No. 23-5950

IN THE

United States Court of Appeals for the Sixth Circuit

IN RE: NISSAN NORTH AMERICA, INC. LITIGATION

On Appeal from the U.S. District Court
for the Middle District of Tennessee
Nos. 19-cv-843, 19-cv-854, 22-cv-98
(Hon. William L. Campbell, Jr.)

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae the American Association for Justice certify that it is a non-profit organization. It has no parent corporation or publicly owned corporation that owns 10% or more of its stock.

Respectfully submitted this 3rd day of April 2024.

/s/ Jeffrey R. White

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions including class actions. Throughout its 77-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

SUMMARY OF ARGUMENT

The named plaintiffs in this case recount strikingly similar events in which their Nissan cars unexpectedly and unnecessarily braked to a stop with no driver input. The district court granted class certification, ruling specifically that plaintiffs had met their burden of showing that questions of fact or law were common to the class. This court should affirm.

1. The analysis required for ascertaining commonality under Rule 23(a)(2) is not as stringent as that required to meet the predominance requirement of Rule 23(b)(3).

[1] All parties consent to the filing of this brief, and no counsel for any party authored it in whole or in part. Apart from the amicus curiae, no person, party, or party's counsel contributed money intended to fund the brief 's preparation and submission.

Plaintiffs in this case met their burden of showing that a question of fact—whether the vehicles have a tendency to brake unexpectedly and unnecessarily in potentially dangerous situations—is common to all the members of the class. They set out this claim in precise pleadings with reasonable specificity. Plaintiffs identified the models of Nissan vehicles affected. They identified the source of the unnecessary braking activity: the Forward Emergency Braking (FEB) system common to all the class vehicles. And Plaintiffs identified the cause: a malfunction in an FEB component, the Continental ARS410 radar sensor, which at times detects obstacles that are not actually there and erroneously signals the braking system to stop the car.

Importantly, Plaintiffs (as well as the district court) employ the term "defect" in its ordinary factual sense: an imperfection or condition that can cause an unintended adverse result. Nissan and supporting amici mistakenly conflate this meaning with "defective" as a legal conclusion rendered by a jury in a product liability action, which also considers unreasonable danger, consumer expectations, or risk-utility balancing.

Plaintiffs' pleading makes a prima facie showing of commonality. Additionally, Plaintiffs detail significant admissible evidence in support of their claims.

Plaintiffs have shown that this common question matters. If the alleged

defective condition is in fact common to all the class vehicles, that answer will be central to advancing Plaintiffs' claims of implied warranty, express warranty, fraudulent misrepresentation and violation of state consumer protection laws. If the answer is No—for example, if the classwide evidence shows that the unexpected stoppages are due to driver error, poor maintenance, or some other case-by-case cause—then defendants prevail classwide on those claims.

2. Nissan's primary argument on appeal, echoed by its supporting amici, is that the district court failed to examine Nissan's own evidence showing that there were differences among the class vehicles, including software upgrades to the FEB system that resulted in significantly fewer warranty claims related to unnecessary braking activation.

There may be many reasons why owners who experience an unintended stoppage might not make a warranty claim, including the fact that Nissan dealers had repeatedly been unable to fix, and often even to diagnose, the problem.

In fact, Nissan's evidence confirms Plaintiffs' contention that the unnecessary stoppage defect *is* common to the class vehicles. Nissan's evidence shows that even after the software upgrades, class vehicle owners continued to experience such unpredictable incidents. The owner of a class vehicle remains the owner of an automobile that could at any time stop in a potentially dangerous situation. And the car continues to be worth less because of that fact.

Although the district court's discussion is admittedly terse, its reliance on this Court's decisions in *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565 (6th Cir. 2004), and *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013), confirm that the district court was faithfully applying this Court's uncontroversial principle that design changes and improvements are not relevant to commonality if they do not remedy the defect for some of the class. *In Re Ford Motor Co.*, 86 F.4th 723 (6th Cir. 2023), is not to the contrary, as this Court there found error in a district court's failure to consider evidence of Ford improvements that would have eliminated the alleged defects.

