benefited from the alleged misconduct, Pet.App.7a, and that other courts have held that "it must be reasonably clear at the outset that all class members were injured by the defendant's conduct," Pet.App.10a. But the court concluded that the inclusion of such net gainers did not preclude class certification (or defeat Article III standing, an argument PIMCO never made) "as long as one member of a certified class has a plausible claim to have suffered damages." Pet.App.8a-9a. Moreover, the court assumed, based on the allegations of the complaint, that "plaintiffs sold short, so prima facie at least ... they were injured if the price of cover was artificially inflated during the class period." Pet.App.14a. The court further held that any inquiry into injury should be deferred to "the damages stage of the litigation." Pet.App.7a-8a.

The court observed that, "if the class definition clearly were overbroad, this would be a compelling reason to require that it be narrowed." Pet.App.12a. But the court concluded that "this has not yet been shown." *Id.* In reaching that conclusion, the Seventh Circuit placed on *PIMCO* (*i.e.*, defendants) the burden to prove that the class was overbroad, and suggested

that PIMCO should have sought to "depose a random sample of class members to determine how many were net gainers from the alleged manipulation and therefore were not injured." Pet.App.14a.

The Seventh Circuit also rejected PIMCO's argument that inherent conflicts of interest precluded certification. Pet.App.14a-16a. The court acknowledged that class members would have competing interests in shaping the evidence and, in particular, in calculating and showing artificiality based on when short positions were offset. Pet.App.15a. Rather than requiring the district court to make findings as to whether such conflicts existed, the Seventh Circuit held that, "[a]t this stage in the litigation, the existence of such conflicts is hypothetical." *Id.* The court added that any "real" conflicts could be addressed (if at all) later through use of subclasses. Pet.App.15a-16a.[3]

REASONS FOR GRANTING THE WRIT

Class certification is critical in the high-stakes arena of class litigation alleging federal securities, antitrust, or commodities violations. Because "[a]n 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," Fed. R. Civ. P. 23 cmt. to 1998 amendments, the gateway requirements of Rule 23 are critical to ensuring that the class action device is not abused. The Seventh Circuit's decision in this case raises several

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[3] On August 5, 2009, PIMCO moved the district court for permission to depose class members to further determine, among other things, how many class members were uninjured. The district court denied that request.

fundamental and interrelated questions on which the lower courts are split concerning the requirements of Rule 23 and the duty of the courts to ensure that those requirements are met *before* certification.

The first question concerns whether or to what extent Rule 23 permits the certification of a putative class that includes plaintiffs who not only were uninjured by, but actually *benefited* from, the alleged misconduct. Until the Seventh Circuit's decision below, "no circuit ha[d] approved of class certification where some class members derive[d] a net economic benefit from the very same conduct alleged to be wrongful." *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1190 (11th Cir. 2003). Rather, other circuits had barred certification in such circumstances. Moreover, this Court has held that Rule 23 may not be interpreted to "'abridge, enlarge or modify any substantive right,'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (quoting 28 U.S.C. §2072(b)). But that is exactly what happens when Rule 23 is read to permit the certification of a class including numerous plaintiffs who by definition *lack* a cause of action (because they were not injured by the conduct at issue). This issue is recurring and important in antitrust, securities, and commodities class actions given the incentive for plaintiffs to draw classes as big as they can to force lucrative settlements.

The decision below also raises a fundamental and frequently recurring question concerning the scope of Rule 23's adequacy-of-representation requirement and the proper treatment of intra-class conflicts at the certification stage. While the Seventh Circuit acknowledged that the inherent intra-class conflicts among class members on different sides of the same

transactions gave class members opposing interests in how the evidence should be shaped, the court held that those conflicts did not preclude certification on the ground that the conflicts were merely "hypothetical" at this time and could be addressed at some later point. Pet.App.15a-16a. That holding conflicts with this Court's decisions (*e.g.*, *Amchem*) stressing the importance of Rule 23's adequacy-of-representation requirement, and with decisions of other circuits holding that analogous conflicts precluded certification.

And the Seventh Circuit's resolution of these issues raises a recurring and over-arching question concerning the procedures governing the Rule 23 determination. The court approved class certification even though the evidence, at a minimum, raised serious questions about whether the class was overbroad or beset by intra-class conflicts. In doing so, the court simply assumed (despite the contrary evidence) the truth of plaintiffs' allegations on class injury and deferred any factual inquiry into the degree of intra-class conflicts until a later day. Moreover, the court placed on *defendants* the burden of proving that the requirements of Rule 23 were not met. That decision conflicts with the decisions of other circuits holding that courts must ensure that the record in fact supports each Rule 23 requirement *before* certification (informed by evidentiary proceedings and discovery, if necessary), and that plaintiffs bear the burden of proving that the requirements of Rule 23 are met.

