No. 25-1492

IN THE

United States Court of Appeals for the Fourth Circuit

STATE OF RHODE ISLAND OFFICE OF THE GENERAL TREASURER, ON BEHALF OF THE EMPLOYEES RETIREMENT SYSTEM OF THE STATE OF RHODE ISLAND; LOCAL #817 IBT PENSION FUND

Plaintiffs-Appellees,

v.

THE BOEING COMPANY; DAVID L. CALHOUN; DENNIS A. MUILENBURG; BRIAN J. WEST; GREGORY D. SMITH

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia, Alexandria Division
Case No. 1:24-cv-00151 (Hon. Leonie M. Brinkema)

BRIEF OF *AMICUS CURIAE* THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION SUPPORTING DEFENDANTS-APPELLANTS AND REVERSAL

Kevin M. Carroll
SECURITIES INDUSTRY AND
FINANCIAL MARKETS ASSOCIATION
1099 New York Avenue, NW
6th Floor
Washington, D.C. 20001
(202) 962-7300

Benjamin W. Snyder
Counsel of Record
Vladimir J. Semendyai
PAUL HASTINGS LLP
2050 M Street, NW
Washington, D.C. 20036
(202) 551-1700

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INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association that represents the interests of hundreds of securities firms, banks, and asset managers.[1] SIFMA is also the United States regional member of the Global Financial Markets Association. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. To further that mission, SIFMA regularly files *amicus curiae* briefs in cases such as this one that raise issues of vital concern to securities industry participants. This case involves important issues concerning standards for class certification in private securities actions, which are directly relevant to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court emphasized in *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013), that district courts addressing class-certification motions have a "duty to take a close look" at class certification requests and may not defer the

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief.

appropriateness of class-wide resolution to later innings that are likely to never come. That is because in modern class-action litigation, the decision to certify a class is "typically a game-changer, often the whole ballgame." *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890, 908 (3d Cir. 2022) (Porter, J., concurring); *accord Speerly v. Gen. Motors, LLC*, --- F.4th ----, No. 23-1940, 2025 WL 1775640, at *35 (6th Cir. June 27, 2025) (*en banc*) (Nalbandian, J., concurring) ("For many damages class actions, certification is the whole ballgame."). As Justice Ginsburg observed, "[e]ven in the mine-run case, a class action can result in 'potentially ruinous liability,'" and "[a] court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (quoting Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment and citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978)).

The Supreme Court's mandate in *Comcast* of rigorous review of all class action elements was nothing new. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) ("In adding 'predominance' and 'superiority' to the qualification-for-certification list, . . . the Reporter for the 1966 amendments cautioned: 'The new provision invites a close look at the case before it is accepted as a class action . . . .'") (citation omitted). But *Comcast* clarified the particular importance of such review in the context of damages questions, holding that when the

appropriateness of certification depends on the plaintiffs' ability to prove damages on a class-wide basis rather than through plaintiff-by-plaintiff proof, it is not enough for plaintiffs to provide assurances that they will eventually devise a model that allows the necessary class-wide resolution. Instead, before certifying the class, the district court must undertake "a rigorous analysis" to ensure "that there [is] *in fact*" a damages model "sufficiently" connected to plaintiffs' liability case to satisfy Rule 23(b). *Comcast*, 569 U.S. at 33 (citation and internal quotation marks omitted).

Leaving no doubt about the importance of this issue, the Court has returned to it multiple times in the years since *Comcast*. In *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), the Court reiterated "plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)." *Id.* at 275 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-52 (2011), and *Comcast*, 569 U.S. at 31-35). And in *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 594 U.S. 113, 122 (2021), the Court pointed to its "repeatedly explained" requirement that "a court has an obligation before certifying a class to 'determine that Rule 23 is satisfied, even when that requires inquiry into the merits.'" *Id.* at 122 (brackets and citations omitted).

