No. 16-809

IN THE

Supreme Court of the United States

JOSEPH MAZZEI, on Behalf of Himself and All Others Similarly Situated,

Petitioners,

v.

THE MONEY STORE, TMS MORTGAGE, INC. and HOMEQ SERVICING CORP.,

Respondents.

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

BRIEF IN OPPOSITION

NEAL KUMAR KATYAL
COLLEEN E. ROH SINZDAK
HOGAN LOVELLS US LLP
555 Thirteenth St. NW
Washington, DC 20004
(202) 637-5600

DANIEL A. POLLACK
Counsel of Record
EDWARD T. MCDERMOTT
MCCARTER & ENGLISH, LLP
245 Park Avenue, 27th Floor
New York, NY 10167
(212) 609-6900
dpollack@mccarter.com

Counsel for Respondents

QUESTIONS PRESENTED

1. Are the Seventh Amendment and/or the Rules Enabling Act violated when—on a Rule 23 motion to decertify a class after the jury has reached a verdict in the class's favor—the courts below apply a procedure which:

> (i) imposes a post-verdict burden on the class to again satisfy Rule 23's prerequisites by a preponderance of the evidence; and
>
> (ii) allows the trial court to reweigh the trial evidence and rule on a merits issue decided upon by the jury in the class's favor, disregarding the standards imposed under FRCP Rule 50; and
>
> (iii) applies a deferential abuse of discretion standard of appellate review to a trial court's post-verdict decision to decertify the prevailing class?

2. Does decertification of a prevailing class conflict with this Court's decisions addressing Rule 23 in *Amgen* v. *Conn. Retir. Plans & Trust Funds*, 133 S.Ct. 1184 (2013) and *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S.Ct. 1036 (2016), where the trial court's decertification is based on its disagreement with the jury's determination on an issue going to the merits of the class claim?

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondents The Money Store, TMS Mortgage, Inc. and HomEq Servicing Corp. make the following disclosures:

(1) Wells Fargo & Company, the stock of which is publicly traded on the New York Stock Exchange, is the parent of Wells Fargo Bank, N.A., the ultimate successor by merger to Respondents The Money Store, TMS Mortgage, Inc. and HomEq Servicing Corp. Berkshire Hathaway Inc., a publicly held corporation, owns 10% or more of the stock of Wells Fargo & Company.

(2) Wells Fargo & Company owns more than 10% of Wells Fargo Bank, N.A., the ultimate successor by merger of Respondents The Money Store, TMS Mortgage, Inc. and HomEq Servicing Corp.

(3) No other publicly held company owns 10% or more of any of the Respondents.

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BRIEF IN OPPOSITION

INTRODUCTION

In 2001, Joseph Mazzei filed a class action alleging respondents breached their mortgage contracts by assessing certain late fees. The district court certified a class of plaintiffs who were charged these fees and whose loans were originated or serviced by respondents. But, after a jury verdict on petitioners' behalf, the district court found that petitioners had offered no classwide evidence that a contract existed between respondents and those class members whose loans respondents had merely serviced. By contrast, there was no dispute that a contract existed between respondents and class members—like Mazzei—whose loans respondents originated.

Because this fundamental question divided the class among itself and divided some members from their class representative, the district court decertified the class under Rule 23 on grounds of predominance and typicality. The court noted that this relief avoided the more draconian step of granting judgment as a matter of law for defendants under Rule 50, something that the court would have done had decertification not been granted.

The Second Circuit affirmed, easily dismissing petitioners' assertion—raised for the first time on appeal—that the post-jury verdict class decertification violated the Seventh Amendment. The court of appeals explained that the effect of granting post-verdict decertification was the same as granting a new trial under Rule 59 in an individual case; each class member retained the right to pursue her claims separately. Because Rule 59 does not violate the Seventh Amendment, post-jury decertification must also comply, so long as the stringent Rule 59 standard for setting aside jury findings is met.

To recite these facts is to demonstrate why certiorari is inappropriate. Rule 23 contemplates that decertification may occur any time "before final judgment." Fed. R. Civ. P. 23(c)(1). There is nothing untoward about a district court's decision to decertify a breach of contract class action after a trial has made plain that the existence of a contract is undisputed for some class members, and unproven for others. Petitioners have not pointed to a single case that supports their assertions to the contrary, still less have they offered a basis for the novel claim that the Seventh Amendment guarantees their right to a classwide verdict of breach of contract in the absence

of classwide evidence proving that a contractual relationship existed.