Certiorari is warranted to resolve these conflicts of authority, to provide guidance to lower courts, and to ensure the faithful application of Rule 23 to the class certification decision. The decision below is already being invoked by lower courts and class action

plaintiffs to support certification of ever more adventurous and bloated classes. And if, as the Seventh Circuit held, *this* class on *this* record satisfies Rule 23, then only the rare antitrust, securities, or commodities class will flunk Rule 23. Such a radical and unsettling revision of Rule 23's gateway requirements warrants this Court's review.

I. CERTIORARI IS WARRANTED TO REVIEW THE SEVENTH CIRCUIT'S DECISION THAT THE INCLUSION OF NUMEROUS UNINJURED PLAINTIFFS DOES NOT PRECLUDE CLASS CERTIFICATION

The Seventh Circuit held that certification was warranted even though the record indicated that the defined class includes numerous plaintiffs who not only were uninjured by the conduct at issue, but actually benefited from that conduct. That decision directly conflicts with the decisions of this Court and other circuits on both the substantive requirements of Rule 23 and the inquiry demanded before a class is certified.

A. The Decision Below Conflicts With The Decisions Of Other Circuits Holding That Certification Of Such An Overbroad Class Is Improper

1. The certified class at issue undeniably includes numerous plaintiffs who actually benefited from any distortion in futures pricing. The extremely active trading patterns in this market, and the erratic fluctuations in the artificiality alleged by plaintiffs, make it inevitable that the alleged misconduct, if true, produced winners as well as losers—including among those who sold short. Indeed, at the time of certification, a majority of class member traders/

accounts for whom trading data is in the record were net gainers according to plaintiffs' own experts. Class representative Hershey, for example, engaged in three transactions during the Class Period: two purchases on May 11, 2005 (one of which closed out a pre-existing short position) and a sale on May 27, 2005 to liquidate his remaining long position. CASA 206-08, 219-20. Based on Plaintiffs' own artificiality ribbons, these trades netted an economic gain for Hershey from the alleged artificiality. The same goes for other class members, including large institutional investors that engaged in many trades daily. CASA 255-71, 340-68.

2. The Seventh Circuit acknowledged that "some of the class members probably were net gainers from the alleged manipulation," Pet.App.12a, but held that class certification was proper. That decision directly conflicts with the decisions of other circuits. Indeed, until the decision below, "no circuit ha[d] approved of class certification where some class members derive[d] a net economic benefit from the very same conduct alleged to be wrongful by the named representatives of the class." *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1190 (11th Cir. 2003); *see also Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group L.P.*, 247 F.R.D. 156, 177 (C.D. Cal. 2007) ("[N]o circuit approves of class certification where some class members derive a net economic benefit from the very same conduct alleged to be wrongful by the named representatives of the class, let alone where some *named* plaintiffs derive such a benefit.").

Pickett v. Iowa Beef Processors, 209 F.3d 1276 (11th Cir. 2000)—which the Seventh Circuit recognized, but declined to follow, Pet.App.15a—illustrates the approach taken by other circuits. That case involved a

class action alleging price manipulation in the market for cattle. 209 F.3d at 1277-78. As the Eleventh Circuit recognized, however, the defined class at issue "include[d] those who claim harm from the very same acts from which other members of the class *have benefitted* [*sic*]." *Id.* at 1280 (emphasis added). The Eleventh Circuit therefore reversed the district court's certification order, holding that "a class cannot be certified ... when it consists of members who benefit from the same acts alleged to be harmful to other members of the class." *Id.* As the court explained, such a "plaintiff class cannot satisfy the adequacy requirement of Rule 23(a)(4)." *Id.*

Likewise, in *Phillips v. Klassen*, 502 F.2d 362, 367-68 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974), the D.C. Circuit held that a class of retired government employees could not maintain a class action for coerced retirement where some members of the class gained from the alleged wrongdoing. As the court explained, "[w]hen, as here, there is complaint as to injury from an allegedly invalid action of a Government official and the action may be taken as *conferring economic benefits* or working economic harm, depending on the circumstances of the individual, the foundations of maintenance of a class action are undermined." *Id.* at 367 (emphasis added). Because there would be "divergent views among the" plaintiff class "as to whether they have been injured or benefited," the court affirmed the denial of class certification. *Id.*

Other circuits also have held that Rule 23(b)(3)'s predominance requirement cannot be met where it is apparent at the certification stage that the class includes both injured and uninjured members. For example, in *Newton v. Merrill Lynch, Pierce, Fenner &*

Smith, Inc., 259 F.3d 154 (3d Cir. 2001), the Third Circuit held that certification of a class of securities traders was improper where plaintiffs' claims required "an economic injury determination for each trade" to determine "whether securities violations occurred." *Id.* at 190. Like the alleged price manipulation here, the trading at issue in *Newton* "did not necessarily injure each class member," so some members suffered economic injury and others did not. *Id.* at 187.