But notwithstanding the Supreme Court's sustained attention to this issue, district courts all too often shirk their "duty" to perform a careful evaluation of

whether plaintiffs have offered viable methodologies for establishing damages or other critical elements through class-wide rather than individualized proof. *Comcast*, 569 U.S. at 34. In case after case, district courts have relied on plaintiffs' assurances that their experts could eventually devise methodologies sufficient to prove class-wide damages, if necessary, rather than requiring that those methodologies actually be presented for "rigorous analysis" at the certification stage. *Id.* at 33. And predictably, "the risk of 'in terrorem' settlements that class actions entail," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (citation omitted), means that those methodologies never materialize for district court (let alone appellate) review, because defendants are forced to settle rather than putting plaintiffs to their proof.

The facts here vividly illustrate the problems that result when district courts fail to undertake the "rigorous analysis" that *Comcast* requires. 569 U.S. at 33. As defendants explain, plaintiffs' theory of liability is that even if none of defendants' statements was material in itself, over time the repeated statements gradually inflated the market's understanding of Boeing's commitment to safety. *See* Boeing Op. Br. 28-32, 39. But plaintiffs' expert offered no methodology at all by which to identify damages that map onto such a theory of liability. Instead, he simply recited legal boilerplate about the test for damages in securities suits and predicted that he will be able to come up with an appropriate model to apply that test at some later date. *See*

id. at 28-32. Treating that sort of testimony as sufficient to support certification of a potentially multi-billion-dollar class would "reduce Rule 23(b)(3)'s predominance requirement"—and *Comcast* itself—"to a nullity." *Comcast*, 569 U.S. at 36. This Court should not countenance that result.

ARGUMENT

I. Enforcement of *Comcast*'s Limits on Class Certification Is Critical for U.S. Financial Markets

As a prerequisite for class certification under Rule 23(b)(3), *Comcast* requires that plaintiffs present a methodology for calculating damages on a class-wide basis that is consistent with their liability theories. *See* 569 U.S. at 33. District courts must undertake a "rigorous analysis" to ensure that plaintiffs have satisfied that evidentiary burden by "affirmatively demonstrat[ing]" compliance with Rule 23(b). *Id.* at 33, 35 (internal quotation marks omitted) (citations omitted).

That requirement plays a particularly important role in private securities litigation. As a practical matter, the class-certification stage is often the *only* opportunity for a court in a securities class action to assess the validity of the plaintiffs' damages methodology. Following class certification, defendants face enormous pressure to settle even when they have meritorious defenses. *See, e.g.*, *AT&T Mobility*, 563 U.S. at 350 (observing that when facing "damages allegedly owed to tens of thousands of potential claimants" and "even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.");

Coopers & Lybrand, 437 U.S. at 476 ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (explaining that "class certification creates insurmountable pressure on defendants to settle" because "facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low") (citations omitted); *see also Speerly*, 2025 WL 1775640, at *35 (Nalbandian, J., concurring) (tracing the historical roots of class actions and explaining that courts must not "wait until summary judgment to do the dirty work" of ensuring that a class action should proceed because "[t]he aggregation of hundreds of thousands of claims into a single suit is an immensely powerful tool" for exerting settlement pressure on defendants (citation omitted)).

This danger is not merely speculative. The number of federal class-action securities-fraud filings continued to increase in recent years following a pandemic-related drop. *See* Cornerstone Research, *Securities Class Action Filings—2024 Year in Review* 1 (2024), https://tinyurl.com/5n7ajdnv (hereinafter, "*Cornerstone 2024 Year in Review*"). In 2024, "[t]he number of 'core' [class-action] filings—those excluding M&A filings[2]—was 14% higher than the historical average" and the

[2] "Core filings" refers to "all state 1933 Act class actions and all federal securities class actions, excluding those defined as M&A filings." *Cornerstone 2024 Year in Review* at 26. The term "core federal filings" further excludes state filings.

number of "federal Section 10(b)-only filings" was "the highest level on record." *Id.* at 1, 2. Yet, "[f]rom 1997 to 2024, . . . only 0.4% of core federal filings (or 21 lawsuits) reached trial." *Id.* at 16. In short, if the flaws in a damages methodology are not addressed at the class-certification stage, there will generally be no opportunity for a district court (or court of appeals) to remedy the error later because "these cases—should they . . . obtain class certification—will almost always settle." Geoffrey Rapp, *Rewiring the DNA of Securities Fraud Litigation: Amgen's Missed Opportunity*, 44 Loy. U. Chi. L.J. 1475, 1478 (2013) (footnote omitted); *see* Henry J. Friendly, *Federal Jurisdiction: A General View* 119-20 (1973) ("While the benefits to the individual class members are usually miniscule, the possible consequences of a judgment to the defendant are so horrendous that these actions are almost always settled.").

