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The Applicability of the Federal Rules of Evidence at Class Certification

Libby Jelinek

ABSTRACT

The role of evidence during class certification proceedings has evolved significantly since the adoption of the modern class action in 1966. Most notably, in 2011 the U.S. Supreme Court made clear in *Wal-Mart Stores, Inc. v. Dukes* that certification requires evidentiary proof that Rule 23 of the Federal Rules of Civil Procedure (FRCP) is satisfied. Yet neither FRCP 23 nor the Supreme Court has specified whether the evidence offered must be admissible under the Federal Rules of Evidence (FRE). Without guidance, lower courts are split on the issue. This Comment addresses the split by analyzing whether the FRE should apply to class certification proceedings. To do so, this Comment identifies and applies a framework from cases that held the FRE inapplicable to other proceedings. Because of the class certification proceeding's preliminary stage, narrow purpose, and discretionary nature, this Comment argues that the FRE need not apply. Rather, judges should have the discretion to consider inadmissible evidence when determining whether to certify a class.

AUTHOR

UCLA School of Law, J.D. 2017.

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INTRODUCTION

Since the 1966 adoption of Rule 23 in the Federal Rules of Civil Procedure (FRCP),[1] class actions have become a common part of civil litigation.[2] Before a matter can proceed as a class action, the class must be certified: The party seeking class treatment must move for class certification and the judge must find that all the requirements of FRCP 23(a) and (b) are satisfied. Once a class is certified, the action proceeds on a representative basis, eliminating the need for multiple individual suits. The outcome of the subsequent litigation will be binding on all members of the class. FRCP 23(a) ensures that the interests of absent class members are protected, and the subtypes in FRCP 23(b) ensure that there is sound policy justification for departing from traditional individual adjudication.[3]

As for evidentiary requirements, FRCP 23 does not require an evidentiary hearing nor does it specify what burden of proof the parties must satisfy before certification can be granted.[4] In the early years of class certification proceedings, evidence played little role in the certification decision.[5] That began to change in 2001, when the Seventh Circuit, followed by other appellate courts, opted to increase the evidentiary burden at class certification.[6] Recent U.S. Supreme Court decisions continued this trend.

1. The Federal Rules of Civil Procedure (FRCP) were first adopted in 1938 under the authority of the Rules Enabling Act. The rules are drafted by an appointed advisory committee, adopted by the U.S. Supreme Court, and approved by Congress. *Federal Rules of Civil Procedure*, *in* BLACK'S LAW DICTIONARY (10th ed. 2014). The FRCP "govern the procedure in all civil actions and proceedings in the United States district courts." FED. R. CIV. P. 1. For a more complete history of the emergence of the class action, see generally Stephen C. Yeazell, *From Group Litigation to Class Action Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514 (1980).
2. *See* Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 475 ("Any lawyer who works with antitrust, corporations, securities, discrimination, lending, real property, or torts will necessarily be familiar with class action litigation as a normal part of his or her work.").
3. *See infra* Part I.A.
4. *See* FED. R. CIV. P. 23.
5. *See infra* Part I.
6. *See* Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001); *see also In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008); Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 268–69 (5th Cir. 2007), *abrogated by* Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006).

Most importantly, the Supreme Court's 2011 holding in *Wal-Mart Stores, Inc. v. Dukes*[7] (*Dukes*) emphasized that courts must conduct a "rigorous analysis" of whether the requirements of FRCP 23 are satisfied, adding that the requirements cannot be satisfied without actual supporting evidence.[8] Especially for FRCP 23(b)(3) class actions, which generally require plaintiffs to demonstrate their intended method of proof at trial to ensure no individual issues will predominate,[9] class certification determinations are now often fact-intensive inquiries involving a mass of evidence.[10]

Although district courts post-*Dukes* must rely on actual evidence to determine whether certification is proper, FRCP 23 has never been amended to specify whether the judge may rely on both admissible and inadmissible evidence when making that determination. That is, nowhere do the rules specify whether the Federal Rules of Evidence (FRE)[11] apply to class certification under FRCP 23—unlike, for example, summary judgment under FRCP 56.[12] Courts are currently split on whether the FRE apply at class certification,[13] and the Supreme Court has not yet settled the issue.

7. 564 U.S. 338, 350–51 (2011). In *Dukes*, employees brought a class action suit alleging that their employer gave local managers discretion over pay and promotions, and that managers then used their discretion to deny the plaintiffs equal pay or promotions because of their sex. *Id.* at 343–44. The Supreme Court reversed the grant of class certification, finding the plaintiffs did not offer significant proof that the employer operated under a general policy of discrimination and therefore they did not meet the FRCP 23(a) commonality requirement. *Id.* at 355–60, 367.
8. *Id.* at 350–51 ("Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.").
9. *See* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1434 (2013) (requiring courts to determine whether plaintiffs provided a "just and reasonable" methodology for proving their class claims before finding predominance).
10. *See infra* Part I.A.
11. The Federal Rules of Evidence (FRE) were enacted in 1975 under the authority of the Rules Enabling Act, 28 U.S.C. § 2072 (2012), and enacted by Congress, Act of Jan. 2, 1975, Pub. L. No. 93–595, 88 Stat. 1926, to codify existing evidence law governing the U.S. Federal Courts. For a discussion of the development of the FRE, see Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 157–61 (2008).
12. FRCP 56 expressly specifies that the FRE apply to summary judgment proceedings. It provides that a party must support its motion for summary judgment by "citing to particular parts of materials in the record," and that "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." FED. R. CIV. P. 56.
13. *See infra* Part I.C.

So far, the debate has focused almost exclusively on the appropriate use of expert evidence during class certification proceedings.[14] Yet proving the requirements of class certification can involve a much broader range of evidence and consequently can present much more varied grounds for evidentiary objections.[15] Moreover, courts' current analysis of whether the FRE apply is underdeveloped. Courts applying the FRE to class certification proceedings generally dispose of the issue with a single citation to FRE 1101, which provides the scope of the evidence rules and does not expressly exclude class certification.[16] In contrast, courts declining to apply the FRE state simply that class certification is a preliminary proceeding, without ever addressing FRE 1101.[17] A final, reasoned answer to this question can and should be provided.

To that end, this Comment offers a more comprehensive analysis of whether the FRE should apply at class certification. Part I provides background on FRCP 23 and the evolving role of evidence in class certification, including the current split regarding the application of the FRE. Part II analyzes whether the text of the FRE itself compels its application to any proceeding not explicitly listed as outside its scope, including class certification proceedings. Part III then identifies a framework for determining whether an admissible-at-trial rule must be imposed on a proceeding. Finally, Part IV applies this framework to class certification proceedings and concludes that it is both appropriate and beneficial for judges to maintain the discretion to consider inadmissible evidence during class certification proceedings.

14. *See infra* notes 43–47 and accompanying text.
15. *See, e.g.*, Pedroza v. PetSmart, Inc., No. ED CV 11–298–GHK, 2013 WL 1490667, at *1 (C.D. Cal. Jan. 28, 2013) (noting the defendant "assert[ed] a total of 184 objections to Plaintiff's evidence").
16. *See, e.g.*, Lewis v. First Am. Title Ins. Co., 265 F.R.D. 536, 544 (D. Idaho 2010) ("[T]he FRE . . . support [the] position that the FRE apply generally at the class certification stage. . . . Rule 1101 of the FRE . . . does not except or change the application of the FRE at the class certification stage."). In pertinent part, the FRE provide that the rules apply to civil cases and proceedings, subject to the exceptions listed in 1101(d). FED. R. EVID. 1101. Class certification proceedings are not explicitly listed as an exception. Other courts reason that applying the FRE is necessary to satisfy *Dukes*'s rigorous analysis requirement. *See infra* Part I.C.
17. *See, e.g.*, Gonzalez v. Millard Mall Servs., Inc., 281 F.R.D. 455, 459 (S.D. Cal. 2012) ("Since a motion to certify a class is a preliminary procedure, courts do not require strict adherence to the Federal Rules of Civil Procedure or the Federal Rules of Evidence. . . . Therefore, the Court may consider inadmissible evidence at the class certification stage.").

I. ROLE OF EVIDENCE DURING CLASS CERTIFICATION PROCEEDINGS

Evidence has played an increasingly important role in class action litigation. Yet FRCP 23 provides little guidance for judges on what evidence to consider when deciding whether to certify a class. FRCP 23 does not identify a standard of proof, require the judge to hold an evidentiary hearing before certifying a class, or identify any evidentiary rules applicable to the class certification proceeding. This is especially problematic for the modern class certification proceeding, which can be a fact-intensive inquiry involving large amounts of evidence. To understand how and what type of evidence is involved, this Part begins by outlining the specific certification requirements of FRCP 23. Next, this Part discusses the evolving role of evidence in the class certification proceeding, beginning with the adoption of modern FRCP 23 and continuing through the recent Supreme Court decisions in *Wal-Mart Stores, Inc. v. Dukes*[18] and *Tyson Foods, Inc. v. Bouaphakeo* (*Tyson Foods*).[19] Finally, this Part concludes by identifying the current split on whether the FRE apply during class certification proceedings and explaining why it is important that this question be resolved.

A. Requirements of FRCP 23: What Must Be Established to Certify a Class

A class action is a form of aggregate litigation in which a number of individual claims proceed collectively as one representative suit. One or more representative-plaintiffs, called "class representatives," litigate the claims on behalf of all members of the class, including those who are "unnamed" or "absent."[20] A class does not exist as a legal entity until a court certifies it, usually after the plaintiff moves for class certification.[21] If a class is certified, the result of the action will be binding on the class representatives and all absent class members. The class action is thus an exception to the general rule

18. 564 U.S. 338 (2011).
19. 136 S. Ct. 1036 (2016).
20. RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL, at Ch. 10-C (5th Cir. ed. 2017).
21. *See* Smith v. Bayer Corp., 564 U.S. 299 (2011). FRCP 23 provides for both plaintiff and defendant class actions, but this Comment is written primarily from the perspective of the plaintiff class. In addition, while classes can be certified solely for settlement purposes, this Comment does not focus on settlement certification.

that "litigation is conducted by and on behalf of the individual named parties only."[22]

The party who moves for class certification bears the burden of demonstrating that each of the four requirements of FRCP 23(a) is met. Certification is proper only if the judge "is satisfied, after a rigorous analysis," that FRCP 23(a) is satisfied.[23] In addition, the moving party must establish that the putative class fits within one of the four subtypes identified in FRCP 23(b).

The first step in the certification analysis involves whether FRCP 23(a) is met. FRCP 23(a) lists four prerequisites for maintaining a class action: numerosity, commonality, typicality, and adequacy.[24] To satisfy the numerosity prerequisite, the class must be "so numerous that joinder of all members is impracticable."[25] There is no strict number of claimants required,[26] so the determination will vary depending on the jurisdiction and the specific factual circumstances of the case. Some jurisdictions have certified classes of fewer than twenty members, while other jurisdictions require members numbering over forty.[27] The plaintiff "must show some evidence of or reasonably estimate the number of class members" without relying on "pure speculation or bare allegations."[28]

22. Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979).
23. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982), *cited by* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011).
24. Courts sometimes also require that the members of a proposed class be ascertainable, meaning readily identifiable, at least for 23(b)(3) classes. *See, e.g.*, Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 995 (8th Cir. 2016). For a discussion of the ascertainability requirement, see Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 YALE L.J. 2354 (2015).
25. FED. R. CIV. P. 23(a)(1).
26. *See In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 852 (6th Cir. 2013).
27. ROBERT KLONOFF, CLASS ACTIONS AND MULTI-PARTY LITIGATION IN A NUTSHELL 39–40 (4th ed. 2012); *see, e.g.*, Ikonen v. Hartz Mountain Corp., 122 F.R.D. 258, 262 (S.D. Cal. 1988) ("[C]lasses of 20 are too small, classes of 20–40 may or may not be big enough depending on the circumstances of each case, and classes of 40 or more are numerous enough."); *see also, e.g.*, Rannis v. Recchia, 380 F. App'x 646, 651 (9th Cir. 2010) ("In general, courts find the numerosity requirement satisfied when a class includes at least 40 members.").
28. Assif v. Titleserv, Inc., 288 F.R.D. 18, 23 (E.D.N.Y. 2012) (first quoting Russo v. CVS Pharm., Inc., 201 F.R.D. 291, 295 (D. Conn. 2001); then quoting Flores v. Anjost Corp., 284 F.R.D. 112, 123 (S.D.N.Y. 2012)). Courts are permitted to make common-sense assumptions when evaluating a plaintiff's evidence, including by assuming a class's numerosity. *See* Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 541 (6th Cir. 2012); *Assif*, 288 F.R.D. at 23.