In *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 311-12 (3d Cir. 2009), the Third Circuit similarly recognized that proof of injury "often is critically important" in large-scale class actions, and held that plaintiffs must demonstrate at class certification that the fact of injury "is capable of proof at trial through evidence that is common to the class rather than individual to its members." Rejecting the notion that class certification required plaintiffs to make only "'a threshold showing that the element of impact [*i.e.*, fact of damage] will predominantly involve generalized issues of proof,'" *id.* at 321 (citation omitted), Chief Judge Scirica explained for the court that Rule 23 requires "a careful, fact-based approach, informed, if necessary by discovery," *id.* at 326, and vacated the district court's class certification order.

And, in *Bell Atlantic Corp. v. AT&T Corp.*, the Fifth Circuit held that two classes of plaintiffs alleging harm "by the refusal of [AT&T] to permit the passage of caller identification ... data across its long-distance telephone network" did not satisfy Rule 23(b)(3)'s predominance requirement. 339 F.3d 294, 296 (5th Cir. 2003). "Establishing causation, or 'fact of damage', requires the plaintiff to demonstrate a causal connection between the specific antitrust violation at

issue and an injury to the business or property of the antitrust plaintiff." *Id.* at 302. The Fifth Circuit held that such a showing could not be made—despite the plaintiffs' proposed "formula" to calculate damages—because "[t]he record indicates that ... any adequate estimation of actual damages suffered would require" "individualized inquiries." *Id.* at 304-07.

The Seventh Circuit's decision in this case cannot be reconciled with these holdings. The undisputed fact that "some of the class members probably were net gainers," Pet.App.12a, directly impacts the Rule 23(b)(3) determination because it means that the fact of injury—an essential element of the CEA cause of action—must be established on an individualized trade-by-trade basis, as in *Newton*. And by glossing over this defect, the Seventh Circuit failed to require that "a careful, fact-based approach, informed, if necessary by discovery," *Hydrogen Peroxide*, 552 F.3d at 326, was undertaken to ensure that Rule 23 was satisfied.

B. The Decision Below Conflicts With This Court's Decisions Recognizing That Rule 23 May Not Be Used To Expand Substantive Rights

The Seventh Circuit's decision upholding the certification of the overbroad class here conflicts with this Court's decisions as well. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Court stressed that "Rule 23's requirements must be interpreted in keeping ... with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" *Id.* at 613 (quoting 28 U.S.C. §2072(b)); *see also id.* at 629; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("[N]o reading of [Rule 23] can ignore the Act's mandate that

'rules of procedure "shall not abridge, enlarge or modify any substantive right."'") (quoting *Amchem*, 521 U.S. at 613). The Seventh Circuit flouted that mandate in upholding certification of the class at issue.

The CEA's express private right of action extends only to those who have suffered "actual damages" from the alleged manipulation. 7 U.S.C. §25(a)(1). "[A]ctual damages" is therefore an essential element of the cause of action. *See, e.g., Damato v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 878 F. Supp. 1156, 1160-61 (N.D. Ill. 1995); *Kolbeck v. LIT Am., Inc.*, 923 F. Supp. 557, 566-67 (S.D.N.Y. 1996); *Three Crown Ltd. P'ship v. Caxton Corp.*, 817 F. Supp. 1033, 1042 & n.14 (S.D.N.Y. 1993). Indeed, as noted, Congress added the "actual damages" element of the CEA precisely to *limit* the scope of the cause of action. Plaintiffs who cannot show "actual damages" lack a private right of action—and therefore lack "statutory standing," *see Warth v. Seldin*, 422 U.S. 490, 500 (1975)—under the CEA.

Certifying a class of uninjured CEA plaintiffs contravenes this Court's decisions, the Rules Enabling Act, and Rule 23 by enlarging the substantive rights of these class members. That is not a mere "damages" issue, as the Seventh Circuit held, Pet.App.7a-8a; it goes to the availability of the cause of action *vel non*. *See Hydrogen Peroxide*, 552 F.3d at 311 ("'Proof of injury ... must be distinguished from calculation of damages.'") (citation omitted); *Newton*, 259 F.3d at 189 (establishing economic loss goes *not* to "the calculation of damages but whether or not class members have any claims at all"); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977) (presuming class-wide proof of injury in an antitrust class action would "contravene the mandate of the Rules Enabling Act"), *cert. denied*,

435 U.S. 968 (1978). The fact that the Seventh Circuit sanctioned a result forbidden by this Court's decisions is reason enough to grant review.

C. The Decision Below Conflicts With The Decisions Of This Court And Other Circuits On The Inquiry Demanded Before Certification

The Seventh Circuit compounded its errors and exacerbated the circuit conflict by concluding that the record was sufficient to support certification and by placing on defendants the burden to show that certification was improper. Pet.App.12a-14a.

1. In *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982), the Court held that a class "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." As illustrated by the decision below, in the 25 years since *General Telephone*, the lower courts have developed conflicting standards on what that "rigorous analysis" should entail. *See Loftin v. Bande (In re Flag Telecom Holdings Ltd. Sec. Litig.)*, 574 F.3d 29, 39-40 (2d Cir. 2009) (discussing different approaches); *Brown v. Am. Honda (In re New Motor Vehicles Canadian Export Antitrust Litig.)*, 522 F.3d 6, 25-26 (1st Cir. 2008).