At the same time, plaintiffs' flawed damages theories—based on promises of purportedly *Comcast*-compliant methodologies to come—are widespread. For example, as plaintiffs touted to the district court in this case, promised methodologies similar to the one proffered here by Mr. Coffman have been accepted over *Comcast*-based objections in sixty securities class actions (counting this case) across the country. *See* Fox Declaration re Response in Support of Motion to Certify Class, Ex. 1 at 2-12, *In re The Boeing Co. Sec. Litig.*, No. 1:24-cv-00151 (Feb. 20, 2025) (ECF 130-1) ("Table of Cases Exhibit") (collecting cases). Furthermore, Mr.

Coffman, plaintiffs' damages expert in this case, admitted that his purported damages theory in this case comes from a recycled "template . . . that [he] use[s] in many reports." JA720-721. Indeed, he testified that he has submitted the same rote analysis in damages reports "dozens of times," "[m]aybe 10-15" times per year. JA722-723; *see, e.g.*, *In re FibroGen Sec. Litig.*, No. 21-cv-02623-EMC, 2024 WL 1064665, at *15-16 (N.D. Cal. Mar. 11, 2024) (generally accepting Mr. Coffman's "'out-of-pocket' damages methodology"). And Mr. Coffman is hardly the only damages expert peddling such hollow damages analyses. *See, e.g.*, *In re Vale S.A. Sec. Litig.*, No. 19-CV-526-RJD-SJB, 2022 WL 122593, at *18 (E.D.N.Y. Jan. 11, 2022), *report and recommendation adopted*, 2022 WL 969724 (E.D.N.Y. Mar. 31, 2022) (accepting a similarly rote "out-of-pocket" damages model from expert Steven Feinstein).

This problem plainly has metastasized in this Circuit too. In *In re NII Holdings, Inc. Securities Litigation*, for example, the court offered a cursory analysis remarkably similar to the one here, ultimately basing its certification decision on the fact that the "out-of-pocket" damages method "is widely accepted as the traditional measure of damages for Rule 10b-5 actions." 311 F.R.D. 401, 413-14 (E.D. Va. 2015). District courts also granted class certification on comparably thin grounds in *In re Under Armour Sec. Litig.*, 631 F. Supp. 3d 285, 312 (D. Md. 2022); *In re Willis Towers Watson PLC Proxy Litig.*, No. 1:17-cv-1338 (AJT/JFA), 2020 WL 5361582,

at *11 (E.D. Va. Sept. 4, 2020); *City of Cape Coral Mun. Firefighters' Ret. Plan v. Emergent Biosolutions, Inc., HQ*, 322 F. Supp. 3d 676, 691 (D. Md. 2018); and *KBC Asset Mgmt. NV v. 3D Sys. Corp.*, No. 0:15-2393-MGL, 2017 WL 4297450, at *7 (D.S.C. Sept. 28, 2017). *See* Table of Cases Exhibit at 2-3 (collecting cases). And each of those cases settled following class certification, reinforcing the need for this Court to restore *Comcast*'s vitality in this Circuit.

Moreover, the district courts' frequent endorsement of barebones damages theories creates a snowball effect that further exacerbates the problem. Subsequent district courts shirk *Comcast*'s "rigorous analysis" requirement and instead simply rely on this growing body of flawed precedent to grant class certification motions—a fact not lost on class-action plaintiffs. *See, e.g.*, *Pub. Emps.' Ret. Sys. of Miss. v. TreeHouse Foods, Inc.*, No. 16-cv-10632, 2020 WL 919249, at *9 (N.D. Ill. Feb. 26, 2020) (noting plaintiffs' argument that certification is proper because of "dozens of cases in which Coffman's expert opinions" were accepted). Indeed, the district court here also jumped on this bandwagon: it certified plaintiffs' class despite the lack of a proper damages methodology just because "the vast majority of courts, including [that same district court]" have done so before. JA1695. It is up to this Court to reestablish *Comcast*'s validity in this circuit and prevent more district courts from jumping on this bandwagon.