To satisfy the commonality prerequisite, the plaintiff must show "there are questions of law or fact common to the class."[29] Commonality requires a plaintiff to demonstrate that his claims "depend upon a common contention [and] its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[30] In *Dukes*, for example, the plaintiffs claimed that their managers denied them equal pay or promotions on the basis of sex.[31] The claim presented a legal question common to the class, namely whether the class was subjected to employment discrimination. But because the plaintiffs offered insufficient evidence that the employer operated under a general policy of discrimination, the plaintiffs failed to establish a fact common to the class that would enable a common answer to that question.[32]

To establish typicality, the plaintiff must show "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[33] Courts have found typicality to be satisfied when the plaintiff alleges that each member of the class suffered the same injury from the same unlawful conduct.[34] In general, a plaintiff will establish typicality if the plaintiff can establish commonality, as the two requirements "tend to merge."[35]

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29. FED. R. CIV. P. 23(a)(2).
30. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011); *see also* Rikos v. Procter & Gamble Co., 799 F.3d 497, 505 (6th Cir. 2015) ("In other words, named plaintiffs must show that there is a common question that will yield a common answer for the class (to be resolved later at the merits stage), and that that common answer relates to the actual theory of liability in the case."), *cert. denied by* 136 S. Ct. 1493 (2016).
31. *Dukes*, 564 U.S. at 343.
32. *Id.* at 359. Compare *Dukes* with *Young*, in which plaintiffs established commonality by showing "[c]ommon proof of causation—that use of geocoding software could have prevented the harms suffered by the class members—[was] central to all of Plaintiffs' claims and would advance the interests of the class as a whole." *Young*, 693 F.3d at 543.
33. FED. R. CIV. P. 23(a)(3).
34. *See* Assif v. Titleserv, Inc., 288 F.R.D. 18, 24 (E.D.N.Y. 2012). As the *Young* court noted:

> Because Plaintiffs allege both a single practice or course of conduct on the part of each Defendant—the failure to implement a geocoding verification system—that gives rise to the claims of each class member and a single theory of liability, the court did not abuse its discretion in finding that named Plaintiffs' claims are typical of the class as required by Rule 23(a)(3).

Young, 693 F.3d at 543; *see also* Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993) (noting that typicality requires that "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.").

35. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982), *cited by Dukes*, 564 U.S. at 349 n.5; *see also* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, 7A FEDERAL PRACTICE AND PROCEDURE § 1764 (3d ed. 2005) ("Thus, many courts have found typicality

Finally, to satisfy the adequacy prerequisite, the plaintiff must show "the representative parties will fairly and adequately protect the interests of the class."[36] In determining adequacy, the judge considers "the competency of class counsel and any conflicts of interest that may exist."[37] Representative plaintiffs have successfully established adequacy by showing: (1) that their counsel has experience in class actions and in the particular area of law at issue; and (2) that their interests are the same as every other class member's.[38]

In addition to satisfying the four prerequisites of FRCP 23(a), the claim must fit into at least one of the four subtypes of class actions listed in FRCP 23(b).[39] Each category under FRCP 23(b) addresses its own policy goal.[40] FRCP 23(b)(3)[41] is the most common category under which to seek class certification because it allows a representative plaintiff to recover individualized damages. Thus, different remedies may be ordered for different members of the class.[42]

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if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory.").

36. FED. R. CIV. P. 23(a)(4).
37. *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 853 (6th Cir. 2013) (citing *Dukes*, 564 U.S. at 349 n.5).
38. *See, e.g.*, *Assif*, 288 F.R.D. at 24–25.
39. *See* FED. R. CIV. P. 23(b)(1)(A) (permitting class treatment to avoid the "risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class"); *id.* 23(b)(1)(B) (permitting class treatment in cases that "would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests"); *id.* 23(b)(2) (permitting class treatment where the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"); *id.* 23(b)(3) (permitting class treatment where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy").
40. For an analysis of each of these subtypes and the policy goals they further, see Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843 (2016). In short, some of the policy goals furthered include: (1) "protecting judicial legitimacy and preventing unfairness to litigants" in cases where inconsistent results or a defendant's depleted results might otherwise render an injustice, *id.* at 848; (2) "promoting the rule of law and securing effective relief for large-scale harms" in injunctive civil rights cases, *id.*; and (3) increasing efficiency, access, and deterrence by aggregating the claims of the plaintiffs whose potential damages would otherwise be too small to litigate individually, *id.* at 861.
41. FED. R. CIV. P. 23(b)(3) (language provided *supra* in note 37).
42. *See Dukes*, 564 U.S. at 362–63. Note that 23(b)(2) claims can also involve money damages that are not individualized (nonexclusive) and incidental to the plaintiffs' primary claim for injunctive relief (nonpredominant). *See* Suzette M. Malveaux, *Class Actions at the Crossroads:*

When proving the requirements of FRCP 23(a) and (b), plaintiffs often rely on expert evidence such as social framework analysis[43] and statistical evidence.[44] Consequently, one of the main issues currently disputed is whether this evidence is subject to the admissibility requirements for expert testimony under FRE 702.[45] If so, the district court must conduct a *Daubert* hearing[46] before it may rely on expert evidence in the class certification proceeding.[47]

Although the use of expert evidence is currently dominating the conversation surrounding FRCP 23, it is by no means the only type of evidence produced during class certification proceedings. In recent class certification cases in the Ninth Circuit alone, plaintiffs have relied on lay witness testimony,[48] declarations,[49] written correspondence,[50] and employment

An Answer to Wal-Mart v. Dukes, 5 HARV. L. & POL'Y REV. 375, 378, 390–91 (2011) (arguing that it goes against the drafter's intent and precedent to argue that only 23(b)(3) allows for monetary damages). In certain cases, 23(b)(1)(A) and 23(b)(1)(B) also allow recovery of money damages. *See* Robert H. Klonoff, *Class Actions for Monetary Relief Under Rule 23(b)(1)(A) and (b)(1)(B): Does Due Process Require Notice and Opt-Out Rights?*, 82 GEO. WASH. L. REV. 798, 812–15, 819 (2014) (describing the availability of money damages under 23(b)(1)(A) and 23(b)(1)(B)).

43. *See, e.g.*, Ellis v. Costco Wholesale Corp., 285 F.R.D. 492, 520–21 (N.D. Cal. 2012).

44. *See, e.g.*, Jimenez v. Allstate Ins. Co., 765 F.3d 1161, 1167–69 (9th Cir. 2014); *Ellis*, 285 F.R.D. at 521–28. Note that the Supreme Court in *Dukes* disapproved of certifying a class based on "Trial by Formula"—that is, trial through the use of representative evidence extrapolated to the entire class—which appeared to marshal against ever relying on representative evidence in the certification decision. *Dukes*, 564 U.S. at 367. Yet in March of 2016, the Supreme Court in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), refused to categorically bar the use of representative evidence to establish class-wide liability. *Id.* at 1045–47.

45. Under Rule 702, expert testimony is admissible only if the witness is a qualified expert who will testify to specialized knowledge that is: (1) helpful to the trier of fact; (2) based on sufficient facts or data; (3) the product of reliable principles and methods that were reliably applied. FED. R. EVID. 702.

46. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588–89 (1993) (holding that a trial judge must make act as a gatekeeper by making a preliminary assessment of the validity and admissibility of expert testimony before admitting it at trial).

47. For arguments that courts should require a full *Daubert* hearing before certifying a class based on expert evidence, see Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815–16 (7th Cir. 2010); Gregory Mitchell, *Good Causes and Bad Science*, 63 VAND. L. REV. EN BANC 133 (2010); and Meredith M. Price, Note, *The Proper Application of* Daubert *to Expert Testimony in Class Certification*, 16 LEWIS & CLARK L. REV. 1349 (2012).

48. *See, e.g.*, Green v. Fed. Exp. Corp., 614 F. App'x 905, (9th Cir. 2015); Jimenez v. Allstate Ins. Co., No. LA CV10-08486 JAK, 2012 WL 1366052, at *8 (C.D. Cal. Apr. 18, 2012).

49. *See, e.g.*, Parsons v. Ryan, 754 F.3d 657, 672 (9th Cir. 2014); Pena v. Taylor Farms Pac., Inc., 305 F.R.D. 197, 205–06 (E.D. Cal. 2015), *aff'd*, 690 F. App'x 526 (9th Cir.), *petition for cert. filed*, No. 17-395 (U.S. Sept. 15, 2017); Alcantar v. Hobart Serv., No. ED CV 11-1600 PSG, 2012 WL 5946129, at *4 (C.D. Cal. Nov. 28, 2012), *aff'd*, 800 F.3d 1047 (9th Cir. 2015); *Jimenez*, 2012 WL 1366052, at *9.

50. *See, e.g.*, Edwards v. First Am. Corp., 798 F.3d 1172, 1182–83 (9th Cir. 2015) (noting plaintiffs presented memoranda submitted to defendant's board of directors as evidence

documents such as an employee handbook, time records, wage statements, or complaints.[51] Reliance on this evidence raises several issues, such as relevance,[52] hearsay,[53] lack of personal knowledge,[54] and lack of foundation,[55] among others.[56] Yet, as noted previously, courts have not settled the question of whether those evidentiary issues should be governed by the FRE.

B. How Recent Case Law Has Increased the Role of Evidence at Class Certification

After the 1966 amendments and through the 1980s, class actions flourished.[57] Courts interpreted the certification requirements of FRCP 23 liberally and granted certification freely, often allocating the risk of error to opponents of class certification. As one court stated, "if there is to be an error made, let it be in favor and not against the maintenance of the class action."[58]

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of a common scheme), *cert. dismissed*, 136 S. Ct. 1533 (2016); *Parsons*, 754 F.3d at 668 (noting plaintiffs presented letters and emails as evidence of defendant's common policy); *Jimenez*, 2012 WL 1366052, at *9 (noting plaintiffs presented an email as evidence of defendant's common policy).

51. *See, e.g.*, *Green*, 614 F. App'x at 905; *Alcantar*, 2012 WL 5946129, at *3–4; *In re* Microsoft Xbox 360 Scratched Disc Litig., No. C07-1121-JCC, 2009 WL 10219350, at *1 (W.D. Wash. Oct. 5, 2009).
52. *See* FED. R. EVID. 401, 402; *see, e.g.*, Fisher v. Ciba Specialty Chems. Corp., 238 F.R.D. 273, 279–81 (S.D. Ala. 2006).
53. *See* FED. R. EVID. 801; *see, e.g.*, Lujan v. Cabana Mgmt., Inc., 284 F.R.D. 50, 64–65 (E.D.N.Y. 2012).
54. *See* FED. R. EVID. 602; *see, e.g.*, Soutter v. Equifax Info. Servs. LLC, 299 F.R.D. 126, 128–29 (E.D. Va. 2014); *Lujan*, 284 F.R.D. at 64–65.
55. *See* FED. R. EVID. 602; *see, e.g.*, Bell v. Addus Healthcare, Inc., No. C06-5188RJB, 2007 WL 3012507, at *3 (W.D. Wash. Oct. 12, 2007).
56. *See, e.g.*, Gonzalez v. Millard Mall Servs., Inc., 281 F.R.D. 455, 459 (S.D. Cal. 2012) (stating that the defendant objected to all 112 questionnaire responses submitted in support of certification because they were not signed under penalty of perjury and 68 were in Spanish and had not been translated); Flores v. Anjost Corp., 284 F.R.D. 112, 124 (S.D.N.Y. 2012) (stating that the defendant objected that a spreadsheet supporting numerosity was provided "in advance of a non-binding, confidential mediation session between the parties" in violation of FRE 408).
57. *See* Arthur R. Miller, Keynote Address, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 296 (2014) (describing the development of the modern class action).
58. Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968); *see also* Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975) ("The court is bound to take the substantive allegations of the complaint as true. . . . While the court may not put the plaintiff to preliminary proof of his claim, it does require sufficient information to form a reasonable judgment.").