The Seventh Circuit's decision upholding certification on the record here conflicts with the decisions of other circuits holding that "the decision to certify a class calls for findings by the court, not merely a 'threshold showing' by a party, that each requirement of Rule 23 is met," and that "[f]actual determinations supporting Rule 23 findings must be made by a preponderance of the evidence." *Hydrogen Peroxide*, 552 F.3d at 307; *see Miles v. Merrill Lynch & Co. (In re*

Initial Pub. Offering Sec. Litig.), 471 F.3d 24, 41 (2d Cir. 2006) (Certification is not appropriate unless a court "receive[s] enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met."); *see also Flag Telecom*, 574 F.3d at 38 ("[L]ower courts have an 'obligation' to resolve factual disputes relevant to the Rule 23 requirements, and to determine whether the requirements are met ...."); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 266-68 (5th Cir. 2007) (plaintiff has burden of proving loss causation at certification stage to establish that predominance requirement is met); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004).[4]

As Chief Judge Scirica explained for the court in *Hydrogen Peroxide*, "the requirements set out in Rule

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[4] *In re IPO* alone illustrates how the standards for class certification have perplexed the lower courts. In *In re IPO*, the Second Circuit carefully reconsidered and distanced itself from earlier cases upholding class certification, including *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc. (In re Visa Check/MasterMoney Antitrust Litig.)*, 280 F.3d 124, 139-40 (2d Cir. 2001), *cert. denied*, 536 U.S. 917 (2002). In *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001), the Seventh Circuit observed that, "[b]efore deciding whether to allow a case to proceed as a class action, ... a judge should make whatever factual and legal inquiries are necessary under Rule 23." In contrast to the decisions of other circuits (*e.g.*, *In re IPO* and *Hydrogen Peroxide*), however, *Szabo* provided no guidance as to *what* "factual and legal inquiries" are "necessary under Rule 23" and, instead, left this determination almost entirely up to the district judge. *Id.* at 676-77. As a result, both the district court in this case (which recognized *Szabo*, Pet.App.27a) and the Seventh Circuit (which saw no need even to mention *Szabo*) concluded—in conflict with the decisions of other circuits—that the record supported certification without resolving the disputed facts concerning the degree of overbreadth and intra-class conflicts.

23 are not mere pleading rules." 552 F.3d at 316. Therefore, courts must go beyond the pleadings and engage the facts through discovery and evidentiary proceedings in order to ensure that certification is proper. *See id.* at 316-21. That approach takes into account the touchstone significance of the certification decision on the course of class litigation, as well as recent amendments to Rule 23. *See id.* at 310, 318-19.

The decision below is the antithesis of the approach mandated by other circuits to protect against off-the-cuff class certifications. Indeed, rather than ensuring that plaintiffs had established each element of Rule 23 by a preponderance of the evidence before the class was certified, the Seventh Circuit simply speculated that there were "probably" not so "many" net gainers as to preclude certification. Pet.App.12a. And to generate the premises for that speculation, the Seventh Circuit assumed that plaintiffs' ultimate allegations of price manipulation were true, an approach rejected in the cases cited above.[5] Armchair

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[5] The Seventh Circuit reasoned that there were "probably not many" class members who were net long because in the absence of "a great many net short sellers ... PIMCO could not have driven its price to an artificially high level." Pet.App.13a. But that erroneously equates net gainers with traders who were net long and impermissibly accepts Plaintiffs' ultimate allegations of price manipulation. Likewise, the Seventh Circuit assumed that any net gainers would have to be both short (to be in the class) and long (to benefit from the alleged manipulation), that any such traders must have been pursuing hedging strategies, and that traders rarely hedge their positions *completely*. Pet.App.12a-13a. But that reasoning ignores the fact that the market includes commodities traders who frequently switch back and forth between net long and net short—not to "hedge," but to "speculate." Robert W. Kolb & James A. Overdahl, *Understanding Futures Markets* 154-57 (6th ed. 2006). Class

economics and naked assumptions about the plaintiffs' theory of the case or the likely members of a class are no substitute for the factual findings required before a court may certify a class under Rule 23.

2. Rather than recognizing that plaintiffs had failed to meet their burden in proving that each requirement of Rule 23 was met, the Seventh Circuit flipped the burden onto defendants and held that certification was warranted because *defendants* had not "depose[d] a random sample of class members to determine how many were net gainers from the alleged manipulation." Pet.App.14a. That holding also conflicts with the decisions of this Court and other circuits.