3. This Court should reject proposals by defense amici to require district courts to assess the sufficiency of plaintiffs' evidence on the merits before certifying a class. Their rationale—that such drastic measures are necessary to protect corporate defendants from the burdensome expense of class litigation and from pressures to agree to in terrorem settlements—does not hold water.

The contention that a class action is more expensive or less efficient than a multitude of individual identical lawsuits is simply bad math. Denying class certification should not bestow complete immunity from accountability for corporate defendants like Nissan. It requires each plaintiff to bring their own civil action for damages at a vastly greater and duplicative demand on the resources of the parties as well as the courts.

The contention that class action defendants face undue pressure to succumb to unwarranted settlements is one that is often made, but it is bereft of any factual support. Class action defendants, like defendants in civil actions generally, make settlement decisions for a wide variety of reasons, viewed through the lens of their own self-interest. Amici speaking for the business community would ask this Court to attempt to influence those decisions by manipulating the pleadings at the certification stage. But if there is a case to be made that corporations like Nissan require such special protections, the place to make that case is Congress, not the judicial branch.

ARGUMENT

A set of electric train tracks runs through downtown Plano, Texas. In November 2017, Plaintiff Vaughn Kerkorian was driving over those tracks in his 2017 Nissan Rogue when the car automatically "braked to a complete stop in the middle of the train tracks, with the engine shut off." First Amended Consolidated Action Complaint ("Complaint") ¶ 128. The car did the same thing at the same location the following month. *Id.* at ¶ 129.

The named plaintiffs in this case recount strikingly similar, sometimes harrowing experiences. Complaint ¶¶ 16-134. Plaintiffs' evidence indicates that the root cause of this dangerous situation is a malfunction of a component of the vehicles' Forward Emergency Braking system. *Id.* at ¶¶ 141–45. As summarized by the district

court, Plaintiffs allege that the Continental ARS410 radar sensor used in all class vehicles detects obstacles in the path of class vehicles that are not there and erroneously triggers an internal system that causes the vehicles to brake without driver input, causing accidents or risk thereof. *In re Nissan N. Am., Inc. Litig.*, No. 3:19-CV-00843, 2023 WL 2749161, at *2 (M.D. Tenn. Mar. 31, 2023) (mem. op.).

The district court determined that Plaintiffs "have met their burden of establishing class certification under Fed. R. Civ. P. 23(a) and 23(b)(3)." *Id.* at *13. With respect to the prerequisite showing under Rule 23(a)(2), the district court ruled that "whether the AEB systems are defective [and] whether Nissan knew of the defect" are "questions of law or fact common to the class." *Id.* at *7.[2]

A leading treatise observes that "the commonality requirement is not usually a contentious one." 7 Newberg and Rubenstein on Class Actions § 23:19 (6th ed. 2023). Nevertheless, Nissan and its supporting amici in this case strenuously argue that the district court reversibly erred in failing to undertake a sufficiently "rigorous analysis" of the commonality prerequisite.

AAJ submits that, to the contrary, the district court's analysis is well-grounded in the evidence and precedent. In their efforts to obtain a different outcome, Nissan and supporting amici would have this Court upend the long-standing and settled area

[2] The parties agree that Automatic Emergency Braking System and Forward Emergency Braking are synonymous. Mem. Op. at *1 n.1.

of class action law regarding commonality.

I. PLAINTIFFS PRODUCED AMPLE AND SUFFICIENT EVIDENCE TO SUPPORT THE DISTRICT COURT'S FINDING THAT COMMON ISSUES OF LAW OR FACT WARRANT CLASS CERTIFICATION.

A. Commonality Is Not a High Barrier to Class Certification.

Nissan and its supporting amici repeat the "rigorous analysis" mantra as little more than an epithet to signal that the company does not agree with the district court's class certification conclusions.

It is true that the Supreme Court has long instructed district courts to apply "a rigorous analysis" to ascertain "that the prerequisites of Rule 23(a) have been satisfied." *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). But not all Rule 23 requirements demand the same in-depth probing of the evidence. The Court has made clear, for example, that the threshold requirements set out in Rule 23(b)(3)—particularly "predominance"—are considerably "more stringent," *Amchem Prods. v. Windsor*, 521 U.S. 591, 609 (1997), and "more demanding than Rule 23(a)." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013); *see also Zehentbauer Fam. Land, LP v. Chesapeake Expl., L.L.C.*, 935 F.3d 496, 503 (6th Cir. 2019).