Courts commonly accepted the allegations in the complaint as true,[59] and judges ruled solely on the pleadings if they determined sufficient facts were set forth.[60] Due to this liberal interpretation, classes were certified on conclusory assertions and the "procedure fell victim to overuse . . . and misuse."[61]

More recently, however, courts have emphasized closer attention to the actual requirements of FRCP 23(a) and (b). Most circuit courts have increased the evidentiary burden at class certification.[62] The Supreme Court continued this trend, holding FRCP 23 is not "a mere pleading standard"[63] and rejecting courts' previous view that the plaintiff's allegations must be accepted as true. Rather, a "rigorous analysis" is required—"[a] party seeking class certification must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."[64] Departing from past practice, the Supreme Court also allowed consideration of the merits as necessary to determine whether FRCP 23 is satisfied.[65] Notably, though, any merits determination at the certification stage is not binding on the finder of fact later on.[66] *Dukes* also clarified that district courts must consider evidence

59. *See, e.g.*, *Blackie*, 524 F.2d at 901; *see also, e.g.*, Cassese v. Wash. Mut., Inc., 255 F.R.D. 89, 95 (E.D.N.Y. 2008); Moreno-Espinosa v. J & J AG Prods., Inc., 247 F.R.D. 686, 687 (S.D. Fla. 2007); Collazo v. Calderón, 212 F.R.D. 437, 442 (D.P.R. 2002); Yadlosky v. Grant Thornton, L.L.P., 197 F.R.D. 292, 295 (E.D. Mich. 2000); Arenson v. Whitehall Convalescent & Nursing Home, Inc., 164 F.R.D. 659, 663 (N.D. Ill. 1996); Larry James Oldsmobile-Pontiac-GMC Truck Co., Inc. v. Gen. Motors Corp., 164 F.R.D. 428, 437 (N.D. Miss. 1996).

60. *See, e.g.*, Weathers v. Peters Realty Corp., 499 F.2d 1197, 1200 (6th Cir. 1974).

61. Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, 678 (1979).

62. The Second, Third, and Fifth Circuits found that "some showing" is not a high enough standard; instead, they held that each FRCP 23 requirement must be met by a preponderance of the evidence. *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307, 322 (3d Cir. 2008); Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 268–69 (5th Cir. 2007), *abrogated by* Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 27, 29–32 (2d Cir. 2006).

63. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

64. *Id.* at 350–51.

65. *See id.* at 351 ("Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped."); *see also* ROBERT H. KLONOFF ET AL., CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 273, 282 (3d ed. 2012). For an argument against the increased role of merits at class certification, see Steig D. Olson, *"Chipping Away": The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935 (2009).

66. *In re Initial Pub. Offerings*, 471 F.3d at 41 ("[T]he determination as to a Rule 23 requirement is made only for purposes of class certification and is not binding on the trier of facts, even if that trier is the class certification judge." (citing Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004))).

that demonstrates or refutes the requirements of FRCP 23. The Court held that plaintiffs, in particular, must provide "'significant proof' that Wal-Mart 'operated under a general policy of discrimination'" to satisfy the commonality requirement and certify the class.[67] As a result of these changes, class certification has become much more difficult.

The increased emphasis on the requirements of FRCP 23 is part of an effort to increase reliability in certification.[68] Courts and scholars cite two main reasons why reliability is especially important at class certification. First, if a class action is certified without meeting the requirements of FRCP 23, an absent class member could be unfairly bound by the outcome of the case. Second, defendants could be exposed to a costly settlement agreement or trial proceeding because they suddenly face liability to a large class. Application of the FRE is thought to improve the reliability of decisions. Yet, despite the increased role of evidence and the growing emphasis on reliable certification proceedings, the Supreme Court has not expressly required that the evidence considered at class certification comply with the FRE.

The closest the Supreme Court has come to addressing the question is *Dukes* and *Tyson Foods*. The Court in *Dukes* noted that the district court had concluded that *Daubert* and FRE 702 "did not apply to expert testimony at the certification stage of class-action proceedings." It then stated in dicta that "We doubt that is so."[69] Courts and scholars interpreting this remark disagree on whether *Dukes* requires all evidentiary rules to apply.[70] The precise evidentiary burden and applicability of the FRE remain ambiguous.

67. *Dukes*, 564 U.S. at 355.

68. *See* Miller, *supra* note 57, at 296–301 (noting the new rigorous analysis requirement, the increasing role of merits inquiries at class certification, the Class Action Fairness Act of 2005, and a national policy favoring arbitration); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 449, 475–87 (2013) (describing the trend towards the "restrictive ethos" in civil procedure).

69. *Dukes*, 564 U.S. at 354 (citation omitted).

70. *Compare* Lujan v. Cabana Mgmt., Inc., 284 F.R.D. 50, 64–65 (E.D.N.Y. 2012) (requiring that declarations submitted in support of class certification comply with the FRE in part because "recent dictum by the Supreme Court [in *Dukes*] suggests that evidence offered in connection with such a motion must satisfy admissibility requirements"), *and* Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 GEO. WASH. L. REV. 606, 636 (2014) (referring to *Daubert* hearings as "the camel's head in the tent for the use of evidentiary standards at class certification"), *with* Gonzalez v. Millard Mall Servs., Inc., 281 F.R.D. 455, 459–60 (S.D. Cal. 2012) (refusing to apply the FRE at class certification under *Dukes* because "dicta from the Supreme Court are still not binding on lower courts"), *and* Tait v. BSH Home Appliances Corp., 289 F.R.D. 466, 492

The Supreme Court forewent an opportunity to clarify the issue in *Tyson Foods*, where the defendant argued on appeal that the plaintiff class was improperly certified. The plaintiff employees alleged that they were denied overtime compensation because the defendant company had a policy not to pay for time spent donning and doffing protective gear.[71] In certifying the class, the district court relied on a representative study conducted by the plaintiffs' expert. The study used videotaped observations to calculate the average time it took employees to don and doff their gear.[72] The defendant argued on appeal that reliance on the plaintiffs' study was improper because "differences in the composition of [the plaintiffs'] gear may have meant that, in fact, employees took different amounts of time to don and doff."[73] The argument failed.

The district court never held a hearing regarding the admissibility of the study, but the Supreme Court nevertheless affirmed the district court's certification of the class.[74] The Supreme Court stated that the defendant's primary defense against certification was to show the study was "unrepresentative or inaccurate."[75] But the Supreme Court concluded that, because the defendant challenged neither the study's relevance under FRE 401[76] or 403[77] nor its reliability under FRE 702,[78] there was no basis to conclude the judge erred in considering the evidence.[79] As in *Dukes*, this reasoning might

(C.D. Cal. 2012) (stating that the dictum in *Dukes* "mischaracterize[s] the district court's holding," exemplifies why Supreme Court dicta "is a treacherous guide for lower courts," and "provides no clear guidance on the extent of [FRE 702's application at class certification]").

71. Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045–47 (2016).
72. *Id.* at 1043.
73. *Id.* at 1041.
74. *Id.* at 1049. The Supreme Court reasoned the district court could have denied class certification had it "concluded that no reasonable juror could have believed that the employees spent roughly equal time donning and doffing," but the district court had made no such finding. *Id.*
75. *Id.* at 1047.
76. FRE 401 provides that: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." FED. R. EVID. 401.
77. FRE 403 provides that: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.
78. *See supra* note 45.
79. *Tyson Foods*, 136 S. Ct. at 1044–45.

suggest that the evidence relied upon at certification must be admissible, but it fails to definitively settle the issue. In fact, the Supreme Court added that had the defendant shown the study was "unrepresentative or inaccurate," and therefore inadmissible under FRE 702, this would be a "fatal similarity" best dealt with "as a matter of summary judgment, not class certification."[80] Thus, *Tyson Foods* should not be read to definitively require judges to apply the FRE at class certification.

C. Lower Court Split: Must the FRE Apply to Class Certification Proceedings?

Without definitive guidance from either FRCP 23 or the Supreme Court, federal courts are currently split on whether the FRE apply.[81] Some courts require that all evidence at class certification be admissible. These courts express varied reasoning.[82] For example, some courts say that applying the FRE is necessary for a truly "rigorous analysis."[83] Others rely on dicta in *Dukes*, in

80. *Id.* at 1047 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 107 (2009)).

81. For cases noting and describing the split, see Anderson Living Tr. v. WPX Energy Prod., LLC, 306 F.R.D. 312, 378 n.39 (D.N.M. 2015); Flores v. Anjost Corp., 284 F.R.D. 112, 124 n.3 (S.D.N.Y. 2012); Lujan v. Cabana Mgmt., Inc., 284 F.R.D. 50, 64 (E.D.N.Y. 2012); and Lewis v. First Am. Title Ins. Co., 265 F.R.D. 536, 552–53 (D. Idaho 2010). Also see Mullenix, *supra* note 70, at 617 n.58, which states: "Federal courts are split concerning how stringently to apply the rules of evidence at class certification proceedings."

82. Note that the Second Circuit may have implicitly adopted this position. In *Lujan*, 284 F.R.D. 50, the district court reasoned in part from the Second Circuit case *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474 (2d Cir. 2008), in which the Second Circuit reviewed a district court's holding that the plaintiffs moving for class certification must "make a 'prima facie' showing of a particular securities fraud element by 'admissible evidence.'" *Lujan*, 284 F.R.D. at 64 (quoting *Salmon*, 544 F.3d at 486 n.9). The Second Circuit rejected the prima facie standard but was silent on the admissible evidence standard. *See Salmon*, 544 F.3d 474; *see also Lujan*, 284 F.R.D. at 64. The *Lujan* court interpreted the Second Circuit's silence as "implicitly accept[ing] the admissibility requirement." *Lujan*, 284 F.R.D. at 64. Even accepting this interpretation, an implicit adoption by definition provides no express rationale for the position taken.

83. *See, e.g.*, Sicav v. Wang, No. 12 Civ. 6682, 2015 WL 268855, at *6 (S.D.N.Y. Jan. 21, 2015) ("[To conduct a rigorous analysis of the FRCP 23 requirements] the Court must ensure that there is a basis in admissible evidence for each factual representation made in support of class certification to assure that a class is not certified based on conjecture as opposed to provable facts."); Soutter v. Equifax Info. Servs. LLC, 299 F.R.D. 126, 131 (E.D. Va. 2014) ("The demand for a rigorous analysis of the class qualifying factors at the critical class certification stage makes it important that the evidence to be used in

which the Supreme Court expressed doubt that FRE 702 was inapplicable to expert reports submitted in support of class certification, despite acknowledging that such dicta is not binding.[84] Still others argue by analogy, comparing class certification proceedings to threshold motions like motions to dismiss for lack of jurisdiction, where courts may not rely on inadmissible hearsay.[85] The most cited reason for applying the FRE, however, is the text of the FRE itself. FRE 101 and 1101 lay out the scope of the evidentiary rules.[86] The FRE apply to civil cases and proceedings, criminal cases and proceedings, and contempt proceedings,[87] subject to the exceptions provided in FRE 1101(d). Class certification proceedings are noticeably absent from FRE 1101(d)'s list of exceptions. Courts and scholars alike have argued that this absence alone is determinative.[88]

In contrast, other courts decline to apply the FRE at class certification. In general, courts declining to apply the FRE assert that traditional evidentiary rules need not apply at class certification because it is a preliminary proceeding.[89] Relatedly, some courts dismiss evidentiary objections as inviting

making that decision be reliable. The [FRE] teach that personal knowledge is the predicate of reliability." (citing FED. R. EVID. 602)).

84. *See, e.g.*, *Soutter*, 299 F.R.D. at 131; *Lujan*, 284 F.R.D. at 64.

85. *See, e.g.*, *Soutter*, 299 F.R.D. at 131; *Lujan*, 284 F.R.D. at 64.

86. Rule 101 of the FRE provides: "These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101." FED. R. EVID. 101.

87. FED. R. EVID. 1101(b).

88. The Seventh Circuit has provided some indication that it would strictly apply the FRE because class certification is not listed in FRE 1101(d). *See* Mars Steel Corp. v. Cont'l Bank N.A., 880 F.2d 928, 938 (7th Cir. 1989) (holding the FRE apply to FRCP 23(e) class settlement fairness hearings because those proceedings are not listed as an exception in FRE 1101(d)); *see also Soutter*, 299 F.R.D. at 131 (finding class certification "without doubt" falls under the scope of the FRE as defined by Rule 1101); Mullenix, *supra* note 70, at 636 ("Significantly, class certification hearings are not among the excepted types of proceedings to which the rules of evidence need not apply."). *But see* Anderson Living Tr. v. WPX Energy Prod., LLC, 306 F.R.D. 312, 378 n.39 (D.N.M. 2015) (taking the middle position that while class certification does not fall under one of the exceptions listed in FRE 1101, perhaps only the "most egregiously inadmissible pieces of evidence" should be excluded at class certification). This is discussed in further detail in Part IV.C.