In *Amchem*, this Court held that "parties seeking class certification must show that the action is maintainable under Rule [23]." 521 U.S. at 614. Other circuits have recognized and applied that rule. *See, e.g.*, *Valley Drug Co.*, 350 F.3d at 1196 ("[U]nder Rule 23 it is the plaintiffs, as the moving party, who bear the burden of proving that class certification is appropriate."); *Hydrogen Peroxide*, 552 F.3d at 315-16 ("[I]t is clear that the party seeking certification must convince the district court that the requirements of Rule 23 are met ...."); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1086 (6th Cir. 1996) (reversing where district court had "ordered defendants to 'show cause

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representative Hershey, for example, switched from being short to long and benefited more from the alleged artificiality on his long position than he lost on his short position. And trading data showed institutional traders who engaged in numerous trades daily (short and long) to exploit market conditions. Regardless, class members did not benefit from the alleged artificiality only on long positions. The erratically fluctuating artificiality alleged by plaintiffs would have benefited many *short* positions as well.

why [the court] shouldn't certify a class,'" thereby "plac[ing] the burden on defendants to disprove plaintiffs' 'entitlement' to class certification"); *accord Flag Telecom*, 574 F.3d at 39-40; *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 724 (9th Cir. 2007); *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 529 (D.C. Cir. 2006); *Bell Atl. Corp.*, 339 F.3d 294, 301 (5th Cir. 2003).

The Seventh Circuit's decision upholding class certification on the ground that *defendants* failed to prove "the extent to which" the defined class is overbroad, Pet.App.13a (emphasis added), turns the required burden of proof on its head. It was *Plaintiffs'* burden to prove that the defined class—despite its obvious structural flaws—meets the requirements of Rule 23. To satisfy that burden, Plaintiffs were obligated to present evidence showing that the class was *not* overbroad. The Seventh Circuit's contrary ruling is seriously misguided and warrants review. Indeed, putting the burden on defendants was particularly inappropriate on this record, which showed that a majority of the plaintiffs for whom there was trading data, including named plaintiff Hershey (who plaintiffs presumably thought had among the strongest claims), had no net loss. If anything, such a record justifies giving Plaintiffs' evidence closer scrutiny.

II. CERTIORARI IS WARRANTED TO REVIEW THE SEVENTH CIRCUIT'S DECISION THAT THE INHERENT CONFLICTS OF INTEREST DO NOT PRECLUDE CERTIFICATION

Certiorari is also warranted to review the Seventh Circuit's decision that class certification was proper despite the evidence that class members were on

opposite sides of the same transactions and therefore had diametrically opposed interests on how the evidence should be shaped. That decision conflicts with the decisions of this Court and other circuits on the demands of Rule 23's adequacy-of-representation requirement and exacerbates a conflict over the extent to which a court is required to scrutinize the severity of such intra-class conflicts *before* certification.

A. The Decision Below Conflicts With The Decisions Of This Court And Other Circuits On The Basic Requirements Of Rule 23(a)(4)

1. The class at issue is defined to include *any* trader who liquidated a short position during the class period, regardless of when the trader established the short position or offset or liquidated that position and regardless of the trader's other transactions during the class period. The defined class thus crudely sweeps up large institutional traders who were net long at various times during the class period with traders who were net short, and even traders who purchased and sold *on opposite sides of the same transactions.*

Because each class member's showing of injury will depend on establishing that any artificial inflation in the price was lower when *they* sold short than when *they* bought to liquidate the short position, individual class members have diametrically opposed interests in how the evidence should be shaped and, in particular, how the artificiality curve is defined. Class members who offset the bulk of their short positions early in the class period and were predominantly long or neutral thereafter would want to show that the alleged "inflation" in the price peaked early, and that the later increases in price were "due to market forces for which

PIMCO was not responsible." Pet.App.15a. Class members who were predominantly short later in the period would want to prove the opposite. And at the level of specific transactions, class members who bought at a particular time would want to maximize the calculation of artificiality, while class members who sold would want to minimize it.[6]

These conflicts are not merely "hypothetical," *id.*, but are actual and already inflicting harm. Plaintiffs presented their theories and evidence about the fluctuations of alleged price artificiality through the artificiality "ribbons" constructed by their experts before the certification decision. Pet.App.62a-63a. The class representatives thus have already committed to a position on this central issue on which the interests of class members conflict, and as a result some class members already have been prejudiced. The contradictory outcomes generated by applying the differing "ribbons" propounded by plaintiffs' own experts to identical trading patterns underscore this conflict. *See, e.g., id.*; CASA 219-20, 337, 340-68, 370.

The only thing not known at this point is *which* class members fall into the opposing camps. The essence of the Seventh Circuit's holding, therefore, is that the obvious prejudice to some class members can be ignored at class certification—notwithstanding Rule 23(a)(4)'s adequacy-of-representation requirement—so

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[6] For example, class representative Hershey held a long position when Breakwater Trading, the other class representative, alleges price artificiality peaked and it suffered damages. CASA 163-65. Similarly, Hershey's long position put him on the opposite side of trading from another class member, Josef Kohen, who initiated and closed a short position at the same time. CASA 164.

long as we do not know who they are. In other words, under the Seventh Circuit's decision, a "potential" conflict does not become "actual" until it is clear precisely whose ox is being gored.