Commonality, on the other hand, is not a limitation on the scope of Rule 23 class actions. It is the very reason Rule 23 was adopted, and for that reason, it has long been viewed as less exacting and an "easily met" prerequisite. *Strougo v. Tivity*

Health, Inc., No. 3:20-CV-00165, 2023 WL 3873305, at *3 (M.D. Tenn. June 7, 2023); *see also Ladd v. Nashville Booting, LLC*, No. 3:20-CV-00626, 2023 WL 3400485, at *6 (M.D. Tenn. May 11, 2023) (same); *Hosp. Auth. of Metro. Gov't of Nashville & Davidson Cnty., Tennessee v. Momenta Pharms., Inc.*, 333 F.R.D. 390, 403–05 (M.D. Tenn. 2019) (same, collecting cases); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 (11th Cir. 2009) (holding that the burden of proving commonality at the class certification stage is "relatively light").

Plaintiffs satisfied that burden here.

B. Plaintiffs Met Their Burden of Showing Questions of Law or Fact Common to the Class.

The Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Court's last detailed pronouncement regarding the subject, "clarified the scope of" the commonality requirement of Rule 23(a)(2). *Davis v. Cintas Corp.*, 717 F.3d 476, 487 (6th Cir. 2013). Plaintiffs clearly satisfied that prerequisite for class certification.

1. Plaintiffs' Complaint Described Common Question with Specificity.

Although Plaintiffs enumerated a long list of issues of law or fact that are common to the class, *see* Complaint ¶ 214, the district court focused on the following: "whether the AEB systems are defective, whether Nissan knew of the defect, whether Nissan concealed the defect, and whether Nissan's conduct rises to the level of being violative of certain common law and statutory protections." Mem. Op. at

*4; *see also id.* at *7, 13 ("[T]he Court found the existence of common questions surrounding the alleged defect and Nissan's knowledge of a defect."). This brief will focus on the question of whether the existence of the FEB Defect is common to the class, which is also Nissan's primary focus.[3]

The Supreme Court has explained that "a rigorous analysis" under Rule 23(a) requires "specific presentation identifying the questions of law or fact that were common." *Falcon*, 457 U.S. at 161. "Sometimes the issues are plain enough from the pleadings," *id.* at 160, so long as plaintiffs have provided the district court with "precise pleadings" having "reasonable specificity," *id* at 160–61. As this Court recognized in *Doster v. Kendall*, 54 F.4th 398, 432 (6th Cir. 2022), the rigorous analysis prescribed by the Court in *Dukes* retains this *prima facie* standard. "In obvious cases, plaintiffs may rely on allegations in the 'pleadings' alone." *Id.* at 432 (quoting *Falcon*, 457 U.S. at 160).[4]

Plaintiffs' Complaint is more than up to the task. The district court reviewed Plaintiffs' allegations that the FEB Defect caused the Nissan vehicles to brake

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[3] *See Whirlpool*, 722 F.3d at 853 ("[F]or purposes of Rule 23(a)(2) [e]ven a single [common] question will do.") (quoting *Dukes*, 564 U.S. at 359).

[4] The Supreme Court in a different context has stated that "a common question is one where the same evidence will suffice for each member to make a *prima facie* showing." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 136 (2016); *see also Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 414 (6th Cir. 2018); *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 468 (6th Cir. 2017) ("If the same evidence will suffice for each member to make a *prima facie* showing, then it becomes a common question.").

unintentionally and unnecessarily while driving and that this defect is caused by a malfunction in a component radar sensor (the Continental ARS410) that erroneously detects objects in the path of the vehicle that are not actually there and causes the vehicles to brake without driver input. Mem. Op. at *2. Plaintiffs further alleged that the class Nissan vehicles—2017–2020 Rogues, 2017–2021 Rogue Sports, 2019–2021 Altimas, and 2020–2021 Kicks—were equipped with the identical FEB system with its malfunctioning component. *Id*. at *2–3.

Plaintiffs have clearly made out a *prima facie* case in their pleadings that the existence (or nonexistence) of this defect is a question common to the class.