89. *See, e.g.*, *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 613–14 (8th Cir. 2011) (holding the district court need not strictly apply the FRE by conducting a full *Daubert* hearing because of the "inherently preliminary nature of pretrial evidentiary and class certification rulings"); Fisher v. Ciba Specialty Chems. Corp., 238 F.R.D. 273, 279 (S.D. Ala. 2006) ("[B]ecause of the preliminary nature of [class certification] proceedings. . . . Courts . . . may consider evidence that may not ultimately be admissible at trial."); *In re* Hartford Sales Practices Litig., 192 F.R.D. 592, 597 (D.

inappropriate considerations of the merits.[90] Courts that do not apply the evidentiary rules at certification rarely address FRE 1101 before reaching their holding.[91]

Courts in the Third and Ninth Circuits have given conflicting signals, further adding to the confusion. One district court in the Third Circuit held "a court's finding of sufficient numerosity could be reached only on the basis of adequate admissible evidence."[92] But two unreported cases from district courts in the Third Circuit held that evidence submitted at class certification need not be admissible at trial.[93] The Third Circuit has not clearly settled the question. Rather, district courts have cited the Third Circuit as authority on both sides of the split.[94] Similarly, one district court in the Ninth Circuit strictly applied the FRE, reasoning that "the FRE do not determine applicability based on whether the motion is dispositive or not, but based on [the] limited set of exceptions set forth in Rule 1101."[95] But several other district courts in the Ninth Circuit adopt the reasoning that the preliminary nature of class certification negates a strict requirement of admissibility.[96] The Ninth Circuit also has left the

Minn. 1999) (holding that "courts will consider evidence that may not be admissible at trial" during class certification proceedings, in part because it is a preliminary matter (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974)); Thompson v. Bd. of Educ. of the Romeo Cmty. Schs., 71 F.R.D. 398, 401 n.2 (W.D. Mich. 1976) (following *Eisen*'s position that the FRE should not apply to preliminary matters like class certification proceedings (citing *Eisen*, 417 U.S. at 178)), *rev'd on other grounds*, 709 F.2d 1200 (6th Cir. 1983).

90. *See, e.g.*, Bacon v. Honda of Am. Mfg., Inc., 205 F.R.D. 466, 470 (S.D. Ohio 2001), *aff'd*, 370 F.3d 565 (6th Cir. 2004).

91. One exception is *Thompson v. Board of Education of the Romeo Community Schools*, 71 F.R.D. 398, which noted that, while some of the evidence received might be inadmissible under the FRE and FRE 1101(b) provides that the FRE apply generally to civil proceedings, the FRE "need not be viewed as binding during a hearing on such preliminary matters as class certification when a full scale evidentiary hearing may not be absolutely necessary." *Id.* at 401 n.2.

92. *In re* FleetBoston Fin. Corp. Sec. Litig., 253 F.R.D. 315, 340 (D.N.J. 2008).

93. *See In re* Front Loading Washing Mach. Class Action Litig., No. 08-51, 2013 WL 3466821, at *10 (D.N.J. July 10, 2013); Sherman v. Am. Eagle Express, Inc., No. 09-575, 2012 WL 748400, at *3 (E.D. Pa. Mar. 8, 2012).

94. *Compare* Serrano v. Cintas Corp., No. 04-40132, 2009 WL 910702, at *2 (E.D. Mich. Mar. 31, 2009) (citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), as supporting its decision not to apply the FRE), *aff'd sub nom.* Davis v. Cintas Corp., 717 F.3d 476 (6th Cir. 2013), *with* Anderson Living Tr. v. WPX Energy Prod., LLC, 306 F.R.D. 312, 378 n.39 (D.N.M. 2015) (citing *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 584 (3d Cir. 1984), as supporting its application of the FRE).

95. Lewis v. First Am. Title Ins. Co., 265 F.R.D. 536, 544 (D. Idaho 2010).

96. *See, e.g.*, Keilholtz v. Lennox Hearth Prods. Inc., 268 F.R.D. 330, 337 n.3 (N.D. Cal. 2010) ("On a motion for class certification, the Court makes no findings of fact and announces

question unsettled.[97] The foundational question of whether evidence must be admissible is thus left surprisingly unsettled.

There are important policy reasons for resolving this evidentiary issue. First, ensuring the reliability of the certification decision is especially important to protect the interests of defendants pulled into expensive representative litigation, the interests of absent class members, and the court's interest in judicial economy.[98] Courts that see the FRE as a tool to ensure the fairness and reliability of class certification are more likely to impose an admissible-at-trial rule.[99] But contrary to this reasoning, inadmissible evidence may still be probative.[100] Indeed, considering inadmissible evidence could achieve a more fair, reliable, and accurate result.

Second, whether the FRE apply may affect accessibility and justice for low-income plaintiffs. Courts' interpretations of procedural rules generally and class actions in particular have been increasingly restrictive.[101] Additional

no ultimate conclusions on Plaintiffs' claims. Therefore, the [FRE] take on a substantially reduced significance, as compared to a typical evidentiary hearing or trial."); Arredondo v. Delano Farms Co., 301 F.R.D. 493, 505 (E.D. Cal. 2014) ("Since a motion to certify a class is a preliminary procedure, courts do not require strict adherence to the [FRCP] or the [FRE].").

97. A recent appeal of a district court's grant of certification would have presented an opportunity for the Ninth Circuit to answer the question, but the issue was not raised. In *Pena v. Taylor Farms Pacific, Inc.*, 305 F.R.D. 197 (E.D. Cal. 2015), a district court held that "evidence presented in support of class certification need not be admissible at trial." *Id.* at 205 (quoting Pedroza v. Petsmart, Inc., No. ED CV 11-298-GHK, 2013 WL 1490667, at *1 (C.D. Cal. Jan. 28, 2013)), *aff'd*, 690 F. App'x 526 (9th Cir.), *petition for cert. filed*, No. 17-395 (U.S. Sept. 15, 2017). The district court then overruled the defendant's evidentiary objections before certifying two of the proposed subclasses. *Id.* at 205–06, 222–23. On appeal, the Ninth Circuit affirmed the district court's partial grant of certification without further analyzing the FRE issue. *See* Pena v. Taylor Farms Pac., Inc., 690 F. App'x 526 (9th Cir.), *petition for cert. filed*, No. 17-395 (U.S. Sept. 15, 2017).

98. *See supra* note 68 and accompanying paragraph.

99. *See, e.g.*, Sicav v. Wang, No. 12 Civ. 6682, 2015 WL 268855, at *6 (S.D.N.Y. Jan. 21, 2015) (reasoning that, while the court is not yet resolving factual disputes, it must "ensure that there is a basis in admissible evidence . . . to assure that a class is not certified based on conjecture as opposed to provable facts").

100. *Cf. In re* Extradition of Matus, 784 F. Supp. 1052, 1058 (S.D.N.Y. 1992) ("American Courts commonly refuse to admit excellent highly probative evidence. . . . [H]earsay is often admitted in code countries since, given proper weight, it may be very persuasive."); Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 169 (2006) (noting that Jeremy Bentham criticized the evidence rules as "needless and often suboptimizing distractions" and called to admit all logically relevant evidence).

101. *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (providing a detailed analysis of the ways in which courts have undermined the compensation, deterrence, and efficiency functions of the class action by heightening the certification requirements); *see also* Miller, *supra* note 57, at 296–303 (criticizing

barriers to class certification can be especially detrimental to low-income groups, for whom class litigation may be the best or only means of litigating consumer fraud, unfair wages, or workplace discrimination claims.[102] Although applying the FRE at class certification would by no means signal the end of class adjudication, it would be one more brick in a wall hindering access to courts. Given the importance of class actions to promoting access—as well as efficiency, deterrence, and consistency[103]—courts should be cautious before imposing additional burdens on certification. Accordingly, it is important to dig deeper into whether the FRE should apply at class certification and decide whether practical or policy considerations justify applying the FRE to class certification proceedings.

II. INTERPRETING FRE 1101(D)

In considering whether the FRE should apply at class certification, courts must first analyze the text of the evidentiary rules themselves. As discussed above, class certification is not listed as outside the scope of the evidentiary rules.[104] But unless FRE 1101(d) provides an exhaustive list, its absence is not determinative. This Part looks at FRE 1101, which details the scope of the evidence rules, and also considers how the courts have interpreted its text.[105]

recent restrictive developments in class certification, including *Dukes*'s rigorous analysis requirement, the increasing role of merits inquiries at class certification, the Class Action Fairness Act, and extensions of the Federal Arbitration Act); Spencer, *supra* note 68, at 475–88, 476 n.186 (describing the trend towards the "restrictive ethos" in civil procedure, such as the heightened pleading requirement following *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)) (citing A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 200 (2010)).

102. *See* Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants From the Civil Docket*, 65 EMORY L.J. 1531, 1535–39, 1556 (2016).

103. *See supra* notes 39–40 and accompanying text.

104. *See* FED. R. EVID. 1101(d).

105. The Supreme Court held the proper method of interpreting the FRE is through "traditional tools of statutory construction." INS v. Cardoza-Foneseca, 480 U.S. 421, 446 (1987). For critiques of the interpretive principles currently applied to the FRE, see Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1759–1814 (1995), which argues for a practical reasoning approach to interpreting the FRE, rather than a textual approach; Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329, 398–99 (1995), which advocates for an approach to interpreting the FRE that is flexible and uses strict textualism only as a starting point; and Glen Weissenberger, *Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L.

Using past cases that have considered whether the FRE applied to a proceeding not explicitly identified as outside the scope of the rules, this Part then identifies a framework for future cases.

A. Text of FRE 1101

FRE 1101 states that the rules of evidence apply in civil and criminal proceedings, but it provides several exceptions in FRE 1101(d). Specifically, FRE 1101(d) states the rules of evidence do not apply to the following:

1. the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;
2. grand-jury proceedings; and
3. miscellaneous proceedings such as:
   - extradition or rendition;
   - issuing an arrest warrant, criminal summons, or search warrant;
   - a preliminary examination in a criminal case;
   - sentencing;
   - granting or revoking probation or supervised release; and
   - considering whether to release on bail or otherwise.[106]

Thus, FRE 1101 expressly exempts several types of proceedings. The question remains whether the list is exhaustive.

1. Arguments for Interpreting 1101(d) as Non-Exhaustive

District courts in several circuits have held that the "miscellaneous proceedings" identified in FRE 1101(d)(3) do not constitute an exhaustive list.[107] This is because, at the time these cases were decided, FRE 1101(b) stated

REV. 1539, 1556–93 (1999), which proposes that the FRE be interpreted as a perpetual index code.

106. FED. R. EVID. 1101(d).

107. *See, e.g.*, Arista Records LLC v. Does 1–27, 584 F. Supp. 2d 240, 255 (D. Me. 2008) ("But, subsection (d) does not 'represent an exclusive and exhaustive list.'" (quoting United States v. Zannino, No. 83-235-N, 1985 WL 2305, at *3 (D. Mass. June 5, 1985))); UAW v. Gen. Motors Corp., 235 F.R.D. 383, 386–87 (E.D. Mich. 2006) (finding that FRE 1101(d) is not an exhaustive list), *aff'd sub nom.* Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615 (6th Cir. 2007); United States v. Singer, 345 F. Supp. 2d 230, 234 (D. Conn. 2004) ("Rule 1101(d)(3) has never been read as giving an exhaustive list of

that the FRE "apply generally" to civil and criminal proceedings.[108] As the court in *United States v. Weed*[109] explained: "Use of the word 'generally' implies that there are exceptions which are not specifically contemplated by the [FRE] itself."[110] Based on the FRE's language, the *Weed* court and other courts reason that FRE 1101(d) does not purport to be exhaustive.

Applying this reasoning today could be problematic, however. The FRE were restyled in December 2011 as part of an effort "to make the rules clearer and easier to read."[111] In these amendments, the word "generally" was removed from FRE 1101.[112] Although no express reason was given for this change, it is possible that the Advisory Committee wanted to eliminate any confusion about whether they intended the FRE to apply to all civil and criminal proceedings not explicitly listed as an exception.