2. In *Amchem*, this Court explained that "[t]he adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." 521 U.S. at 625. The Court then held that the obvious conflicts of interests among a settlement class of "current and future asbestos-related claims" precluded certification. *Id.* at 597, 627-28. As the Court explained, the "critical goal" of the "currently injured" class members was to obtain "generous immediate payments," whereas the goal of the "exposure-only plaintiffs" was to "ensur[e] an ample, inflation-protected fund for the future." *Id.* at 626. The conflict of interest is at least as strong here, where, as explained above, class members are on opposite sides of the same trades and have diametrically opposed interests in characterizing the degree of alleged price artificiality at particular times.[7]

The Seventh Circuit's decision also conflicts with the decisions of other circuits. For example, in *Langbecker v. Electronic Data Systems Corp.*, 476 F.3d 299, 315-16 (5th Cir. 2007), the Fifth Circuit held that a class of 401(k) investors could not be certified because class members had pursued different trading strategies

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[7] The Seventh Circuit's decision also conflicts with this Court's decision in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). In that case, the Court held that individuals who "could have suffered no injury as a result of [the conduct at issue]" were "simply not eligible to represent a class of persons who did allegedly suffer injury." *Id.* at 403-04. As explained, class representative Hershey was not injured.

and therefore had different interests in shaping the evidence. The Fifth Circuit explained that the class members "were affected by the drop in price in dramatically different ways," with some class members profiting and some losing money. *Id.* at 315. The same goes here, where class members were on opposite sides of the same trades on the same day—some experiencing a loss and others a net gain, depending on how artificiality is characterized.

Valley Drug, 350 F.3d at 1184-86—which the Seventh Circuit recognized, but declined to follow, Pet.App.14a—is to the same effect. That case involved an antitrust class action attacking the delay in the introduction of a drug into the market. Numerous members "of the certified class arguably experienced a net gain from the conduct alleged to be illegal by the named representatives." 350 F.3d at 1188. The court held that "[a] fundamental conflict exists where some members claim to have been harmed by the same conduct that benefited other members of the class." *Id.* at 1189. Despite undeniable evidence of the same kind of "fundamental conflict" here, the Seventh Circuit upheld class certification and called PIMCO's objections "ill conceived." Pet.App.16a.

B. The Decision Below Exacerbates The Conflict Among The Lower Courts On The Duty to Address Conflicts Before Certification

1. Instead of holding that such obvious conflicts of interest among class members precluded certification, the Seventh Circuit upheld certification and observed that, "[i]f and when" the conflicts "become real, the district court can certify subclasses with separate representation of each." Pet.App.15a. But as

discussed, the conflicts here already are "real." And, more to the point, the Seventh Circuit's conclusion that certification was warranted without any evidentiary inquiry at this stage into the severity of the conflicts of interest splits with the decisions of other circuits.

Many large-scale securities, commodities, and antitrust class actions involve intra-class conflicts of some kind. Nonetheless, there can be material differences in both the degree and kind of conflicts that may exist. For example, a securities class action may be dominated by "buy and hold" investors. "In and out" traders may be rare, and short sellers excluded entirely. The alleged price "artificiality" often is created by a misrepresentation and then remains constant or moves only in one direction, until it is dispelled by a corrective disclosure. In those circumstances, the class is more likely to share a basic unity of interest, even if some of their interests conflict on relatively minor matters. And if subclasses are needed, they often can be defined by a few simple, objective criteria—such as those who purchased before or after a particular corrective disclosure.

Here, by contrast, the class includes sophisticated institutional traders who switched back and forth between long and short positions throughout the class period, often taking positions opposite each other at the same times while the artificiality ribbons (as alleged by Plaintiffs' experts) went up and down on a daily basis. Pet.App.62a-63a; CASA 340-68. In such a purported class, there is no predictable unity of interest or adequacy of representation—only chaos, and an opportunity for class counsel to earn a windfall by settling the claims of hundreds of class members whose actual interests vary greatly.

2. Despite the importance of such distinctions, the lower courts have taken widely divergent approaches to investigating conflicts issues at the certification stage. Consistent with the teachings of this Court's decisions and the circuit cases discussed above, some courts have recognized that the severity of intra-class conflicts of interest must be tested *before* certification. For example, in *Valley Drug* the Eleventh Circuit admonished that "we do not believe that it is unduly burdensome to require the named representatives to bring forth evidence to the court that no fundamental conflict exists among the class members, especially in view of the fact that under Rule 23 it is the plaintiffs, as the moving party, who bear the burden of proving that class certification is appropriate." 350 F.3d at 1196. That approach squares with the circuits that have held that "the district judge must receive enough evidence ... to be satisfied that each Rule 23 requirement has been met"—*before* certifying a class. *In re IPO*, 471 F.3d at 41; *see* pp. 17-18, *supra*. In stark contrast, the Seventh Circuit relieved plaintiffs of their burden to bring forth *evidence* that "no fundamental conflict exists" and held that testing the conflicts now "would be premature." Pet.App.16a.