Petitioners therefore request splitless error correction in the absence of any error. Further, the petition spends a good deal of ink complaining that post-verdict decertification may only be granted when the Rule 50 standard for judgment as a matter of law is met, ignoring that the district court stated that the standard was satisfied in this case. In fact, because the district court stated that it would have granted judgment as a matter of law to the respondents as an alternative to decertification, review by this Court could not improve petitioners' outcome and it might worsen it.

Perhaps because the reasons for rejecting certiorari are so apparent, the petition attempts to cloud the matter by misstating the facts, misrepresenting the law and the lower court opinions, and gesturing towards illusory splits with the decisions of this Court and the other circuits. All this sound and fury amounts to nothing. The petition for certiorari should be denied.

STATEMENT

1. Petitioner Joseph Mazzei filed a putative class action against respondents, who originated, owned, and serviced his mortgage. He alleged that respondents had overcharged him for post-acceleration late fees after he defaulted on the loan. Pet. App. 3a. The district court certified a class of plaintiffs whose loans were "owned *or* serviced" by respondents and

who had similarly been charged late fees. *Id.*[1] (emphasis added).

Some background on the mortgage industry is helpful in understanding the controversy that ensued with respect to this class: In general, a borrower enters into a contract with the entity that originates her loan. *Id.* 31a. That entity may also service the loan, or servicing may be handled by a separate company. *Id.*

Here, there was no dispute that the mortgage agreements established a contractual relationship between respondents and those class members whose loans respondents had owned or originated. But the parties were not in accord as to whether there was a contractual relationship between respondents and the class members whose loans were originated or owned by a different entity. Petitioners asserted that privity existed based on the fact that respondents serviced the loans of those class members, but respondents disagreed. Nonetheless, during the class certification proceedings, Petitioner Mazzei assured the court that privity for these borrowers could be proven on a classwide basis. CA R. at A.358-A.359.

At trial, petitioners introduced the expert testimony of Adam Levitin, a law professor. He informed

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[1] Mazzei also brought a breach of contract claim regarding the alleged improper use of the attorneys' fees assessed by respondents. Pet. App. 3a. The district court certified a distinct class for this claim, which was rejected on the merits by the jury. *Id.* The Second Circuit affirmed the jury verdict in a separate unpublished order, *id.*, and petitioners do not challenge that decision.

the jury that he was there to provide background information about the mortgage industry, and the "role of the servicer." Pet. App. 67a. He explained that investors will sometimes purchase loans from their originator, and then enter into a "pooling service agreement" (PSA) with a company that will service the loans. *Id.* at 31a. Levitin opined that a hypothetical borrower could sue her loan servicer for breach of contract based on the terms of her PSA. *Id.* at 67a. Levitin also examined Mazzei's PSA, and stated that it was "typical of the industry." CA R. at A.2811:3-9. Levitin did not testify as to the contents of the PSA governing the loan of any other member of the late fee class, and he made clear that he was offering "no opinion whatsoever on the defendants in this case." Pet. App. at 67a.

That was it. Petitioners did not attempt to present any other evidence that might establish privity. They did not, for example, introduce any other PSAs covering the loans of the late fee class members, nor did they offer any evidence or testimony regarding the contents of those PSAs. *Id.* at 68a. In fact, petitioners did not even seek any of respondents' PSAs through discovery. *See* CA R. at A.1400-A.1446. And they did not provide any alternative classwide evidence regarding a contractual relationship between respondents and the borrowers whose loans they only serviced. Pet. App. 68a.

The jury found for the plaintiffs and awarded Mazzei $133.80 and the class approximately $54 million in total. *Id.* at 4a. Respondents filed a post-trial motion seeking to have the class decertified under Federal Rule of Civil Procedure 23(c)(1)(C) or, in the alternative, for judgment as a matter of law under Rule 50. *Id.*

Respondents argued that petitioners had not proved that there was privity between respondents and the class members whose loans they had merely serviced, while privity remained undisputed for plaintiffs (like Mazzei) whose loans respondents had originated. Respondents explained that this fundamental difference between plaintiffs whose loans they originated and plaintiffs whose loans they only serviced meant that neither the typicality nor the predominance requirements for class certification under Rule 23 were met.