To explain the intent behind the style revisions, the Advisory Committee highlighted three main issues the revisions sought to correct. First, the restyled rules "reduce the use of inconsistent terms that say the same thing in different

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proceedings exempted from the application of the Federal Rules of Evidence."), *aff'd*, 241 F. App'x 727 (2d Cir. 2007); United States v. Weed, 184 F. Supp. 2d 1166, 1173 (N.D. Okla. 2002) ("[T]he Court agrees that Rule 1101(d)(3) does not provide an exhaustive list of exceptions . . . ."). *But see* United States v. Honken, 378 F. Supp. 2d 1010, 1023–24 (N.D. Iowa 2004). *Honken* held the FRE must apply to trial security proceedings in part because trial security "is not one of the proceedings expressly identified in the [FRE] as a 'miscellaneous proceeding' to which the [FRE] are inapplicable." *Honken*, 378 F. Supp. 2d at 1023. Yet even *Honken* qualified its reasoning by stating: "[FRE] 1101(d) does not, either expressly or by reasonable implication, make the [FRE] inapplicable . . . ." *Id.* at 1024. If FRE 1101(d) can make the FRE inapplicable by implication, it follows that its list of exceptions is not strictly exhaustive.

108. *See Weed*, 184 F. Supp. 2d at 1173; *see also Singer*, 345 F. Supp. 2d at 234.

109. 184 F. Supp. 2d 1166.

110. *Id.* at 1173.

111. COMM. ON RULES OF PRACTICE & PROCEDURE, REP. OF THE JUDICIAL CONFERENCE 27 (Comm. Print 2010), *as reprinted in* H.R. DOC. No. 112-28, at 95 (1st Sess. 2011) (Conf. Rep.).

112. The unrestyled FRE 1101(b) provided:

> **Proceedings generally**. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

H.R. DOC. No. 112-28, at 194. The restyled FRE 1101(b) was amended to provide:

> **To Cases and Proceedings**. These rules apply in:
>
> - civil cases and proceedings, including bankruptcy, admiralty and maritime cases;
> - criminal cases and proceedings; and
> - contempt proceedings, except those in which the court may act summarily.

Id.

ways."[113] Webster's Dictionary defines the word "generally" as "in most cases."[114] It is possible that the Committee found the use of the word "generally" in FRE 1101 to be superfluous, since the exceptions listed in 1101(d) already communicate that the rules do not apply in all cases. If the Committee interpreted the word "generally" as repetitive in this way, then it follows that removing the word did not signal any disagreement with courts' interpretation of its meaning.

Second, the restyled rules remove "intensifiers," which are "expressions that attempt to add emphasis, but instead state the obvious."[115] For example, provisions of the FRE that stated "the court may, in the exercise of discretion" were revised to read "the court may."[116] Again, if the Committee similarly interpreted FRE 1101's use of "generally" as an intensifier that stated the obvious, then it is unlikely that the omission of that word would alter courts' substantive interpretation of the rule.

Third, the restyled rules "minimize the use of inherently ambiguous words."[117] For example, provisions of the FRE that used the word "shall" were amended to instead use the word "must," "may," or "should," depending on the intended meaning.[118] Out of the three reasons, this motivation would point the most towards the Committee intending for FRE 1101 to be read as an exhaustive list. The Committee could have felt that "generally" risked obscuring their intent that the rules apply to all civil and criminal proceedings with the very limited and specific exceptions listed.

But the Advisory Committee made clear that the 2011 amendments were "intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility."[119] Indeed, the Committee on Rules of Practice and Procedure explained that the Advisory Committee defined a change as "'substantive' and therefore beyond the proper ambit of the restyling project" if "it changes the structure of a rule or method of analysis in a manner that fundamentally changes how courts and litigants have thought

113. FED. R. EVID. 101 advisory committee's notes to 2011 amendments.
114. *Generally*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/generally [https://perma.cc/CU6E-87PQ].
115. FED. R. EVID. 101 advisory committee's notes to 2011 amendments.
116. FED. R. EVID. 611 advisory committee's notes to 2011 amendments.
117. FED. R. EVID. 101 advisory committee's notes to 2011 amendments.
118. *Id.*
119. *Id.*

about, or argued about, the rule."[120] The Advisory Committee must have intended to leave untouched the decisions finding FRE 1101(d) non-exhaustive. Moreover, the restyled rules also added the words "such as" to FRE 1101(d)(3).[121] This language introduces the exceptions as examples of some—but not all—miscellaneous proceedings to which the FRE do not apply. This addition is consistent with some district courts' interpretation of FRE 1101(d) as non-exhaustive.

2. Arguments for Interpreting 1101(d) as Exhaustive

Courts put forward straightforward reasoning for finding that FRE 1101(d) is an exclusive and exhaustive list. For example, in *Lewis v. First American Title Insurance Co.*,[122] the court rejected arguments that a "motion for class certification is not dispositive and [thus] need not be supported by admissible evidence."[123] The court interpreted the language of FRE 101 and 1101 to mean the only proceedings beyond the scope of the FRE are those explicitly stated in FRE 1101.[124] The court held that "the FRE do not determine applicability based on whether the motion is dispositive or not, but based on a limited set of exceptions set forth in Rule 1101."[125]

Lewis's conclusion is too shortsighted to be persuasive. Yes, the FRE determine applicability based on a set of exceptions set forth in Rule 1101. But each proceeding listed is excepted for a reason: A characteristic of that hearing makes applying the FRE either unnecessary or counterproductive. For example, while the FRE "expressly state that they are inapplicable in

120. H.R. DOC. No. 112-28, at 96.

121. The unrestyled FRE 1101(d)(3) provided the rules do not apply in the below proceedings:

> **Miscellaneous proceedings**. Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

FED. R. EVID. 1101 advisory committee's notes to 2011 amendments. The restyled FRE 1101(d)(3) provided the rules do not apply to "miscellaneous proceedings such as: [exceptions listed]." *Id.*

122. 265 F.R.D. 536 (D. Idaho 2010).

123. *Id.* at 544 (quoting Parkinson v. Hyundai Motor Am., 258 F.R.D. 580, 599 (C.D. Cal. 2008)) (discussing FED. R. EVID. 101).

124. *See id.* at 544.

125. *Id.*; *see also* Mars Steel Corp. v. Cont'l Bank N.A., 880 F.2d 928, 938 (7th Cir. 1989) (holding the FRE apply to fairness hearings because they "are not among the proceedings excepted from the Rules of Evidence" in FRE 1101(d)).

proceedings 'granting or revoking probation,'"[126] the reason the FRE are inapplicable is that the party already stands convicted of a crime.[127] Similarly, the rules expressly state that the FRE do not apply to sentencing. But the reason the FRE are inapplicable is that, "in view of the judge's obligation to the general public, as well as to the defendant, to be fair, reasonable and just, it is imperative that [the judge] be allowed to draw upon a wealth of information concerning the defendant's background."[128] It follows that, in the right circumstances, other proceedings with similar characteristics to those listed as exceptions could also be outside the scope of the FRE. Therefore, FRE 1101(d) is not exhaustive.

III. FRAMEWORK USED TO DETERMINE THE APPLICABILITY OF THE FRE

If FRE 1101(d) is a nonexclusive and nonexhaustive list of exceptions—that is, proceedings in which the FRE do not apply—then the next step is to determine under what circumstances courts have recognized additional exceptions beyond those listed in 1101(d). This Part takes up that task.

Courts in several districts have applied the same general framework when considering whether the FRE apply to a proceeding. None of these courts concludes its analysis after finding the proceeding is not listed in FRE 1101(d). Instead, they look to three main factors to determine whether the proceeding is properly treated as outside the scope of the evidentiary rules. First, the courts consider whether the U.S. Congress intended for the proceeding to be within the scope of the FRE. Second, the courts consider whether the proceeding at issue is analogous to a proceeding already recognized as outside the scope of the rules. Third, the courts consider whether the nature of the proceeding provides sufficient policy reasons to exclude it from the FRE's purview. For example, proceedings that are preliminary, discretionary, or narrow in purpose have been excepted from the FRE. Only by conducting this analysis can courts be sure that the

126. United States v. Bari, 599 F.3d 176, 179 (2d Cir. 2010) (quoting FED. R. EVID. 1101(d)(3)).
127. *See id.* (citing United States v. Carlton, 442 F.3d 802, 809 (2d Cir. 2006)).
128. United States v. Madison, 689 F.2d 1300, 1314 (7th Cir. 1982).

application of the FRE is productive rather than arbitrary. What follows is a closer look at how courts have applied each of the factors.

A. Congressional Intent

In considering whether the FRE apply to a certain proceeding, courts often begin by considering congressional intent. For example, in *United States v. Frazier*[129] the Eleventh Circuit addressed the question of whether the FRE applied to supervised release revocation proceedings. At the time, supervised release revocation proceedings were not included in FRE 1101(d)(3). The court did not treat the absence of supervised release revocation from the proceedings listed in FRE 1101(d) as dispositive.[130] Instead, it began by considering congressional intent.[131] That is, the court contemplated why Congress might have intended for supervised release revocation proceedings to be outside the scope of the FRE and nevertheless neglect to list it as an exception.

The court reasoned: "The absence of supervised release from [FRE] 1101 can best be explained by the fact that [FRE] 1101 was enacted prior to the creation of supervised release [which was created in 1984]."[132] The court noted that Congress consistently applied the same rules to revocation of probation, parole, and supervised release—proceedings explicitly listed in FRE 1101(d).[133] From this, the court inferred that Congress never amended FRE 1101 to include supervised release because "Congress considered probation revocation and supervised release revocation to be so analogous as to be interchangeable."[134]

Likewise, in *United States v. Singer*,[135] the Connecticut district court held the FRE inapplicable to jury polling because applying the FRE would produce an "absurd result" clearly not intended by Congress.[136] Specifically, the court reasoned that applying the FRE would mean treating

129. 26 F.3d 110, 112 (11th Cir. 1994).
130. *Id.* at 113.
131. *Id.*
132. *Id.* at 113 & n.1.
133. *Id.* at 113.
134. *Id.*
135. 345 F. Supp. 2d 230 (D. Conn. 2004), *aff'd*, 241 F. App'x 727 (2d Cir. 2007).
136. *Id.* at 234.

the jurors as witnesses giving testimony, even though jurors are prohibited from testifying at a trial in which they sit as jurors.[137]

In other cases, however, congressional intent marshaled against finding an additional exception. In *United States v. Weed*,[138] the court considered whether the FRE apply to a proceeding to determine the defendant's mental competency to stand trial.[139] The court found FRE 1101(d)(3) did not provide an exhaustive list of exceptions, but nevertheless declined to add mental incompetency hearings to the list.[140] The court reasoned in part that it would be "strange . . . that the [FRE] would not apply" to a hearing with "all of the hallmarks of an adversarial proceeding."[141] Therefore, in the court's view, Congress likely intended for the FRE to apply to mental incompetency proceedings.

B. Analogy

Courts do not stop their analysis at congressional intent. In *United States v. Palesky*,[142] the First Circuit agreed with the defendant that the exception for "proceedings with respect to release on bail or otherwise" was framed in light of the Bail Reform Act of 1966, 18 U.S.C. § 3146.[143] Nevertheless, the court reasoned that it saw "no reason to confine the exception to this specific example."[144] Instead, it analogized release on bail to the proceeding at issue: a hearing to determine the safety of an acquitee's release from commitment.[145]

Similarly, to determine whether the evidentiary rules applied to supervised release proceedings, the court in *Frazier* also considered whether supervised release revocations were conceptually different from probation and parole revocation proceedings already listed as exceptions.[146] The court found no such difference.

137. *Id.*
138. 184 F. Supp. 2d 1166 (N.D. Okla. 2002).
139. *Id.* at 1173.
140. *Id.*
141. *Id.* at 1173–74.
142. 855 F.2d 34 (1st Cir. 1988).
143. *Id.* at 36 (quoting FED. R. EVID. 1101(d) advisory committee notes to 1972 proposed rules). *See generally* Bail Reform Act of 1966, 18 U.S.C. § 3146 (2012).
144. *Palesky*, 855 F.2d at 36.
145. *Id.*
146. United States v. Frazier, 26 F.3d 110, 113–14 (11th Cir. 1994).

To the contrary, the court reasoned the "purpose and theory of all three types of release are essentially identical."[147] The court continued that past treatment of the proceeding supported this interpretation, noting that an earlier Sixth Circuit case characterized all revocation proceedings as more flexible than trials and therefore not strictly bound by the FRE.[148] Supervised release revocation proceedings were thus sufficiently analogous to other proceedings already listed in FRE 1101(d), so the court found the FRE were inapplicable to supervised release proceedings.[149] As *Palesky* and *Frazier* demonstrate, even proceedings not explicitly listed among the 1101(d) exceptions might nevertheless fall outside the scope of the FRE based on analogy.