Nissan does not directly dispute this or the fact that a risk of sudden unintended and unnecessary braking activity affects all of the class vehicles. Nor does Nissan dispute that this risk is due to the FEB Defect, *i.e.*, the erroneous sensing of a phantom object by a radar sensor component of the FEB system, which is present in all of the class vehicles. The evidence proffered by Nissan, as will be discussed below, was not relevant to commonality but instead to the merits of the class claims.

The Supreme Court in *Dukes* indicated that, at least where commonality is disputed, a plaintiff must offer "[s]ignificant proof" that the harms to individual members of the class were attributable to a general policy or unitary course of conduct of the defendant. *Dukes*, 564 U.S. at 353; *see also In re Ford Motor Co.*, 86

F.4th 723, 726 (6th Cir. 2023) (*Dukes* requires plaintiff "to offer 'significant' evidentiary proof that he can meet all four of those criteria, where they are contested"); *Doster*, 54 F.4th at 432 ("If the parties disagree over a fact critical to a Rule 23 requirement, though, plaintiffs cannot rest on their complaint. They must provide evidence.").

In this case, Plaintiffs set forth an abundance of evidence supporting their allegations that the alleged defect is common to the class. Pls.' Br. 9–11. This evidence includes Nissan's own admissions regarding the defect, its root cause, and Nissan's inability to fix the defect, Nissan's own Technical Service Bulletins, Complaint ¶¶ 149–55, and detailed consumer complaints filed with the National Highway Safety Transportation, *id*. at ¶¶ 160–76.

2. The Answers to Plaintiffs' Common Questions Are Classwide and Central to Resolution of This Litigation.

Perhaps the most important development announced in *Dukes* was the Supreme Court's insistence that the common questions of law or fact be questions that *matter*. That is, the questions to be decided on a classwide basis must not only be "common to the class," but will "generate common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Thus, a "common" question within Rule 23(a)(2) is one where "determination of its

truth or falsity will resolve an issue that is central to the validity of each one of the [individual] claims in one stroke." *Dukes*, 564 U.S. at 350.

As this Court has indicated, this requirement means that a "Yes" or "No" answer to the common question will resolve an issue that is central (even if not dispositive) of all the individual claims. *Ford*, 86 F.4th at 727; *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 458 (6th Cir. 2020); *Zehentbauer Fam. Land, LP v. Chesapeake Expl., L.L.C.*, 935 F.3d 496, 503 (6th Cir. 2019); *cf. Bridging Cmtys. Inc. v. Top Flite Fin. Inc.,* 843 F.3d 1119, 1124 (6th Cir. 2016) (holding that plaintiffs seeking certification "need not prove that [every] element of a claim can be established by classwide proof").

In this case, the district court correctly determined that "[t]hough Plaintiffs raise multiple legal theories under the laws of several states, all of those claims are based in warranty, fraud, and consumer protection, and all of those claims center around proof of a defect in the specific sensor used in the class vehicles." Mem. Op. at *4. The question of whether the FEB Defect exists matters because it is central to all of Plaintiffs' claims (as opposed to driver error, poor maintenance, or some other case-by-case cause). The existence of the FEB Defect is a common question because the answer, whether "Yes" or "No," "is apt to drive the resolution of the litigation."

A district court can know that the answer to the common question will drive the resolution of plaintiffs' claims by looking at the elements of those claims and the

proof that will be required. It is for this purpose only—to determine that the answer to the common question will actually matter to the litigation on the merits—that the district court may examine merits-related evidence. *Doster*, 54 F.4th at 430. Rigorous analysis does not, however, allow the district court to test whether the plaintiffs' evidence would support a trial verdict for plaintiffs on the merits.

Importantly, Plaintiffs (and the district court) employ the term "defect" in its ordinary usage. *See Defect*, Black's Law Dictionary (11th ed. 2019) ("An imperfection or shortcoming, esp. in a part that is essential to the operation or safety of a product."). Merriam-Webster defines "defect" similarly as "an imperfection or abnormality that impairs quality, function, or utility." *Defect*, Merriam-Webster, https://www.merriam-webster.com/dictionary/defect; *see also Marcantel v. Michael & Sonja Saltman Fam. Tr.*, 993 F.3d 1212, 1223 (10th Cir. 2021).