This conflict is entrenched in the district courts, whose class certification decisions are often not reviewed at the circuit level because of settlements. In *In re Seagate Technology II Securities Litigation*, 843 F. Supp. 1341, 1359 (N.D. Cal. 1994), Judge Walker refused to defer consideration of the intra-class conflicts presented by a putative securities class including traders who purchased *and sold* during the class period ("in/out traders"). As the court explained, such a conflict "presents not only an *eventual* problem

with the damages element, but also an *immediate* problem" as to the development of evidence. *Id.* at 1358-59. Moreover, the court explained, subclasses are often not a realistic solution to conflicts in price manipulation cases where the alleged artificiality and trading patterns are complex, because of the prospect of an unmanageable number of subclasses. *Id.* at 1361-62. Accordingly, the court held that "the precise composition of the plaintiff class, and the resultant extent and severity of class conflicts, are factual inquiries which must be made [before certification] on a case-by-case basis." *Id.* at 1365. Judge Walker further suggested that a court armed with a real factual understanding of the structure of the class could then seek to strike a sensible balance between conflicts issues and the utility of the class action device—for example narrowing the class to minimize conflicts problems when that could be done at acceptable cost to other jurisprudential interests.

Seagate's analysis has been expressly adopted by several lower courts that have refused to certify classes beset by conflicts of interest analogous to the ones here. *See, e.g., In re Physician Corp. of Am. Sec. Litig.*, No. 97-3678-CIV, 2003 WL 25820056, at *10 (S.D. Fla. May 21, 2003); *Ziemack v. Centel Corp.*, 163 F.R.D. 530, 542 (N.D. Ill. 1995); *Ballan v. Upjohn Co.*, 159 F.R.D. 473, 485-86 (W.D. Mich. 1994). Other courts have simply refused to certify classes because of such conflicts in similar cases without explicitly citing *Seagate*. *See, e.g., Premium Plus Partners, L.P. v. Davis*, No. 04 C 1851, 2008 WL 3978340, at *4-6 (N.D. Ill. Aug. 22, 2008); *Centurions v. Ferruzzi Trading Int'l, S.A.*, No. 89 C 7009, 1994 WL 114860, at *9-17 (N.D. Ill. Jan. 7, 1993); *McCullough v. Ferruzzi*

Trading Int'l, No. 90 C 1138, 1993 WL 795256, at *4-5 (N.D. Ill. Jan. 7, 1993).

Other lower courts, however, have assumed that intra-class conflicts can be managed later by defining sub-classes, or by severing the trial into separate liability and "damages" phases. Most of these decisions, like the Seventh Circuit's here, improperly seek to side-step the issue of conflicts under Rule 23(a)(4) entirely, by deeming it somehow "premature," or relevant only to the determination of damages. *See, e.g., In re Scientific-Atlanta, Inc. Sec. Litig.*, 571 F. Supp. 2d 1315, 1335 (N.D. Ga. 2007); *Tracinda Corp. v. DaimlerChrysler AG (In re DaimlerChrysler AG Sec. Litig.)*, 216 F.R.D. 291, 297 (D. Del. 2003); *In re Gaming Lottery Sec. Litig.*, 58 F. Supp. 2d 62, 69-71 (S.D.N.Y. 1999); *Weikel v. Tower Semiconductor Ltd.*, 183 F.R.D. 377, 394-95 (D.N.J. 1998). And like the decision below, most of these decisions simply hold out the prospect of subclasses down the road as a means of deferring the conflicts issue, without any meaningful analysis of whether subclasses would be practical. *E.g., Scientific-Atlanta*, 571 F. Supp. 2d at 1335; *Tracinda Corp.*, 216 F.R.D. at 297. Because certification often forces settlement of class actions, that assumption is rarely tested in the crucible of actual trial management, or reviewed on appeal.

The conflicts-of-interest problem is pervasive in large-scale class actions such as this and frequently litigated, yet the lower courts are divided about whether and to what extent such conflicts must be tested at the certification stage under Rule 23. And this division underscores the broader question of the duty of the courts to ensure that the record supports each requirement of Rule 23 before certifying a class.

Particularly given the stark intra-class conflicts discussed above, this case presents an ideal vehicle for the Court to provide guidance on these questions.

III. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT

"[T]he fight over class certification is often the whole ball game" in class action litigation, given the "high stakes involved in class certification decisions" for defendants as well as plaintiffs. *Hartford Accident & Indem. Co. v. Beaver*, 466 F.3d 1289, 1294 (11th Cir. 2006). As a result, "[f]ew pretrial motions in our civil justice system elicit as much controversy as those for the certification of class actions." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 97 (2009). In large-scale securities, antitrust, and commodities class actions, the certification fight often turns on whether the defined class is overbroad because of the inclusion of uninjured plaintiffs, and whether conflicts of interest among class members preclude certification. And the burden of proof and evidentiary requirements at certification are often dispositive. Given the touchstone importance of the certification determination, the proper resolution of the questions presented is key to ensuring that the class action procedure is not abused.