2. The district court agreed. It decertified the class and entered judgment individually for Mazzei. The court recognized that the jury verdict in favor of plaintiffs necessarily meant that the jury had found privity with respect to all class members. Pet. App. 63a. But the court determined that the jury's finding could not be supported by the evidence.

The court observed that the case law "make[s] it-clear that a servicer is not automatically in privity with a borrower." *Id.* at 65a-66a. Rather, Privity "depend[s] on the nature of the relationship between the servicer and the borrower and whether there has been a valid assignment of contractual duties to the servicer." *Id.* at 66a. But the only evidence petitioners presented on this issue was Levitin's background testimony opining that Mazzei's PSA was "typical of the industry," and that a hypothetical borrower could sue a servicer for breach of contract. *Id.* at 67a, 69a. "Putting aside that Levitin had no competence to testify on a conclusion of law," Levitin offered no testimony regarding any specific agreements covering the servicing of the loans of other class members. *Id.* at 69a-70a. Indeed, he emphasized that he was providing "no opinion whatsoever on the defendants."

Id. at 67a. Thus, even if it were permissible to credit Levitin's statements, finding privity would have taken sheer speculation on the part of the jury as to whether the particular documents controlling each class member's loan created a contractual relationship with respondents. *Id.* at 69a-70a.

The district court held that the failure to prove privity with respect to some, but not all, class members made it impossible for the class to meet the certification requirements of Rule 23. Specifically, Rule 23(a)(3)'s typicality requirement could not be met because Mazzei's loan was originated by respondents. He was therefore "an atypical class representative for those members of the class whose loans were merely serviced" by respondents. *Id.* at 71a. The class also failed "to prove that the common question of whether the defendants breached" the loan agreements by charging late fees "predominated over the individual issues of whether each class member is in privity of contract with the defendants." *Id.* at 72a. Thus, Rule 23(b)(3)'s predominance requirement was also unsatisfied.

The court recognized that decertification of a class, particularly after a jury verdict, is a "drastic step," but it found that it would be a "manifest injustice" to award $54 million for breach of contract to the class when it was not clear that all of the class members even had a contract with respondents. *Id.* at 72a-73a. Nor was it possible to simply narrow the class because the plaintiffs "never provided any basis to allocate the damages among members of the class whose loans were originated by the defendants and those whose loans were only serviced." *Id.* 72a.

The court also stated that if decertification had not been granted, defendants would have been entitled

to judgment as a matter of law under Rule 50. *Id.* at 73a. The court observed that a Rule 50(b) motion may only be granted "when there is such a complete absence of evidence supporting the verdict that the jury's verdict could only have been the result of sheer surmise and conjecture." *Id.* (internal quotation marks omitted). But the court stated that the standard was met. *Id.* For that reason, "decertifying the class furthers the interests of absent class members because it protects them from being saddled with the fact that the [lead] plaintiff failed to produce enough evidence to protect their interests at trial." *Id.*

3. On appeal, the Second Circuit affirmed. Petitioners argued that it violated their Seventh Amendment rights and Rule 23 to decertify the class action after a jury verdict. They further argued that there was no basis for decertification because the evidence adequately established privity.

The Second Circuit rejected these claims. It first observed that petitioners appeared to be raising many of their arguments for the first time on appeal. *Id.* at 6a n. 4. Overlooking this potential waiver, the Second Circuit held that Rule 23 clearly contemplates decertification at any point prior to the entry of judgment. *Id.* at 6a. It further held that "[a]s to Mazzei, there is no Seventh Amendment issue at all" because he had judgment entered for him based on the jury verdict. *Id.* at 8a-9a. There was also no Seventh Amendment violation with respect to the class because post-verdict decertification "has the same effect as would a grant of a motion for a new trial pursuant to Federal Rule 59a." *Id.* at 9a. As in a new trial order—which is plainly compatible with the Seventh Amendment—every class member

retained the right to file a new individual suit to vindicate his or her claims. *Id.*

