No. 15-835

In The
Supreme Court of the United States

THE PROCTER & GAMBLE COMPANY,

Petitioner,

v.

DINO RIKOS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF FOR *AMICUS CURIAE* INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

The IADC has a particular interest in the fair and efficient administration of class actions, which are increasingly global in reach. Foreign plaintiffs often seek class action relief in federal court for alleged wrongs committed on foreign soil. *See* Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy – Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S.*

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[1] This brief was authored by the IADC and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than the IADC or its counsel has made any monetary contribution to the preparation or submission of this brief. Counsel of record for all parties were timely notified more than 10 days prior to filing this brief. Pursuant to rule 37 of the Rules of the Supreme Court of the United States, all parties have consented to the filing of this and other *amicus curiae* briefs. Letters indicating the parties' blanket consent have been submitted to the Court.

Federal Courts, 90 Cornell L. Rev. 1563, 1567 (2007) ("Since few other countries have group or representative litigation devices, foreign victims often avail themselves of the class action device in order to bring their claims in U.S. courts. As a result, U.S. federal judges increasingly entertain motions to certify mixed U.S.-foreign claimant classes."); *see also In re Parlamat Sec. Litig.*, 497 F. Supp. 2d 526, 531, 540 (S.D.N.Y. 2007) (dismissing the claims of a class of Italian investors who alleged fraud against an Italian food and dairy company because "all of the U.S. conduct was clearly peripheral to the fraud itself").

Moreover, despite longtime skepticism about American class actions, several countries have begun to adopt their own class action procedures. Australia, Canada, and the European Union now provide some form of class relief. *See* Valerie Scott, *Access to Justice and Choice of Law Issues in Multi-Jurisdictional Class Actions in Canada*, 43 Ottawa L. R. 233 (2011-2013) (discussing class action cases and reform in Canada); Roald Nashi, *Italy's Class Action Experiment*, 43 Cornell Int'l L.J. 147 (2010) (analyzing Italy's class-action regime, instituted in 2010); S.I. Strong, *Cross-Border Collective Redress in the European Union: Constitutional Rights in the Face of the Brussels I Regulation*, 45 Ariz. St. L.J. 233 (2013) (discussing the issues facing the European Union's adoption of collective action); R. Mulheron, *The Class Action in Common Law Systems* 5 (Hart Publishing: Oxford 2005) (noting that Australia, British Columbia and Canada all have their own versions of class

action procedures); Susan M. Sharko, et al., *Global Strategies and Techniques for Defending Class Action Trials: Defending the Global Company in Multinational Litigation*, 77 Def. Couns. J. 295 (2010). Other countries routinely look to Rule 23 as a benchmark for developing their own class action mechanisms. *See* Strong, *supra*, 45 Ariz. St. L.J. at 234 (discussing the United States' role as a pioneer of class action cases, and the subsequent international acceptance of collective redress); Nashi, *supra*, 43 Cornell Int'l L.J. at 157 (comparing Rule 23 requirements with the Italian model). Accordingly, this Court's interpretation of Rule 23 will have a significant impact on IADC members both here and abroad.

SUMMARY OF THE ARGUMENT

Procter & Gamble, Inc.'s petition for writ of certiorari raises three grounds for review. This *amicus curiae* brief covers the first ground: whether class certification must be based on evidence that the putative class members in fact suffered a common injury, or whether such a factual inquiry should occur only at the merits stage. Pet. i. The Sixth Circuit endorsed the latter approach, and that was error. In this brief, the IADC will provide additional context showing that this Court's long-standing precedent, embodied in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) and its progeny, forbids the analysis conducted by the Sixth Circuit here. And for good

reason: the Sixth Circuit's decision to forego a meaningful review of the evidence produces significant negative downstream effects on the law, on courts' case loads, on parties, and on consumers. We discuss the decision's harmful effects, and ultimately urge this Court to realign the nation's class-action jurisprudence, which the Sixth Circuit has upended.

ARGUMENT

I. The Sixth Circuit's Analysis Undermines This Court's Repeated Requirement That Plaintiffs Prove the Appropriateness of Class Certification.