In short, Plaintiffs define the FEB Defect in this case as a condition that "can cause [the FEB system] to falsely engage or otherwise not work as intended." Complaint ¶ 2. The tendency of the Nissan FEB system to cause unintended and unnecessary braking *is* the "defect." It must not be conflated with the legal conclusion—defective product—rendered by a jury charged with determining whether a product with that condition is "unreasonably dangerous," falls below consumer expectations, or has failed a risk-utility analysis.

For example, whether the FEB Defect exists is a question that is central to

Plaintiffs' claim of breach of implied warranty. A "Yes" answer is necessary for a jury to proceed to the legal conclusion that, because of this defect, the vehicles they purchased "were not in merchantable condition and are not fit for the ordinary purpose of providing safe and reliable transportation." *Id.* at ¶ 246. A "No" answer would deny recovery at a single stroke.

Similarly, Nissan's Basic Warranty covers "defects in materials or workmanship." *Id.* at ¶ 6. Nissan's warranty clearly uses "defect" in the same ordinary sense as the common question here. *Id.* at ¶ 232. Importantly, "the same warranty covered all class vehicles." Mem. Op. at *9. Thus, a finding that the FEB Defect exists would resolve a central issue in the class claim for breach of express warranty. A "No" answer would defeat this cause of action for the entire class.

Also, the question of whether the FEB Defect exists in the class vehicles is central to the claims of fraudulent misrepresentation. As the district court stated, "the nature of the alleged misrepresentation or omission is essentially the same in all instances: that the AEB system was free of defect," a common question that "can be answered with class-wide proof concerning whether or not there was a defect." *Id.* at *12. A "Yes" answer is necessary for Plaintiffs to prevail on their misrepresentation claim. A "No" answer would mean judgment for Nissan on that claim in a single stroke.

Because the question of the existence of the FEB defect was pled with

specificity, was supported by significant classwide evidence, and is central to Plaintiffs' causes of action, this Court should uphold the district court's holding that Plaintiffs satisfied the Rule 23(a)(2) commonality requirement.

II. NISSAN'S EVIDENCE DID NOT NEGATE THE COMMON ISSUES IDENTIFIED BY PLAINTIFFS.

The defense does not seriously dispute or deny Plaintiffs' evidence that the class vehicles are vulnerable to sudden, unintended braking. Instead, Nissan's primary argument for reversal is that the district court failed to consider Nissan's own evidence. *See, e.g.*, Nissan Br. 17, 21, 22. Specifically, Nissan complains that the district court failed to "examine how material dissimilarities among the products and people covered by the proposed classes would affect the outcomes of their claims." *Id.* at 20.

To the contrary, the district court considered Nissan's evidence and correctly determined that it was not relevant to whether the *questions* raised by the Plaintiffs are common to the class. To the extent that Nissan's evidence was relevant at all, it was relevant only to the *merits* of Plaintiffs' claims.

A. Evidence of Nissan's Unsuccessful Efforts to Eliminate the FEB Defect by Software Improvements Does Not Turn Common Questions into Individual Questions.

Nissan says that it attempted to address the FEB Defect by upgrading its vehicle software. *See id.* at 9–12. The company implemented its "S1 software updates" in the summer of 2018, installing the software in 2019 Nissan Rogue,

Rogue Sport, and Altima models. *Id.* at 10–11. In mid-2019, Nissan released its "S2 update" specifically "to improve target recognition in certain parking garages." *Id.* at 11.

Nissan produced evidence showing that rates of warranty claims related to the FEB Defect fell substantially after the software updates became available compared to the pre-update model years. *Id.* at 12. In Nissan's view, that suggests "meaningful differences in performance" that preclude finding that the existence of the FEB Defect can be an issue common to the class. Amici supporting Nissan make this same flawed argument. *See, e.g.*, Brief for Chamber of Commerce of the United States of America and American Tort Reform Association ("U.S. Chamber Br.") at 23; Brief for the Product Liability Advisory Council, Inc. ("PLAC Br.") at 4; Brief for the Alliance for Automotive Innovation ("Alliance Br.") at 4.