The Second Circuit also held that, in considering a post-verdict motion for decertification, jury factfindings can be set aside only if the standard for an order granting a new trial is met. *Id.* at 12a. The findings of fact must be "seriously erroneous," "a miscarriage of justice" or "egregious." *Id.* (internal quotation marks omitted) The court rejected petitioners' contention that the higher standard for a judgment as a matter of law under Rule 50 must be applied instead. *Id.* at 13a-14a. But it also observed that in this case, the district court "ruled that the evidence for [finding privity] was legally insufficient under Rule 50." *Id.* at 15a-16a. There was therefore no question that the judge gave appropriate deference to the jury factfinding. *Id.*

Finally, reviewing for abuse of discretion, the Second Circuit upheld the trial court's decertification analysis. *Id.* at 16a-21a. It agreed petitioners had not offered classwide proof of privity with respect to loan servicing, *id.* at 17a, and it found that it was well within the district court's discretion to decide that this failure required decertifying the class under Rule 23. *Id.* at 20a-21a.

Mazzei petitioned this Court for certiorari individually and on behalf of the class.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION IS CONSISTENT WITH RULE 23 AND THE SEVENTH AMENDMENT

Rule 23 states that "[a]n order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1). The

rule ensures that "a district court's order denying or granting class status is inherently tentative" until final judgment is entered. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 n.11 (1978). That is because "[a] determination of liability after certification * * * may show a need to amend the class definition" and "[d]ecertification may be warranted after further proceedings." Fed. R. Civ. P. 23(c)(1) advisory committee notes to 2003 amendment.

Because there is no question that the Second Circuit's affirmance of a post-jury verdict decertification complies with Rule 23, petitioners offer an even more dramatic assertion. They allege that the Second Circuit's opinion is inconsistent with the Seventh Amendment itself. But the scattershot series of arguments petitioners set forth in support of this claim all miss their mark. Moreover, many of them rest on troubling mischaracterizations of the opinion of the Second Circuit and the precedent of this Court.

1. The Seventh Amendment guarantees a jury trial in certain circumstances, but the right is far from absolute. For example, the Seventh Amendment does not prevent a court from granting summary judgment or directing a jury verdict. *See Fidelity & Deposit Co.* v. *United States*, 187 U.S. 315, 319–321 (1902); *Galloway* v. *United States*, 319 U.S. 372 (1943). And, as is most relevant here, the Seventh Amendment does not interfere with a judge's discretion under Rule 59 "to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence." *Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 433 (1996).

The Second Circuit correctly observed that the effect of post-verdict decertification is the same as the effect of a grant of a new trial. In both cases,

setting aside the jury factfinding "does not resolve the claims" of the plaintiffs, which "survive unimpaired." Pet. App. 14a. After a grant of a new trial, the plaintiff may decide whether or not to seek a new decision on his claims, and after class decertification, each individual plaintiff may do the same. Pet App. 9a. It follows that the Seventh Amendment is not violated by post-verdict decertification, so long as the district court applies the deference to jury factfinding that is applied when considering a motion for a new trial.

2. The petition first takes aim at this straightforward logic by claiming (at 18-19) that the Second Circuit was operating under the erroneous premise that the Seventh Amendment guarantees the jury trial right in state court. But that is simply false. The Second Circuit made no mention of states or state courts *at all*. In order to suggest otherwise, petitioners rely on the unsubstantiated contention that the members of this class will have to pursue their individual claims in state court. Petitioners then cobble together unrelated portions of the Second Circuit's opinion to create the illusion that the court of appeals believed that every class member would be entitled to a jury trial when pursuing her individual claims.

Petitioners apparently thought they were entitled to rewrite the Second Circuit's decision because—in their view—it would violate the Seventh Amendment to decertify a class based on the standard for granting a new trial if the class members were not guaranteed a jury for their individual suits (at 22-23). But that cannot be true. If it were, it would paradoxically be harder to set aside jury factfinding in cases where the Seventh Amendment gives the plaintiffs

no right to a jury on their individual claims. Furthermore, petitioners' argument suggests that participating in a class action somehow gives plaintiffs broader Seventh Amendment rights than they would have if they had pursued their claims individually from the outset.