C. Nature of the Hearing

Rather than analogize to a specific proceeding, other courts have held the FRE were inapplicable when the "nature of the hearing" suggested policy reasons for excluding it. For example, in *United States v. Zannino*,[150] the District Court of Massachusetts held the FRE to be inapplicable to a motion to continue predicated on physical inability to stand trial because the hearing on the motion was dissimilar to a trial on the merits.[151] In particular, the court in *Zannino* focused on the hearing's preliminary nature and its purpose "to obtain sufficient information in order to make a fair and just decision."[152]

Similarly, in *UAW v. General Motors Corp.*,[153] the eastern district of Michigan found the FRE did not apply to a fairness hearing.[154] The court reasoned that fairness hearings were dissimilar to trial because of their "very singular and narrow purpose—to determine whether the settlement at issue is

147. *Id.* at 113 n.2.
148. *See id.* at 113 (citing United States v. Stephenson, 928 F.2d 728, 732 (6th Cir. 1991)).
149. *Id.* at 114. For other cases finding the FRE inapplicable to a proceeding based on analogy to a specific proceeding listed in FRE 1101(d)(3), see *Government of the Virgin Islands ex rel. A.M.*, 34 F.3d 153, 161–62 (3d Cir. 1994); *United States v. C.P.A.*, 572 F. Supp. 2d 1122, 1124–25 (D.N.D. 2008); and *United States v. E.K.*, 471 F. Supp. 924, 929 (D. Or. 1979), all of which analogized a motion to transfer a juvenile offender to a preliminary examination in a criminal case.
150. No. 83-235-N, 1985 WL 2305 (D. Mass. June 5, 1985).
151. *See id.* at *3.
152. *Id.*
153. 235 F.R.D. 383, 386–87 (E.D. Mich. 2006), *aff'd sub nom.* Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615 (6th Cir. 2007).
154. *Id.* at 386.

fair, reasonable, and adequate."[155] Even for proceedings explicitly listed as exceptions in FRE 1101(d), courts have rationalized their exclusion based on their narrow purpose. For example, because the probable cause hearing in extradition proceedings is "akin to a preliminary hearing and not to determine whether the accused is guilty or innocent," courts in at least two circuits have held that the FRE do not apply.[156]

The discretionary nature of certain proceedings has also contributed to the court's finding additional exceptions to the evidentiary rules.[157] The judge has broad discretion in several of the proceedings listed in FRE 1101(d)(3), particularly in preliminary hearings in criminal cases, revocation proceedings, and sentencing proceedings. For example, in preliminary hearings "the magistrate judge has broad discretion in supervising the questioning of witnesses, including the authority to terminate questioning once probable cause has been established."[158] Similarly, in the context of parole revocation proceedings, the Supreme Court reasoned that application of the FRE was unnecessary where "[c]ontrol over the required proceedings by the hearing officers can assure that delaying tactics and other abuses sometimes present in the traditional adversary trial situation do not occur."[159] This characteristic thus provides policy grounds for excluding proceedings from the scope of the evidentiary rules.

IV. APPLYING THE FRAMEWORK TO CLASS CERTIFICATION PROCEEDINGS

Courts have used a framework that considers congressional intent, analogies to exceptions listed in FRE 1101(d), and the nature of the hearing to determine whether a proceeding falls outside the FRE. This Part applies the framework to the question of whether courts must apply the FRE to class certification proceedings.

155. *Id.* at 387.
156. *In re* Extradition of Contreras, 800 F. Supp. 1462, 1464–65 (S.D. Tex. 1992) (citation omitted); *accord* Bovio v. United States, 989 F.2d 255, 259 n.3 (7th Cir. 1993).
157. *See, e.g.*, United States v. Singer, 345 F. Supp. 2d 230, 233 (D. Conn. 2004) (noting that "the method of polling the jury is left to the judge's discretion" before concluding the FRE do not apply), *aff'd*, 241 Fed. App'x 727 (2d Cir. 2007).
158. United States v. Perez, 17 F. Supp. 3d 586, 594 (S.D. Tex. 2014).
159. Morrissey v. Brewer, 408 U.S. 471, 490 (1972).

A. Congressional Intent

As discussed above, the class certification proceeding is not listed in FRE 1101(d), the section that identifies certain proceedings as beyond the scope of the evidentiary rules. Consequently, this Part begins its analysis by considering whether Congress intended for the FRE to apply to class certification proceedings.

The FRE were adopted in 1975, while the modern class action was adopted in 1966. So, unlike the supervised release proceedings involved in *United States v. Frazier*,[160] the rule makers could have listed class certification as beyond the scope of the FRE from the outset. Why didn't they? Congress's inaction is subject to conflicting interpretations. It could clearly indicate that they intended for the FRE to apply. Or, perhaps the rule makers simply did not think it necessary at the time. Class certification did not originally involve much evidence; judges commonly accepted pleadings as true and granted certification liberally. It was not until the class action evolved further that evidence became both a regular and substantial part of the certification decision. Indeed, it was not until 2001 that some appellate courts began imposing a higher evidentiary burden at class certification, and it was not until the Supreme Court's decision in 2011 that evidentiary proof was explicitly required.[161] Therefore, at the time the FRE were adopted Congress might not have considered it necessary to explicitly exempt class certification proceedings from the FRE. Looking to Congress's original intent sheds little light on the FRE's applicability.

Now, however, the substantial role of evidence at class certification is apparent, and Congress has had multiple opportunities to amend the FRE. Yet Congress still has not added class certification proceedings to FRE 1101(d).[162] Again, Congress's inaction could indicate their intent to exempt class

160. 26 F.3d 110, 112 (11th Cir. 1994).
161. *See supra* note 8 and accompanying text.
162. Amending the FRE is a multistep process. An amendment is first proposed by the Advisory Committee and must be supported by both the Standing Committee and the Judicial Conference before it may be approved by the Supreme Court and accepted by Congress. *See* Teter, *supra* note 11, at 159–60; *see also* JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, THE FEDERAL RULES OF PRACTICE AND PROCEDURE (2010), http://federalevidence.com/pdf/FRE_Amendments/RuleProcess/Summary_RuleProcess.pdf [https://perma.cc/V8RF-7GJM].

certification proceedings from the FRE. Many courts have consistently exempted any evidence presented at the certification stage from admissibility rules, without any action by Congress to correct this interpretation. Of course, their inaction could mean nothing.

In sum, Congressional intent does not appear to point clearly toward applying the FRE at class certification. It is therefore more beneficial to consider the other prongs of the framework.

B. Analogy

The next prong of the framework involves whether the class certification proceeding is analogous to these proceedings specifically exempted by FRE 1101(d). Although courts have analogized to other proceedings when a closely analogous proceeding exists, no proceeding listed in FRE 1101(d) is as closely analogous to the class certification proceeding as, for example, supervised release is to probation and parole revocation proceedings.[163] The most likely analogy would be to a preliminary examination in a criminal case.

Courts have interpreted "preliminary examinations" in FRE 1101(d)(3) as specifically referencing Federal Rule of Criminal Procedure 5.1.[164] Rule 5.1 requires a magistrate judge to conduct a preliminary hearing in criminal cases to determine whether there is "probable cause to believe an offense has been committed and the defendant committed it."[165] Congress considered arguments that the purpose of the preliminary examination should be to "determine whether there is evidence sufficient to justify subjecting the defendant to the expense and inconvenience of trial" and that the FRE should

163. *See supra* notes 146–149 and accompanying text.
164. *See, e.g.*, United States v. Weed, 184 F. Supp. 2d 1166, 1173 (N.D. Okla. 2002).
165. FED. R. CRIM. P. 5.1(e). Although class certification is certainly distinguishable based on its status as a civil proceeding, there is reason to believe this alone should not be determinative. In *Government of the Virgin Islands ex rel. A.M.*, 34 F.3d 153, 161 (3d Cir. 1994), the court considered whether the FRE should apply to juvenile transfer proceedings, where the court determines whether the juvenile should be tried as an adult. The court found juvenile transfer proceedings were neither civil nor criminal but still analogized the proceeding to 1101(d)(3) preliminary examinations based on its preliminary nature. *Id.* The key question is whether, beyond its status as civil or criminal, the nature of the class certification proceeding is analogous to a preliminary examination in a criminal proceeding or whether there are significant conceptual differences.

therefore apply.[166] But Congress rejected this view "for reasons largely of administrative necessity and the efficient administration of justice."[167] In particular, Congress expressed concern that increasing evidentiary requirements would add to administrative pressure by requiring two determinations of admissibility.[168] The accused deserves a speedy determination of probable cause, and hearing evidentiary objections takes precious time. Moreover, the determination of probable cause has significant impact on the accused's liberty. Both Congress and the courts adopted the view that the FRE were inapplicable to preliminary examinations in criminal cases because, to administer justice, an innocent should not stand accused for any longer than necessary.[169]

Some similar interests are present in class certification proceedings. Because class certification does not determine the defendant's liability but rather whether the plaintiffs constitute a class, it can also be characterized as a preliminary proceeding. As a preliminary proceeding, class certification presents similar concerns regarding administrative pressure. A primary concern in many FRCP 23(b)(3) class actions is the efficient adjudication of claims. The application of the formal rules of evidence at such a preliminary stage could frustrate a judge's ability to exercise discretion in managing the case and to preserve judicial resources. Consider, for example, the judge's dilemma in *Tyson Foods, Inc. v. Bouaphakeo*[170] had the FRE applied. Recall that in that case, the judge determined that the weight of the evidence, including a study by the plaintiffs' expert, showed the case would be best litigated as a class action.[171]

166. FED. R. CRIM. P. 5.1, advisory committee notes to 1972 proposed rules (citing Patricia W. Weinberg & Robert L. Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 MICH. L. REV. 1361, 1396–99 (1969)).

167. *Id.*

168. *Id.*

169. As one court explained:

> [U]ncertainty of the guilt of the named defendants—is the . . . reason for a speedy preliminary examination. An innocent accused should not have an arrest hanging over her head for more than 60 days without an opportunity for a determination of probable cause for her loss of freedom and her continuing interest to the authorities.

United States v. Green, 305 F. Supp. 125, 130 (S.D.N.Y. 1969); S. REP. NO. 371, at 34 (1st Sess. 1967) ("No citizen should have his liberty restrained, even to the limited extent of being required to post bail or meet other conditions of release, unless some independent judicial determination has been made that the restraint is justified.").

170. 136 S. Ct. 1036 (2016).

171. *See supra* notes 71–79 and accompanying text.

Now imagine that the FRE strictly applied. The defendant raises several objections to the evidence offered to prove FRCP 23 commonality: the study was improper expert testimony and unfairly prejudicial, and the plaintiffs' declarations contained hearsay. The judge agrees that the evidence does not satisfy the FRE, and so he cannot consider it—even though, in his discretion, the judge believed the evidence was sufficiently reliable, or that plaintiffs could obtain admissible evidence by trial. As a result, the judge does not certify the class. If the plaintiffs decide to go forward individually, suddenly the judge must manage several claims rather than a single aggregate claim, which puts a potentially unwarranted strain on judicial resources. In this way, rigid evidentiary rules could significantly impede judicial discretion and efficiency.

Beyond the interest in preserving judicial resources, in most class certification proceedings the gravest interests at stake are the plaintiffs' interests in being heard and the defendant's interest in avoiding potential liability to an entire class. Although important, none of these interests are comparable to the policy justification behind excluding preliminary examinations in criminal cases from the purview of the FRE. A preliminary examination in a criminal case has higher stakes and a more pressing reason to be held promptly than a class certification proceeding. The court in *Anderson Living Trust v. WPX Energy Production, LLC*[172] distinguished certification proceedings from the 1101(d)(3) exceptions, finding that certification proceedings lack the "public policy need to dispense with the formalities of the rules of evidence" that exists with the "potentially life-and-death decisions concerning" a hearing on preliminary examinations, let alone sentencing, extradition, probation violation, or setting bail.[173] Unlike preliminary examinations in criminal cases, certification does not affect individual liberty, immediately or in the future. It affects only whether the claims are pursued on an individual or class basis. This difference is likely too significant to warrant holding the FRE inapplicable to class certification based solely on a precarious analogy to preliminary examinations.

172. 306 F.R.D. 312 (D.N.M. 2015).
173. *Id.* at 379 n.39.