At the outset, it is doubtful that Nissan's evidence is at all probative of the FEB Defect. There may be many reasons why an owner who experienced an unintended braking action might not make a warranty claim. One could be that owners were learning that Nissan dealerships had repeatedly failed to remedy the malfunction, as reflected in the experiences of the named Plaintiffs, *see* Complaint ¶¶ 16-134, and in complaints filed by consumers with NHTSA and posted on the Internet. *See id.* at ¶¶ 162–75. Some owners may simply have turned off the FEB system to prevent phantom braking by their vehicles. *E.g.*, *id.* at ¶ 27. The inference

that fewer complaints equals fewer unintended braking incidents or that the reduction was due to software updates is weak at best.

One fact is very clear from Nissan's own evidence: the updated software failed to remove the FEB defect from any of the class vehicles. The owner of a class vehicle is still the owner of an automobile that could at any time stop in a potentially dangerous situation. And the car continues to be worth less because of that fact.

Finally, it is not true, as Nissan strenuously argues, that the district court failed to consider Nissan's evidence that different class vehicle sensors had different configurations as a result of different software updates. *See* Nissan Br. 2. Nissan simply disagrees with the district court's evaluation of that evidence.

Nissan focuses on the district court's conclusion that Nissan's arguments "are rooted in a level of specificity simply not required at the certification stage." *See* Nissan Br. 22 (quoting Mem. Op. at *4). But the defense might have allowed itself to be educated by the district court's pointed citations to this Court's decisions in *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir. 2004), and *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 852 (6th Cir. 2013).

In *Whirlpool*, owners of Whirlpool's Duets model washing machines contended that the question of whether design defects caused mold to accumulate was common to their class. The manufacturer argued in response that "the Duets

were built over a period of years on two different platforms, resulting in the production of twenty-one different models during the relevant time frame." 722 F.3d at 854. This Court found from defendant's own evidence that "the two platforms are nearly identical," and that "most of the differences in models were related to aesthetics." *Id*. This Court stated that class certification was appropriate because Whirlpool's design changes did not rectify the alleged defect and the washing machines continued to accumulate mold. *Id.* at 854–55.

The district court's reliance on *Bacon* is also instructive. This Court noted that class certification is "appropriate…[when] [i]t is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue." 370 F.3d at 570 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)). Also, in *Daffin v. Ford Motor Co*., 458 F.3d 549 (6th Cir. 2006), Ohio plaintiffs alleged that a defective throttle body assembly installed in two different model years of minivans caused the accelerators to stick. *Id*. at 550. This Court found class certification appropriate because there was a common answer as to whether the throttle body was defective, "despite the different factual circumstances regarding the manifestation of the accelerator sticking and Ford's attempts to remedy" the defect. *Id*. at 553.

Similarly, the differences in Nissan model vehicles and the product improvements did not result in some of the class vehicles containing the alleged

defect and others, not. The answer to the common question, Yes or No, remained classwide.

This Court's recent decision in *Ford* is not to the contrary. There, the plaintiffs alleged that the brake cylinders in their F-150 pickup trucks were defective in that their internal seals were prone to failure, due either to "leak into booster" or "bypass failure." 86 F.4th at 726. This Court found that the district court's certification of the class amounted to an abuse of discretion because the lower court failed to address evidence of two design changes in the middle of the class period "that purportedly would have remedied both of plaintiffs' alleged theories of seal failure." *Id*. at 728. Unlike this case, the lower court there disregarded evidence that could have established that, because of design improvements, the complained-of defect was eliminated in some, but not all, class vehicles. Here, Nissan's own evidence showed that the software upgrades did not eliminate the FEB Defect for any of the class vehicles.

The district court properly followed this Court's guidance in *Whirlpool*, which this Court reaffirmed in *Ford* for the proposition that design changes in the product are immaterial to commonality where the "defect would persist despite the alterations." *Id*.

III. THIS COURT SHOULD REJECT THE PROPOSALS BY NISSAN AND ITS SUPPORTING AMICI TO CONDITION CLASS CERTIFICATION ON THE SUFFICIENCY OF PLAINTIFFS' EVIDENCE ON THE MERITS.