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). Because this exception results in a plaintiff (or a few plaintiffs) litigating on behalf of a larger unnamed group, this Court has repeatedly held that class certification should not proceed according to "a mere pleading standard." *Wal-Mart*, 131 S. Ct. at 2551. Rather, the plaintiff bears the burden of "affirmatively demonstrat[ing]" his or her legitimate claim to being the class representative. *Id.*; *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). And the plaintiff may only be considered to have carried this burden if the court, upon a "rigorous analysis" that often entails "prob[ing] behind the pleadings," determines that the

plaintiff satisfied the requirements of Rule 23. *Wal-Mart*, 131 S. Ct. at 2551. Absent proof "*in fact*" of commonality (Rule 23(a)(2)), typicality (23(a)(3)), and predominance (23(b)(3)),[2] this Court has consistently ruled against certification. *Id.* Requiring any less of a showing would unfairly bind a group of people with nothing in common but a lawsuit to a single, final judgment. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

Under this well-established precedent, the plaintiffs' purported class – consisting of all purchasers of Align in five states over the course of (at least) seven years – should not pass muster. Pet. App. 7a-8a. Contrary to this Court's standards, the plaintiffs did not affirmatively demonstrate anything: they produced no evidence to support their claim that Align does not work for anyone (the anecdotal allegations of the named plaintiffs notwithstanding); and their expert conceded that he recommended Align to his patients and that at least one of them appeared to improve (although he could not say for certain whether Align caused the improvement). *Id.* at 60a-61a.

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[2] These criteria often overlap. *Wal-Mart*, 131 S. Ct. at 2551 n.5 ("The commonality and typicality requirements of Rule 23(a) tend to merge."); *id.* at 2556 (framing the Rule 23(a)(2) commonality requirement as a question of whether "even a single common question exists," as opposed to the Rule 23(b)(3) assessment of whether "common questions predominate"); *see also Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (describing the evidentiary proof requirements of Rule 23(a) and 23(b)(3)).

This meager foundation cannot satisfy the Court's requirement for proof "in fact."

Yet the District Court and the Sixth Circuit certified the plaintiffs' proposed class nonetheless. The Sixth Circuit's reason for doing so is particularly problematic, because it employs an impermissible analytical framework. The Sixth Circuit's analysis turns on a theoretical inquiry instead of a factual one, assessing whether the plaintiffs "*can prove*" the Rule 23 requirements instead of whether they *did* prove them:

> Whether the district court properly certified the class turns on whether Plaintiffs have shown, for purposes of Rule 23(a)(2), that they *can prove* – not that they have already shown – that all members of the class have suffered the same injury.

Pet. App. 10a. This Court expressly rejected such an approach in *Wal-Mart*. As this Court explained, "[a]ny competently crafted class complaint" can describe a cohesive class. *Wal-Mart*, 131 S. Ct. at 2551. The question that *Wal-Mart* requires courts to ask – the "rigorous analysis" to which every claim should be subjected – is whether that class definition can survive the ensuing litigation. *Id.* at 2551. Here, the Sixth Circuit erroneously certified a class based on the plaintiffs' description of the class's cohesiveness, rather than the plaintiffs' affirmative demonstration that the class is, in fact, cohesive.

In so doing, the Sixth Circuit attempted to distinguish *Wal-Mart* on its facts. Pet. App. 12a. The Sixth Circuit acknowledged that the plaintiffs in *Wal-Mart* "raise[d] the common question whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies . . . that may have worked to unlawfully discriminate against them in violation of Title VII," *id.*, but failed to recognize the similarity of the common question in *Wal-Mart* to the one framed by the plaintiffs here. Both questions are ostensibly susceptible to a binary, yes-or-no answer that would resolve the entire class's claims on the merits. The plaintiffs in *Wal-Mart* even made an effort to prove that their binary question had merit, *Wal-Mart*, 131 S. Ct. at 2553, instead of promising to do so at some point in the future. Pet. App. 61a. But while this Court in *Wal-Mart* used the plaintiffs' common question as a starting point for a deeper inquiry into the evidence in the record, *Wal-Mart*, 131 S. Ct. at 2553, the Sixth Circuit treated it as the end result, and a reason to avoid looking at evidence altogether. Pet. App. 41a-42a. This was error.

Indeed, if the Sixth Circuit had conducted an analysis similar to the one this Court conducted in *Wal-Mart*, it would have discovered that Procter & Gamble's evidence fractures the proposed class in much the same way that the class in *Wal-Mart* crumbled under the evidence of Wal-Mart's policy of local discretion over employment matters. *Wal-Mart*, 131 S. Ct. at 2553-56. As the dissenting judge explained, defining the class certification "at an impossibly high

level of abstraction" cannot hide the fact that "[i]f Align works to varying degrees – or at all – depending on each member's unique physiology, then the question of Align's efficacy involves myriad individual inquiries." Pet. App. 62a. Given the overwhelming evidence in this case, the near-certainty of this outcome only serves to underscore the flaws in the Sixth Circuit's analytical approach.