C. Nature of the Class Certification Proceeding

Even absent a close analogy to a proceeding already recognized as outside the scope of the FRE, the nature of class certification proceedings might warrant finding the evidentiary rules inapplicable.[174] The rationales behind several 1101(d) exceptions are also present for class certification proceedings. This Part analyzes some of these similarities and considers whether they offer sufficient policy reasons for allowing the judge to consider inadmissible evidence.

1. Preliminary Nature of the Proceeding

Even though it is not analogous to preliminary criminal proceedings, class certification's preliminary nature could nevertheless support policy justifications sufficient to except it from the FRE. The court in *United States v. Zannino*[175] defined preliminary as "coming before" and "usually forming a necessary prelude to something else."[176] Like the physical competency proceedings in *Zannino*, class certification proceedings fit the ordinary definition of preliminary. Certification is a necessary prelude to aggregate litigation that binds even absent members of the class. In fact, when not purely for settlement purposes, class certification has long been recognized as a preliminary proceeding.[177] Class certification determines only two things: (1) whether the claim will proceed as an aggregate rather than an individual claim; and (2) if certified as an aggregate claim, who makes up the class.

174. *See supra* Part III.C. *But see* Mullenix, *supra* note 70, at 636 (arguing that because class certification hearings are not listed in Rule 1101(d), and because "virtually all the exceptions apply in the criminal context," the FRE must apply at class certification); *id.* ("There is no justification in the evidence rules for characterizing class certification proceedings as some sort of preliminary proceeding to which the rules of evidence need not apply.").

175. No. 83-235-N, 1985 WL 2305 (D. Mass. June 5, 1985)

176. *Id.* at *3 n.5 (quoting *Preliminary*, *in* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1985)).

177. *Cf.* Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 972, 972 n.89 (2014) (describing class certification as effecting a fundamental but nevertheless procedural transformation—"converting standard litigation to representative litigation"—that has been equated to procedural rules of joinder and consolidation). In contrast to litigation classes, settlement classes "effectively conclude[] the proceeding." *Id.* at 972 n.90 (quoting Ortiz v. Fireboard Corp., 527 U.S. 815, 849 (1999)).

Certification makes no findings regarding liability. Unlike summary judgment, which ends litigation without trial, "a court's inquiry on a motion for class certification is 'tentative,' 'preliminary,' and 'limited.'"[178] Thus, unlike summary judgment, the court need not review the evidence in light of what would be admissible at trial.[179]

Supreme Court precedent supports this characterization of FRCP 23. In *Eisen v. Carlisle & Jacquelin*,[180] the Supreme Court stated that the court bases its certification decision on "tentative findings, made in the absence of established safeguards" and class certification is necessarily "not accompanied by the traditional rules and procedures applicable to civil trials."[181] Later, a plurality of the Supreme Court addressing a choice of law issue in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[182] concluded that FRCP 23 regulates procedure, comparing certification to the rules of joinder and consolidation, which "alter only how the claims are processed."[183] Evidentiary rules traditionally do not apply in such non-determinative, preliminary proceedings.[184]

Opponents, however, put forth two main arguments for why class certification is actually not preliminary in operation. First, in 2003 the drafters amended FRCP 23 to eliminate conditional certification, which once allowed a judge to certify a class before being sure that the requirements of FRCP 23 were met. Without the option of conditional certification, opponents argue class certification hearings are no longer "preliminary . . . in the sense that a judge is going to go back and reconsider his or her class certification order."[185]

This argument is unpersuasive. Besides the fact that a judge nevertheless may still "subsequently . . . revise a class certification order,"[186]

178. *In re* Zurn Pex Plumbing Prod. Liab. Litig., 644 F.3d 604, 613 (8th Cir. 2011) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.11 (1978)).
179. *Id.*
180. 417 U.S. 156 (1974).
181. *Id.* at 178.
182. 559 U.S. 393 (2010) (plurality opinion).
183. *Id.* at 408.
184. Miller, *supra* note 57, at 298 n.22 (explaining that evidentiary standards have not traditionally been imposed "on other procedural issues, such as jurisdiction, venue, and process, that are left for the judge's determination").
185. Mullenix, *supra* note 70, at 636; *see also* Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001) ("[A]n order certifying a class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises. . . .").
186. Mullenix, *supra* note 70, at 637.

certification itself remains a preliminary step in the adjudication. The elimination of conditional certification reemphasizes *Wal-Mart Stores, Inc. v. Dukes*'s[187] requirement that the party seeking class certification must prove that each requirement of FRCP 23 has been satisfied in fact.[188] But the certification proceeding still must come "at an *early* practicable time" after a lawsuit is filed.[189] More importantly, class certification does not make any binding factual determination regarding the defendant's liability.[190] Certification merely serves the purpose of determining how an action will proceed, not what the outcome will be.

The second argument opponents put forward begins with the proposition that very few class actions go to trial. Studies by the Federal Judicial Center (FJC) show class action trial rates range from 0 to 8 percent, while the aggregate settlement rate is 73 percent.[191] Opponents then argue the high settlement rate is attributable to pressure exerted by certification: Defendants would rather settle than face the high costs of defending oneself at trial against a large plaintiff class. This is argued to be especially problematic because certification can empower even weak claims to pressure defendants into settlement.[192] At the extreme, courts and scholars have described class action attorneys as "bounty hunters,"[193]

187. 564 U.S. 338 (2011).
188. *See id.* at 350–51.
189. FED. R. CIV. P. 23(c)(1)(A) (emphasis added). A 1996 Federal Judicial Center study of four district courts in various states found that in practice, motions to certify were filed or issued within median times of 3.1 to 4.3 months after the filing of the complaint. *See* THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 122 fig.19 (1996).
190. *See supra* note 64.
191. WILLGING ET AL., *supra* note 189, at 60 & n.213, 179 tbl.39, *cited by* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1399–1400 (2003).
192. Silver, *supra* note 191, at 1357–58 (discussing views of critics of class certification); Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1112 n.65 (2013) (citing cases discussing unjustified settlement pressure).
193. Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77 (arguing attorneys are incentivized by high fees to sue to enforce public policy even though class members "neither make the decision to sue at the outset nor receive meaningful compensation at the end"). *But see* Miller, *supra* note 61, at 667 (noting that competing empirical evidence implies that "the great bulk of the money received from the defendants actually is distributed to class members, in contrast to the widely held notion that the fund is either devoured by avaricious attorneys or consumed by administrative expenses").

as engaging in "judicial blackmail,"[194] and as using certification to "bludgeon the defendants into submission."[195]

If most certified classes settle, then the practical impact of certifying a class is nearly the equivalent of holding the defendant liable. There will rarely be an adjudication on the merits. From this view, certification is not only the judge's last word on whether FRCP 23 is satisfied, but also likely the determining factor in whether the defendant will pay the plaintiffs. That is, certification is effectively dispositive.[196]

At least one court has adopted this reasoning. In *Anderson Living Trust v. WPX Energy Production, LLC*,[197] the court reasoned that class certification is more similar to a trial—or at least a summary judgment or motion to dismiss hearing—than a miscellaneous proceeding under FRE 1101(d)(3).[198] The court reached this conclusion based on (1) the importance of the proceeding to the outcome of the case and (2) "the evidentiary nature of the hearing."[199] The court in *Anderson Living Trust* explained the problem of certification-induced settlement pressure as follows:

> Class certification is an important stage of a case: a certified class action often settles, often for a large amount of money; a rejected or precertification class action is difficult to settle . . . because res judicata does not attach to the absent class members unless and until the class is certified.[200]

From this view, ensuring accuracy in the certification decision is crucial. Relaxing certification standards, including by allowing the judge to make the certification determination based on inadmissible evidence, will further magnify settlement pressure.[201] Thus, advocates on this end argue that the FRE

194. Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996); *see also In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299–1300, 1304 (7th Cir. 1995).
195. Epstein, *supra* note 2, at 514.
196. *See, e.g.*, Soutter v. Equifax Info. Servs. LLC, 299 F.R.D. 126, 130–31 (E.D. Va. 2014) (describing the changes in bargaining power caused by certification, and concluding that "the class certification decision is, as a practical matter, of dispositive consequence, notwithstanding that it is not dispositive in the same way as is a summary judgment motion.").
197. 306 F.R.D. 312, 378 n.39 (D.N.M. 2015).
198. *Id.* at 378 n.39.
199. *Id.*
200. *Id.* at 379 n.39.
201. *See* John Beisner et. al., *Canadian Class Action Law: A Flawed Model for European Class Actions*, 9 ENGAGE: J. FEDERALIST SOC'Y PRAC. GRPS. 123, 127 (2008) (arguing that "[p]ermissive class certification requirements" enable trials based on statistical

must apply to certification proceedings because of its impact on the likelihood of settlement.

Ultimately these arguments are also unpersuasive. Empirical data does not adequately back up arguments that class certification creates excessive pressure to settle.[202] A high settlement rate is not unusual, even in conventional lawsuits.[203] In any case, the cost of trial and potential damages can pressure defendants to settle. Certainly, some class actions carry a higher settlement cost than if the suits proceeded individually. Class actions often settle cheaply, however, and verdicts rarely reward damages high enough to bankrupt defendants.[204]

Moreover, the past five years have seen an increase in the number of class actions proceeding to trial—a trend that Robert Klonoff predicts will continue.[205] This trend suggests class action defendants are not bending to an overwhelming pressure to settle. In addition, certification alone does not strip defendants of all power over plaintiffs. Defendants still retain several advantages. For example, "the vast majority of pertinent documents belong to the defendant, not the plaintiff," which means plaintiffs will have a bigger burden in discovery.[206] Professor Charles Silver adds that defense attorneys often have the upper hand: They have more monetary resources and a stronger incentive to concentrate those resources on the present case, and the ability to settle "parallel cases that moot class members' claims."[207] Simply put, the blackmail concern is overstated.

Even if most class actions do settle, settlement in and of itself is not problematic. If defendants settle class actions out of fear of trial and verdicts requiring them to pay high damages, this is "a reason for thinking that a defendant is right to settle, not for thinking that a defendant is

evidence and expert testimony, which in turn "exacerbate[s] the already-existing pressure on defendants to settle class actions regardless of the merits of the plaintiffs' claims").

202. *See* Silver, *supra* note 191, at 1429–30; *see also* Olson, *supra* note 65, at 970–73.

203. Silver, *supra* note 191, at 1401.

204. Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1403 n.51 (2000) ("Generally, class actions do not involve aggregate damages of high magnitude relative to the wealth of defendant firms.").

205. Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1641–50 (2016).

206. KLONOFF ET AL., *supra* note 65, at 310.

207. Silver, *supra* note 191, at 1403.

coerced."[208] If the defendant instead believes he has a strong argument against class-wide liability, it "should welcome class certification" as an opportunity to resolve the claims of all class members at once.[209] Lastly, defendants also have means of disposing of unmeritorious claims prior to trial and even certification. A 1996 study by the FJC found that parties often filed motions to dismiss or for summary judgment before a judge's ruling on certification.[210] Judges often ruled on these motions prior to certification,[211] which would guard against certification of and pressure from unmeritorious claims. This practice of filing for dismissal or summary judgment before certification is yet another tool in a defendant's arsenal against certification.

There is no question that class certification is an important proceeding. But certification does not definitively strong-arm a defendant into settling. It is still chiefly a preliminary mechanism.[212] As such, there are grounds for concluding the FRE need not apply at this stage.

2. Narrow Purpose of the Proceeding

Further reinforcing class certification's preliminary nature is the narrow purpose of the proceeding. Class certification serves the narrow purpose of determining whether the requirements of FRCP 23(a) and (b) are satisfied.[213]

208. *Id.* at 1366.
209. *See In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 857 (6th Cir. 2013).
210. WILLGING ET AL., *supra* note 189, at 29, 31*; see also* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 159 (2006) ("Meritless filings are not met with payoff money; they are met with motion practice, and sometimes sanctions." (footnote omitted)).
211. Note that 67 percent of cases in the Eastern District of Pennsylvania were certified with a ruling on a motion to dismiss or summary judgment or both, 83 percent in the Southern District of Florida, 74 percent in the Northern District of Illinois, and 81 percent in the Northern District of California. WILLGING ET AL., *supra* note 189, at 141 fig.58.
212. Certification proceedings are no more dispositive than juvenile transfer proceedings, to which the FRE do not apply. *See* United States v. E.K., 471 F. Supp. 924, 929 (D. Or. 1979) (finding the FRE do not apply to a motion to transfer a juvenile offender, even though "upon its filing [the motion] becomes the essential preliminary step in any criminal prosecution of the juvenile. Absent a motion to transfer, the proceeding will never ripen into a criminal prosecution but will remain a delinquency proceeding").
213. For an example of this argument in the related context of fairness hearings for proposed class action settlements, see UAW v. Gen. Motors Corp., 235 F.R.D. 383(E.D. Mich. 2006), *aff'd sub nom.* Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen.