Petitioners other variant on this argument also fails. They contend (at 21) that the Seventh Amendment demands that a post-verdict decertification motion be evaluated in the same way as a motion for judgment as a matter of law under Rule 50. In support, they argue that decertification generally terminates class members' claims because it is not economically feasible to pursue low value claims individually. But this argument boils down to the novel assertion that the Seventh Amendment somehow protects a plaintiff's right to a class action. In any event, this Court has already rejected an analogous contention, holding that plaintiffs are not automatically entitled to an interlocutory appeal of an order denying class certification on the grounds that such orders effectively terminate the plaintiffs' claims. *See Coopers & Lybrand*, 437 U.S. at 469, 470 n.15.

For similar reasons, petitioners get nowhere with their claim that the Second Circuit erred in applying abuse of discretion review to the district court's decertification decision. That is the standard of review applied by this Court and the courts of appeals in reviewing class decertification determinations in general. *See, e.g.*, *Califano* v. *Yamasaki*, 442 U.S. 682, 703-704 (1979); *AmChem Products, Inc.* v. *Windsor*, 521 U.S. 591, 630 (1997) (Breyer, J., concurring and dissenting); *Floyd* v. *Bowen*, 833 F.2d 529, 534-535 (5th Cir. 1987); *Lowery* v. *Circuit City*

Stores, Inc., 158 F.3d 742, 757-758 (7th Cir. 1998); *Roby* v. *St. Louis Southwestern Ry. Co.*, 775 F.2d 959, 961 (8th Cir. 1985); *Kilgo* v. *Bowman Transportation, Inc.*, 789 F.2d 859, 877-878 (11th Cir. 1986).

Petitioners' request for a higher standard of appellate review relies primarily on their failed contention that decertification must be treated as a judgment as a matter of law under Rule 50. Petitioners also claim (at 29) that even grants of a new trial under Rule 59 are reviewed on appeal under a higher standard than abuse of discretion, but that is incorrect. The very cases petitioners cite make clear that abuse of discretion review applies. *See, e.g.*, *Lind* v. *Schenley Indus., Inc.*, 278 F.2d 79, 89 (3rd Cir. 1960) (reversing a new trial determination because the district court "abused its discretion"); *Crane* v. *Consol. Rail Corp.*, 731 F.2d 1042, 1047 (2d Cir. 1984) (district court's decision to grant a new trial may be reviewed for "abuse of discretion").

Swinging for the stars, petitioners also assert that the Seventh Amendment forecloses *any* post-verdict decertification that requires setting aside jury fact-finding. They claim (at 20) that the Seventh Amendment "limit[s] the re-examination of jury findings to those [procedures] which existed under English common law." But this Court has held exactly the opposite, explaining that "many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment." *Parklane Hosiery Company, Inc.* v. *Shore*, 439 U.S. 322, 336 (1979); *see also, e.g.*, *Gasperini*, 518 U.S. at 436 n.20 (listing various procedures this Court has regarded "as compatible with the Seventh Amendment, although not in conformity with prac-

tice at common law when the Amendment was adopted"); *Galloway*, 319 U.S. at 390 ("The [Seventh] Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791" (internal quotation marks omitted)).

3. In the end, none of the arguments petitioners offer comes close to demonstrating that the decision of the Second Circuit violated the Seventh Amendment. Further, it is unclear why petitioners are advancing these arguments in the first place. Petitioner Mazzei claims to bring this petition in his individual capacity and on behalf of the class, but he cannot possibly argue that *his* Seventh Amendment rights were violated. The district court entered judgment for Mazzei as an individual based on the jury verdict. Pet. App. 5a. Thus, he received the most the Seventh Amendment can deliver: a verdict in his favor based on jury fact-finding. Given this, it is unclear that he even has standing to pursue this petition.

Setting that aside, it also makes little sense to advance the Seventh Amendment claims on behalf of the class because a favorable resolution is unlikely to help the class members and it may well hurt them. The district court specifically stated that, if it had not granted decertification, it would have granted judgment as a matter of law under Rule 50. Thus, a holding that the Rule 50 standard applies to post-verdict decertification motions would not rescue petitioners' class action because the district court stated that the standard was met. And a holding that the Seventh Amendment bars post-verdict decertification altogether would put class members in a *worse* position than they are now because on

remand the district court will simply enter judgment for the respondents. Review generally is not warranted when a decision of this court will not alter petitioners' fate, let alone when it will seal it.

II. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRECEDENT AND THE PRECEDENT OF THE OTHER CIRCUITS

The petition's second question presented asks (at 30) whether decertifying a class because of a failure to prove its case on the merits conflicts with this Court's precedent. The simple answer is that it does, but the district court did no such thing. The court did not decertify the class because the class members' claims failed on the merits. It ordered decertification because Rule 23's typicality and predominance requirements could not be met when one element of the case was completely unproven for some class members and undisputed with respect to Class Representative Mazzei and unspecified and unidentifiable others.

For that reason, the Second Circuit's opinion takes no issue with the fact that "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." (emphasis original) Pet. 30 (quoting *Amgen Inc.* v. *Conn. Retir. Plans & Trust* Funds, 133 S.Ct. 1184, 1191 (2013)). But here "questions common to the class" did not predominate because the class was divided with respect to the fundamental question of privity.

And there is certainly no dispute that when "a failure of proof resolves all class members' claims once and for all," it "confirms that the original certifica-

tion decision was proper." Pet. 31 (quoting *Amgen*, 133 S.Ct. at 1197 n.5). But here the opposite was true. The class's failure to prove privity in connection with loan servicing would have resolved the claims of some class members, while leaving intact the claims of others. It was therefore clear that the original certification decision was *im*proper.

2. Petitioners make several other attempts to demonstrate a conflict with this Court's precedent, all to no avail. Thus, while petitioners assert that *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S.Ct. 1036 (2016), supports their claim of a Seventh Amendment violation, that case was decided under Rule 23 and did not even cite the Seventh Amendment.

In fact, if *Tyson Foods* is relevant at all, it is only because it vindicates the lower courts' analysis of petitioners' evidence: The *Tyson Foods* Court reiterated that the key question in determining whether evidence may be used to prove an element of a class claim is "whether the [evidence] at issue could have been used to establish liability in an individual action." 136 S. Ct. at 1048. If it could not have been used, then finding for the class based on that evidence would violate the Rules Enabling Act by "giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Id.*

The expert evidence here flunks the *Tyson Foods* test. To prove privity on an individual basis, a class member would not be able to merely present evidence regarding *typical* mortgage documents. She would have to present evidence as to the contents and effect of the particular documents governing her mortgage. It was therefore impermissible for the class to take a short cut by merely offering Professor

Levitin's testimony about what typical documents might do.[2]

Petitioners also contend (at 33-37) that under this Court's precedent, respondents' decision not to offer rebuttal evidence regarding privity foreclosed a finding for them on the issue. This discussion is largely unmoored from the questions presented but, more importantly, it is nonsense. The party claiming a breach of contract "carries the burden of persuasion." *Bourne* v. *Walt Disney Co.*, 68 F.3d 621, 631 (2d Cir. 1995) (citing *Gordon v. Leonetti*, 324 F.2d 491, 492 (2d Cir. 1963)). If the plaintiff does not put forward sufficient evidence to meet that burden, then her claim cannot succeed, even if the defendant remains completely silent. That is precisely what happened here.

3. Finally, while petitioners make several half-hearted efforts to demonstrate a split with the decisions of other courts, they do not point to any other circuit court cases regarding post-verdict decertification motions. This omission speaks both to the absence of any conflict in the circuits, and to the infrequency with which courts are faced with the questions presented.

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[2] Ironically, petitioners' first question presented suggests that the Second Circuit's opinion is contrary to the Rules Enabling Act. The petition itself offers almost no rationale for this claim, and in truth it is the petitioners' position that violates the Act because it would enable plaintiffs in a class action to prove their case using evidence that would not be sufficient in an individual case. *Tyson Foods,* 136 S. Ct. at 1048.

These two issues simply add to the long list of factors that counsel against this Court's review: In the end, the petition asks for nothing more than splitless error correction with respect to questions that are rarely litigated, in the face of a well-reasoned lower court opinion, and in the absence of any practical consequences for the petitioners.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

NEAL KUMAR KATYAL
COLLEEN E. ROH SINZDAK
HOGAN LOVELLS US LLP
555 Thirteenth St. NW
Washington, DC 20004
(202) 637-5600

DANIEL A. POLLACK
Counsel of Record
EDWARD T. MCDERMOTT
MCCARTER & ENGLISH, LLP
245 Park Avenue, 27th Floor
New York, NY10167
(212) 609-6900
dpollack@mccarter.com

Counsel for Respondents

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