By ignoring the plaintiffs' lack of evidence supporting certification and relegating Procter & Gamble's overwhelming evidence against certification to a subsequent "merits stage," Pet. App. 11a, the Sixth Circuit reduced the plaintiffs' burden to a carefully crafted pleading.[3] Under this approach, plaintiffs can insulate themselves from *Wal-Mart*'s merits-based analysis merely by aligning their class definition with the gravamen of their underlying claim.

In short, the Sixth Circuit's decision upsets this Court's class-action jurisprudence. Only a decision by this Court can realign this area of the law and prevent the outbreak of a number of serious and wide-ranging consequences, which we will now discuss.

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[3] At least one court has declined to allow a similar claim to even pass the pleading stage. *See Arroyo v. Pfizer, Inc.*, No. C-12-4030 EMC, 2013 U.S. Dist. LEXIS 13789 (N.D. Cal. Jan. 31, 2013) (dismissing a class action lawsuit against Pfizer's "Pro Nutrients Probiotic" because the plaintiff's own experiences with the product, combined with the "generalized statements" of an expert, could not plausibly support the plaintiff's claim that the product provided "no actual benefit" to anyone).

II. The Impact of the Sixth Circuit's Decision Will Be Significant, Immediate, and Far-Reaching.

As Procter & Gamble indicated in its petition, the Sixth Circuit's decision will almost certainly give rise to an increase in class-action litigation. Pet. 21. This is so because the plaintiffs' class definition here provides a template of nearly universal applicability. Future plaintiffs can simply insert their product and state name into the plaintiffs' remarkably broad class definition. This lawsuit provides a boilerplate for dissatisfied consumers of virtually any product, each of whom could certify a class in a false advertising action without proof and regardless of the evidence against them.[4] Combined with the prospect of a large settlement payout, the Sixth Circuit's low bar for class certification will cause similar claims to flood the courts in that Circuit.

This decision also will reverberate beyond the Sixth Circuit. National or multi-state class-action cases can be filed in almost any venue once sufficient class representatives have been identified. In this very case, the Sixth Circuit certified a class of Illinois

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[4] The Sixth Circuit's endorsement of a theory of class-wide liability that has no evidentiary support and borders on the impossible to prove raises serious doubt over the meaning, if any, of Rule 11's requirement that "factual contentions have evidentiary support" or be "likely [to] have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3).

consumers of Align. Pet. App. 7a. These consumers' claims would not have survived the scrutiny of the Seventh Circuit, *Parko v. Shell Oil Co.*, 739 F.3d 1083 (7th Cir. 2014), but they pass muster in the Sixth. Thus, the Sixth Circuit may well become the new forum of choice for plaintiffs in nationwide or multi-state class action cases seeking to avoid other circuits' more stringent class-certification analyses that do adhere to this Court's precedent.

Second, as the dissenting judge explained, people with colorable claims will be subsumed into broad classes. Pet. App. 62a. These unnamed members risk the possibility of having a judgment entered against them in a case that never should have proceeded in the first place, eliminating these members' colorable claims without their knowledge or input. *Id.* Alternatively, if the case settles, those same members risk being undercompensated because they were unwittingly incorporated into a class with lesser, or less certain, damages. These are precisely the sorts of harms that courts should be attempting to root out with a "vigorous analysis" that delves into the merits of a case.

Third, by placing a broad group of consumers within a large, flimsy class, the plaintiffs also include people who do not have any problems with Align. While this raises standing issues, *id.* at 63a, it also means that satisfied consumers may unwittingly contribute to the demise of products that they enjoy, as the companies that produce those products are faced with heavy litigation and settlement costs. *See*

Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."). Consumers will ultimately bear the burden, either in the form of higher prices from companies that decide to stomach the increase in lawsuits, or in the form of the disappearance of favorite products that companies can no longer afford to sell.

Finally, the Sixth Circuit's decision does not take into account that the class certification phase often constitutes the end game, as most class actions settle at the certification stage without proceeding to a trial on the merits. *See* Tobias B. Wolff, *Discretion in Class Certification*, 162 U. Pa. L. Rev. 1897, 1931 (2014) (discussing the prevention of "windfall class settlements" by the district courts exercising discretion when determining "whether and under what conditions to certify a class"). By lowering the threshold for class certification, the Sixth Circuit offers plaintiffs an unimpeded path to post-certification settlement, and forces defendants to incur significant costs that even the strongest evidence apparently cannot preclude.

These negative long-term effects necessitate granting certiorari and reversing the Sixth Circuit's opinion.

CONCLUSION

For the foregoing reasons, this petition should be granted and the judgment reversed and remanded with instructions to decertify the class.

Respectfully submitted,

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