That reality—insurmountable settlement pressure and widespread endorsement of an assembly-line approach to class-action damages by district courts—has wide-ranging negative effects for the Nation's financial system. Although the named defendants in a securities action may bear the immediate consequences of any settlement, the costs of overbroad, unmeritorious litigation ultimately "get[] passed along to the public." *SEC v. Tambone*, 597 F.3d 436, 452-53 (1st Cir. 2010) (Boudin, J., and Lynch, CJ., concurring). Companies may lose equity value, requiring current shareholders effectively to insure former shareholders for their investment losses. *See* Anjan V. Thakor, U.S. Chamber Inst. for Legal Reform, *The Unintended Consequences of Securities Litigation* 14 (2005) (noting that the average securities class action reduces the value of a defendant company's equity by 3.5 percent). Moreover, "the prevalence of meritless securities lawsuits and settlements in the U.S. has driven up the apparent and actual cost of business," causing "foreign companies [to] sta[y] away from US capital markets for fear that the potential costs of litigation will more than outweigh any incremental benefits of cheaper capital." Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* ii, 101 (2007); *see Speerly,* 2025 WL 1775640, at *11 (Sutton, C.J.) (observing that "'[i]ncorrectly certified classes . . . coerce businesses into costly settlements that they sometimes must reluctantly swallow'" and that "[t]hese 'coerced settlements substantially raise the

costs of doing business' for companies, which 'in turn pass on those costs to consumers,' investors, and workers") (quoting *Lab. Corp. of America Holdings v. Davis*, 145 S. Ct. 1608, 1612 (2025) (Kavanaugh, J., dissenting). In a very real way, therefore, the promiscuous certification of securities class actions threatens to undermine the overall competitiveness of American capital markets.

II. Plaintiffs Have Failed to Present a *Comcast*-Compliant Damages Methodology

The Court should reverse the district court's class-certification order. *Comcast* requires plaintiffs to present a "model . . . establishing that damages are capable of measurement on a classwide basis" in a manner "consistent with [their] liability case." 569 U.S. at 34-35. But plaintiffs have not done so in this case; instead, they averred that a general formula for such damages is available and promised to provide a concrete model in the future. That falls far short of the evidentiary showing *Comcast* demands.

Plaintiffs' expert, Mr. Chad Coffman, acknowledged that plaintiffs did not create an actual damages methodology capable of measuring damages specific to this case, despite asserting that out-of-pocket measure of damages "is a standard and well-accepted [damages] method." JA589-590. He also admitted that "the artificial inflation per share that is an input to the [out-of-pocket] damages" measure requires "an inherently case-specific" analysis that "depends on specific facts and circumstances" of each case. JA590-591. But Mr. Coffman provided no case-

specific damages analysis here. Indeed, as explained above, Mr. Coffman's damages approach in this case came nearly verbatim from a "template" he has used for *all* of his class-certification reports since at least 2020, recycling the same five boilerplate paragraphs that are "virtually identical to paragraphs [he] included in expert reports in other cases describing the damages methodology for common stock." JA718-723; *see also* JA721-722; Boeing Op. Br. 11-12; 28-29. The template simply lists various *potential* "technique[s] and valuation approach[es]" for measuring stock-price inflation as a general matter, reserves the right to use other unspecified approaches, and leaves for another day the task of determining how to come up with an actual methodology that measures out-of-pocket damages on a class-wide basis under the facts of this case. JA590-592; *see* Boeing Op. Br. 28-32.