A. It Is Inappropriate at the Class Certification Stage to Inquire into the Strength of Plaintiffs' Evidence for Merits Purposes.

Nissan's supporting amici contend that, quite apart from the facts of this case, this Court should tighten the pleading and proof requirements for the Rule 23(a)(2) prerequisite of commonality in order to shield class action defendants from "procedural unfairness." PLAC Br. 7.

Nissan's supporting amici view the "rigorous analysis" of class certification through dismissal-colored glasses. They do not view the district court's decision as whether justice would be better and more efficiently served by a class action as opposed to numerous individual lawsuits. They would prefer that major corporations like Nissan not be hauled into court at all. Their objective is not efficiency, but immunity. This Court has recognized that, "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 758 (6th Cir. 2013) (quoting *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 545 (6th Cir. 2012)).

The fact that plaintiffs with meritorious claims may be denied access to legal remedies is *the objective* for defendants. *See* J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283, 1295–96 (2022) (in their efforts to kill class actions, "what the defense coalition really wanted was to eliminate—or at least drastically reduce—plaintiffs' ability to assert claims anywhere").

This rationale is apparent in the argument made by the Alliance that class certification massively "magnifies the stakes" for defendants, opening the door to potentially abusive "settlement pressures." Alliance Br. 17. Justice Scalia rejected this exact argument simply as bad math in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). Certifying Shady Grove's class action did *not* transform a $500 dispute into a $5 million dispute. Because each member of the putative class could bring a freestanding suit asserting his individual claim, the aggregate stakes for Allstate remain about the same. *Id*. at 408. Certifying a class action only increases the stakes if defendant's hoped-for alternative is no accountability in court at all. And that is the alternative that Nissan's amici hope for.

They propose a far-reaching, merits inquiry into the sufficiency of a plaintiff's evidence of product defect before the district court can decide that the question of whether a defect exists is common to the class. *E.g.*, Alliance Br. 4 (asking this Court to "make clear that courts cannot certify defect-based class actions unless they determine there is scientific evidence of an actual defect"); Chamber Br. 14 (courts

should require "at the certification stage of cases like this one that are based on alleged product defect" expert testimony as to "how safe [the product] should be made against all foreseeable hazards"). Insisting upon merits evidence, particularly *only* admissible evidence, at this stage makes it far more likely that the company will never actually be called to account for its conduct at trial.

The Supreme Court has long prohibited "preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). And it has consistently maintained that proof of an element essential for plaintiffs to prevail on the merits "is not a prerequisite to class certification." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013). This Court has held that evidentiary proof need not amount to admissible evidence at the class certification stage. *Lyngaas v. Ag*, 992 F.3d 412, 428–29 (6th Cir. 2021). A district court may look to evidence that is relevant to a different issue, specifically whether the common question is central to resolving a claim, even if that evidence is also relevant to the merits of the underlying claim. *Dukes*, 564 U.S. at 351. But the Supreme Court has made clear that this look at the merits evidence is limited, and is not a "license to engage in free-ranging merits inquiries at the certification stage." *Amgen*, 568 U.S. at 466. To hold otherwise "would 'put the cart before the horse.'" *Id*. at 460.

This Court has recognized that this requires district courts assessing commonality to maintain an important distinction. "*Amgen* and *Dukes* now clarify that some inquiry into the merits may be necessary to decide if the Rule 23 prerequisites are met." *Whirlpool*, 722 F.3d at 851–52. Specifically, *Dukes* allows a district court to look at merits-related evidence to ascertain that the common questions "matter to the merits." *Doster*, 54 F.4th at 430 (quoting *Dukes*, 564 U.S. at 352). However, this limited look must not "turn the class certification proceedings into a dress rehearsal for the trial on the merits." *Whirlpool*, 722 F.3d at 851–52 (quoting *Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 811 (7th Cir. 2012)).

Consequently, this Court has instructed that district courts "must distinguish a legal question (what elements make a question "common"?) from an evidentiary one (what must a plaintiff do to prove these elements?)." *Doster*, 54 F.4th at 430.

This is precisely the distinction that Nissan and its supporting amici ask this Court to erase.