As this Court has recognized, "class action practice has become ever more 'adventuresome'" in the decades since Rule 23 was adopted. *Amchem*, 521 U.S. at 617. Antitrust, securities, and commodities class actions have long been a particularly fertile ground for plaintiffs' lawyers, because of the lucrative settlements they frequently yield irrespective of the merits of the

claims.[8] In practice, "[a]lmost all *certified* class actions settle." Thomas E. Willging & Shannon R. Wheatman, Federal Judicial Center, *An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation* 48 (2005). The amount of money spent each year in settling these class actions is enormous. In 2007, for example, the average settlement value of securities class actions was $62.7 million. Ellen M. Ryan & Laura E. Simmons, Cornerstone Research, *Securities Class Action Settlements, 2009 Review and Analysis* 2, *available at* http://securities.stanford.edu/Settlements/REVIEW_1995-2008/Settlements_Through_12_2008.pdf. From 1996 through 2007, defendants spent $53.6 billion settling securities class actions. *Id.* As a result, as one commentator has observed, large-scale class actions "have more in common with business deals than they do with traditional adversarial litigation," making the courthouse a "site for large financial transactions." William B. Rubenstein, *A Transactional Model of Adjudication*, 89 Geo. L.J. 371, 372 (2001).

This phenomenon is not new. "Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (quoting Henry J. Friendly, *Federal Jurisdiction: A*

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[8] In 2008, 210 federal securities class actions were filed—a 19% increase over the number of 2007 filings and 9% increase over the previous ten-year average. Cornerstone Research, *Securities Class Action Filings, 2008: A Year in Review* 2 (2009), *available at* http://securities.stanford.edu/clearinghouse_research/2008_YIR/20090106_YIR08_Full_Report.pdf. Even more class actions may be sparked by the financial crisis of 2008.

General View 120 (1973)), *cert. denied*, 516 U.S. 867 (1995). In the 36 years since Judge Friendly made that observation, the problem of "blackmail settlements" in federal class actions has only grown as courts, like the Seventh Circuit below, have misapplied and eroded Rule 23's requirements.

The empirical evidence underscores that, despite the importance of certification, courts are not subjecting certification motions to the "'rigorous analysis'" demanded by Rule 23. *Hydrogen Peroxide*, 552 F.3d at 309 (quoting *Gen. Tel. Co.*, 457 U.S. at 161). For example, one recent Federal Judicial Center empirical study examined the certification decisions of four representative district courts over a two-year period and found that Rule 23(b)(3) classes were "certified in 94% to 100% of the securities cases," even though "[i]n all or nearly all" of such cases defendants opposed certification, often because of conflicts of interests. Thomas E. Willging et al., *An Empirical Analysis of Rule 23 To Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 89-90 (1996).

The Seventh Circuit's decision in this case further degrades Rule 23's requirements and invites ever-more adventurous class action litigation. Indeed, class action plaintiffs are already pointing to the decision below to argue that injury is irrelevant to the Rule 23 inquiry, *see, e.g.*, *Reed v. Advocate Health Care*, No. 06-C-3337, 2009 WL 3146999, at *6 n.7 (N.D. Ill. Sept. 28, 2009); *Kreger v. General Steel Corp.*, Memorandum in Support of Motion To Certify the Class, 2009 WL 2492895 (E.D. La. July 27, 2009) (No. 07-575), and to argue that courts should shift to the defendants the burden to prove that a class is overbroad, Christopher L. Lebsock, *PIMCO: Another Guidepost for Class*

Certification, Law 360 (Sept. 23, 2009), *at* http://competition.law360.com/articles/123912.

It has been nearly a decade since this Court has comprehensively addressed Rule 23. *See Ortiz*, 527 U.S. 815; *Amchem*, 521 U.S. 591. And as courts and commentators have recognized, the Court has yet to resolve critical issues concerning the certification determination. *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 316 ("The Supreme Court has described the [Rule 23] inquiry as a 'rigorous analysis,' and 'close look,' but it has elaborated no further.") (citations omitted); Alfred J. Lechner, Jr. & Helena A. Lynch, *New Defense Strategies for Class Certification Hearings*, 6 Sec. Litig. Rep. 1 (2009) ("[T]he [Supreme] Court has not addressed the precise standard of proof for class certification."); *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. at 99 ("With so much riding on the class certification determination, one would think that procedural law would have arrived quickly at a clear and broadly shared understanding of the nature of that determination and the permissible parameters for inquiry by the court. That, however, has not been so."). In the absence of such guidance, the lower courts have divided on critical questions concerning the class certification inquiry.

This case provides an ideal vehicle for the Court to provide overdue guidance in this important area of law.

CONCLUSION

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

Respectfully submitted,

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