That is not a *Comcast*-compliant methodology, just a promise of one to come. And the promise, moreover, is highly questionable. Plaintiffs' liability theory depends on their argument that while defendants' individual statements may have been "mere puffery," they "bec[a]me material to investors" when they "[we]re made repeatedly." JA467 (internal quotation marks omitted) (citations omitted).[3] But

[3] In opposing Rule 23(f) certification, plaintiffs sought to downplay that aspect of their theory. *See* JA1786 (arguing that "Defendants' contention that this is an unusual case in which repetition of the statements was the decisive factor in avoiding dismissal is completely unfounded") (citation omitted). But plaintiffs' briefing at the motion-to-dismiss stage relied heavily on the proposition that "[w]hile certain statements, viewed in isolation, may be mere puffery, *when the statements are made repeatedly in an effort to reassure the investing public about matters particularly*

plaintiffs failed to identify any sound methodology for determining how much of that gradual inflation had taken hold on any given trading day during the class period—a determination essential for calculating damages for individual class members. *See* Boeing Op. Br. 30. Making matters worse, plaintiffs also offered no methodology reliably to account for changing investor information about Boeing's safety plans throughout the class period, or to disaggregate the effects on share price that the January 5, 2024, Alaska Airlines accident would have caused regardless of any earlier statements concerning Boeing's commitment to safety. *See id.* at 47-60.

Those case-specific considerations highlight the need for a damages methodology that a court can actually subject to "a rigorous analysis" that "probe[s] behind the pleadings" before certifying a class. *Comcast*, 569 U.S. at 33-34 (citation and internal quotation marks omitted). Without such a methodology, plaintiffs cannot carry their burden of putting forward "evidentiary *proof*" that damages can be established on a class-wide basis in a manner consistent with their theory of liability. *Id.* at 33 (citation omitted; emphasis added). To be sure, "[c]alculations need not be exact" at the class-certification stage. *Id.* at 35. But without *some* details applying the general damages formula to the case at hand, a district court cannot

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important to the company and investors, those statements may become material to investors." JA467 (emphasis in original; citation and internal quotation marks omitted); *see* JA475–76 (similar).

possibly analyze whether the plaintiffs have identified a damages model that is "consistent with [plaintiff's] liability case." *Id.* (citation omitted).

In this regard, the class-certification decision in *In re BP p.l.c. Securities Litigation* is instructive. *See* No. 4:10-md-2185, 2013 WL 6388408, at *16-17 (S.D. Tex. Dec. 6, 2013). There, too, Mr. Coffman opined that he would ultimately be able to calculate damages using a model that "has not yet been created." *Id.* at *17. After identifying the case-specific problems that such a model might encounter, the court denied certification, explaining that "[s]imply invoking the event study methodology" does not demonstrate "how Plaintiffs propose to use an event study to calculate class members' damages, and how that event study will incorporate—and, if necessary, respond to—the various theories of liability." *Id.* Accordingly, the court found that "Plaintiffs have failed to meet *their burden* of showing that damages can be measured on a class-wide basis consistent with their theories of liability." *Id.* Had the district court actually undertaken the *Comcast*-required analysis of Mr. Coffman's assurances here, it would have reached the same conclusion.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of class certification.

Dated: July 25, 2025

Respectfully submitted,

/s/ Benjamin W. Snyder
Benjamin W. Snyder
Counsel of Record
Vladimir J. Semendyai
PAUL HASTINGS LLP
2050 M Street, NW
Washington, D.C. 20036
(202) 551-1700

Kevin M. Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1099 New York Avenue, NW
6th Floor
Washington, D.C. 20001
(202) 962-7300

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief, excluding the portions excepted by the rules, contains 3,343 words, according to the word-count feature of the software used to generate this brief.

I certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6).

/s/ Benjamin W. Snyder
Benjamin W. Snyder

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 2025, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the Court's CM/ECF system, and counsel for all parties will be served by the CM/ECF system.

/s/ Benjamin W. Snyder
Benjamin W. Snyder

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COUNSEL FOR: The Securities Industry and Financial Markets Association

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

/s/ Benjamin W. Snyder
(signature)

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Benjamin W. Snyder Name (printed or typed)	202-551-1873 Voice Phone
Paul Hastings LLP Firm Name (if applicable)	202-551-0373 Fax Number
2025 M Street NW Washington, D.C., 20009 Address	bensnyder@paulhastings.com E-mail address (print or type)

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