Nissan's amici would upend the commonality requirement. The Alliance states that the "fundamental problem with the district court's ruling" was that it framed the common question as whether the vehicles all had a risk of "false positives" suddenly stopping Plaintiffs' cars, not whether these malfunctions "were the result of a defect." Alliance Br. 2; *see also id.* at 6 (asserting that unnecessary braking "is not indicative of a product defect"). But the unintended and unnecessary braking,

whether we call it "defect" or "malfunction" *is* the common *question* of fact that is central to Plaintiffs' claims. Instead, the Alliance turns away from the commonality question to insist on sufficient evidence to prevail on the merits: "failure of Plaintiffs' experts in this case to identify any actual or common defect should, at the very least, have precluded class certification." *Id.* at 16.

The U.S. Chamber argues that a plaintiff class should be required to show by expert opinion "that a product design is so 'defective' that every buyer is entitled to compensation because of the occurrence or substantial risk of product failure." U.S. Chamber Br. 5. Indeed, it would require expert testimony as "necessary to prove a classwide defect" where complex technology is involved. *Id.* at 13. Expert testimony should be required, not to establish that the same malfunction occurs in all the class vehicles, but rather to show "how safe it should be made against all foreseeable hazards." *Id*. at 14 (internal quotes omitted).

Nissan contends that "The very nature of the commonality and predominance analysis *requires* examining the merits to determine whether the factfinder could fairly deliver a common answer or not." Nissan Br. 22 (emphasis in original). But Nissan did not argue that there was no common question because only some class vehicles had a tendency to brake unnecessarily. Instead, it was Nissan's position that this tendency was not a defect at all, but simply "a system limitation," an argument

the district court properly rejected as "merits-based." Mem. Op. at *4.[5]

B. This Court Should Reject Defense Proposals to Erect Additional Barriers to Class Certification to Shield Defendants from *In Terrorem* Pressures to Settle.

The primary rationale advanced by Nissan's *amici* for making class certification more difficult for plaintiffs is that certification imposes upon defendants the burden of "prolonged, expensive litigation" to prove their innocence. Alliance Br. 16. Or they may yield to the temptation to agree to "*in terrorem* settlements driven by defendants' risk aversion, not justice." *Id*. Neither consideration should move this Court to erect additional barriers in the form of more demanding requirements at the class certification stage.

First, the notion that a multiplicity of individual suits would be less expensive (and less burdensome for the district courts around the country) is simply not credible. As this Court has also recognized, "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.'" *Vassalle*, 708 F.3d at 758 (quoting *Young*, 693 F.3d at 545).

[5] Unwittingly, Nissan itself presents a strong, if alternative, argument for affirmance. If the occurrence of false positives is no more than a "system limitation" of the FEB system, it is so for all the class vehicles. Under Nissan's interpretation, the question of defect would still be common to the class. The answer to this common question, as supplied by Nissan, would be a *classwide* "No."

Second, Nissan has made no allegation that Plaintiffs' claims are frivolous or without merit. Nor have Nissan's amici produced any factual support for their conclusory allegation that certification places unfair pressure on defendants to settle. Defendants in class action cases, like defendants in civil actions generally, make settlement decisions for a wide variety of reasons, viewed through the lens of their own self-interest. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286, 362 (2013). It is strikingly odd that Nissan's amici speak for the business community and ask this Court to attempt to influence those decisions by manipulating requirements at the certification stage.

If a case could be made that corporations like Nissan require such special protections at the certification stage, Congress, not the judicial branch, is the appropriate venue.

Indeed, the Supreme Court has stated exactly that: "We do not think it appropriate for the judiciary to make its own further adjustments by reinterpreting Rule 23 to make likely success on the merits essential to class certification in securities-fraud suits." *Amgen*, 568 U.S. at 476–77 (quoting *Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010)) (Easterbrook, C.J.). Such "policy considerations [are] more properly addressed to Congress than to this Court." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979).

That response is equally appropriate in this case.

CONCLUSION

For the foregoing reasons, the judgement of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,331 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman type style.

Date: April 3, 2024

/s/ Jeffrey R. White
JEFFREY R. WHITE

CERTIFICATE OF SERVICE

I, Jeffrey R. White, counsel for amicus curiae and a member of the Bar of this Court, hereby certify that on April 3, 2024, electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users:

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