To the extent a judge makes any determination of the merits of a case, that determination is not binding on the finder of fact later on.[214] This characteristic distinguishes class certification from trial proceedings. Courts have found the FRE applicable to hearings with "all of the hallmarks of an adversarial proceeding."[215] In contrast, courts have found proceedings that are unrelated to the merits of the case to be distinguishable from trials and therefore outside the scope of the FRE.[216]

Due to its narrow purpose, the evidence presented at class certification may not be all the evidence that will be used to prove the merits of a claim at trial; the plaintiffs will be proving separate, additional questions that may need separate, additional evidence. Even if some evidence at certification overlaps with the merits, plaintiffs will have time before trial to either make the evidence presented admissible or possibly find new evidence that is admissible.[217] Until then, a judge needs comprehensive access to the potential evidence to fully discern whether the case is best treated as a class action.[218]

Motors Corp., 497 F.3d 615 (6th Cir. 2007). In that case, the court held that the FRE was inapplicable to fairness hearings because of their "singular and narrow purpose." *Id.* at 387.

214. *See supra* note 64.

215. United States v. Weed, 184 F. Supp. 2d 1166, 1173–74 (N.D. Okla. 2002).

216. *See, e.g.*, Bovio v. United States, 989 F.2d 255, 259 (7th Cir. 1993) (noting "an extradition proceeding is not a trial" before concluding it was permissible to rely on hearsay testimony); *In re* Extradition of Contreras, 800 F. Supp. 1462, 1464 (S.D. Tex. 1992) ("The probable cause hearing is akin to a preliminary hearing and not to determine whether the accused is guilty or innocent. [So, the FRE do] not apply . . . ." (citations omitted)); *see also, e.g.*, United States v. Farmer, 567 F.3d 343, 347 (8th Cir. 2009) ("A revocation hearing is not a criminal trial. . . . The federal rules of evidence do not apply . . . ."); United States v. Schaefer, 87 F.3d 562, 570 (1st Cir. 1996) (distinguishing suppression hearings from trials before concluding the FRE do not apply); Gov't of V.I. *ex rel.* A.M., 34 F.3d 153, 161–62 (3d Cir. 1994) (finding transfer hearings are "not comparable to a civil or criminal trial" and that the FRE do not apply); United States v. Stephenson, 928 F.2d 728, 732 (6th Cir. 1991) (holding a judge may consider hearsay—if proven to be reliable—during revocation proceedings because they are more flexible than trials).

217. In this way, class certification is somewhat comparable to a preliminary injunction proceeding, to which the FRE do not strictly apply. That is because preliminary injunction proceedings are issued "on the basis of . . . evidence that is less complete than in a trial on the merits." Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981).

218. Compare this need to the physical competency hearing in *Zannino*, where "the nature of the hearing, i.e., to obtain sufficient information in order to make a fair and just decision, required that the Court gather the maximum aggregate of relevant information." United States v. Zannino, No. 83-235-N, 1985 WL 2305, at *3 (D. Mass. June 5, 1985); *see also* Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (reasoning that because parole revocation "is a narrow inquiry" that necessitates flexibility, the FRE do not apply).

Additionally, the ability to consider arguably inadmissible evidence will not eliminate the court's ability to conduct the required rigorous analysis. For example, despite considering potentially inadmissible evidence, the district court in *Pena v. Taylor Farms Pacific, Inc.*[219] certified only two of the four alleged subclasses.[220] For the donning and doffing subclass, for example, the court held the "issue of compensation [was] individualized," and so the "plaintiffs' injury [could] not be shown via evidence common to the class."[221] Specifically, the evidence presented by the plaintiffs contained three inconsistencies: (1) whether the employees were required to don and doff on or off the clock; (2) whether all employees were required to wear the same equipment; and (3) whether the employees took varying amounts of time to don and doff their equipment.[222] As in *Pena*, the discretion to consider inadmissible evidence will not equate to giving plaintiffs a free ride to certification. Furthermore, it need not mean completely discounting the evidentiary rules. Judges could still "factor any evidentiary infirmity in to the weight he or she gives to [the evidence],"[223] without being required to ignore the evidence entirely. Thus, excepting the class certification procedure from strict application of the FRE is most consistent with its narrow purpose.

3. Discretionary Nature of the Proceeding

The nature of class certification proceedings is sufficiently discretionary to warrant placing them outside the scope of the FRE. Although limited by the provisions of FRCP 23, the district court has considerable discretion when

219. 305 F.R.D. 197 (E.D. Cal 2015), *aff'd*, 690 F. App'x 526 (9th Cir.), *petition for cert. filed*, No. 17-395 (U.S. Sept. 15, 2017).
220. *Id.* at 224.
221. *Id.* at 211.
222. *Id.* at 210–11.
223. Anderson Living Tr. v. WPX Energy Prod., LLC, 306 F.R.D. 312, 379 n.39 (D.N.M. 2015) (suggesting this approach in dicta); *see also In re* Unisys Savs. Plan Litig., 173 F.3d 145, 164–65 (3d Cir. 1999) (Becker, C.J., dissenting) ("The better course is to admit the evidence and then take factors that otherwise might affect its admissibility into consideration in determining its weight, rather than waste time debating the propriety of admitting the evidence."); United States v. Ochs, 461 F. Supp. 1, 7 (S.D.N.Y. 1978) ("[T]here is no automatic rule against receiving hearsay evidence in suppression hearings where the trial court itself can *accord* that evidence such weight deemed desirable." (emphasis added)), *aff'd*, 636 F.2d 1205 (2d Cir. 1980).

deciding whether to certify a class and how the litigation will proceed.[224] The district court's discretion is rooted in its "inherent power to manage and control its own pending litigation."[225] FRCP 23(b)(3)(d) explicitly gives a judge discretion by "requiring that a district court consider 'the likely difficulties in managing a class action' in deciding whether to authorize certification of [FRCP](b)(3) class actions."[226] Judges also have the discretion not to certify a class even if the requirements of FRCP 23 are satisfied.[227] In making this determination, judges consider factors such as the impact of substantive law, social policy, or broader litigation dynamics on the certification question.[228]

The judge's discretion extends to the internal "management of the operations of a class proceeding on a day-to-day basis, including the behavior of the participating lawyers and parties."[229] For example, judges have discretion to decide on both the extent of discovery and whether or not to hold an evidentiary hearing.[230] If a class is certified, the court must use its discretion to define the class's claims, appoint class counsel, and articulate the issues raised in the case.[231] Decisions to certify are overturned on appeal only for clear abuse of discretion.[232] Judges therefore wield a great amount of discretion during certification proceedings.

Judges are vested with a great deal of discretion for a reason: The Advisory Committee determined that the class action served a necessary purpose and

224. *See* Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981); Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897, 1898 (2014).

225. Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 643 (6th Cir. 2006); *see also* Smith v. ConocoPhillips Pipe Line Co., 801 F.3d 921, 925 (8th Cir. 2015).

226. Wolff, *supra* note 224, at 1898 n.4 (quoting FED. R. CIV. P. 23(b)(3)(D)).

227. *Id.* at 1926 ("[A] court has minimal power to authorize class certification outside the clear boundaries of Rule 23's text. In contrast, the discretion not to certify has formed a significant part of the class action jurisprudence of the federal courts since the enactment of the 1966 revisions to Rule 23.").

228. *Id.* at 1926–39.

229. *Id.* at 1916.

230. BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 9 (3d ed. 2010).

231. FED. R. CIV. P. 23(c)(1). For further discussion of this power, see Wolff, *supra* note 224, at 1918–26.

232. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 630 (1997) (Breyer, J., concurring and dissenting) ("The law gives broad leeway to district courts in making class certification decisions, and their judgments are to be reviewed by the court of appeals only for abuse of discretion."), *quoted affirmatively in* Brown v. Nucor Corp., 785 F.3d 895, 902 (4th Cir. 2015). For a comprehensive discussion of the abuse of discretion standard as applied to class certification decisions, see Wolff, *supra* note 224, at 1901–10.

that a judge is in the best position to determine whether the evidence in each case warrants class treatment. In his scholarship, Tobias Wolff suggests judges need discretion in deciding whether to certify so that courts have the freedom to "test the capacity of the class action to facilitate the 'just, speedy, and inexpensive' resolution of mass claims."[233] Imposing the FRE could significantly infringe on a judge's ability to exercise her discretion in determining whether an action is suitable for class treatment. A judge should be permitted to consider inadmissible evidence as she sees fit.

Of course, this rationale requires one to accept that judges can effectively screen out irrelevant evidence on their own, without hearing attorneys' evidentiary objections. Judges are generally assumed more than capable of doing so. For example, in response to defendants' evidentiary objections during a class certification proceeding, one court simply stated that "to the extent any evidence proffered by the parties constitutes a legal conclusion or lacks foundation, the Court will not consider such material."[234] But of the limited empirical evidence comparing judges' decisionmaking capabilities to jurors', the findings suggest that judges overassess their capacity to rise above the cognitive failings of jurors.[235] If this is the case, perhaps inadmissible evidence, such as hearsay or irrelevant evidence, could inappropriately influence a judge's certification decision.[236] To this point, Linda Mullenix describes a "'bad narrative' strategy" whereby plaintiffs provide heaps of evidence for the sole purpose of telling "a narrative about the evil corporate defendant."[237] The litigants aim to convince the court to certify because the defendant has committed some terrible wrong and deserves to be held accountable, rather than because the requirements of FRCP 23 are met. The current system assumes the judge is only relying on appropriate evidence,[238] but without applying the

233. Wolff, *supra* note 224, at 1899 (quoting FED. R. CIV. P. 1).
234. Blair v. CBE Grp., Inc., 309 F.R.D. 621, 627 (S.D. Cal. 2015). This argument comports with the theory that "our law of evidence strives to prevent error by excluding from jurors information that might mislead them." John H. Langbein, *Historical Foundations of the Law of Evidence: A View From the Ryder Sources*, 96 COLUM. L. REV. 1168, 1195 (1996).
235. *See* Schauer, *supra* note 100, at 188–91; *see also* Barbara A. Spellman, *On the Supposed Expertise of Judges in Evaluating Evidence*, 156 U. PA. L. REV. 1, 6–7 (2007) (discussing judges' ability to assess evidence).
236. *See* Mullenix, *supra* note 70, at 629 ("After all, evidence that is hearsay, irrelevant, and inadmissible is precisely that—material that may be unreliable and untrustworthy.").
237. *Id.* at 627; *see also id.* at 640–41 (describing attorneys' habit of "pad[ding] the record for certification and appeal" with the overproduction of inadmissible evidence).
238 *Id.* at 643.

FRE there is no record verifying whether the judge is in fact relying only on relevant, reliable evidence.[239]

But the ability of an admissible-at-trial rule to remedy these concerns is limited. First, if the FRE apply at class certification, attorneys could be more likely to supplement their flood of evidence with a flood of evidentiary objections. A recent class certification proceeding in the Ninth Circuit contained as many as 184 objections to the plaintiffs' evidence.[240] Second, even if the difference between a judge and a jury's capacity to give proper weight to otherwise inadmissible evidence is overstated, even a small difference could warrant relaxing the evidentiary rules.[241] Third, applying the evidence rules is also likely less effective in nonjury proceedings like class certification because a judge would be screening evidence from herself.[242] In evaluating whether the evidence complies with the FRE, the judge will have already exposed herself to the allegedly misleading evidence. The evidence conceivably could factor into her FRCP 23 determination even if it was ultimately ruled inadmissible. If that is the case, the record would be no clearer

239. *See In re* Leon R.R., 48 N.Y.2d 117, 122 (N.Y. 1979) ("[T]here is simply no way of gauging the subtle impact of inadmissible hearsay on even the most effective trier of fact."), *quoted by* Toys "R" Us, Inc. v. Canarsie Kiddie Shop, Inc., 559 F. Supp. 1189, 1203 (E.D.N.Y. 1983).

240. Pedroza v. PetSmart, Inc., No. ED CV 11-298-GHK, 2013 WL 1490667, at *1 (C.D. Cal. Jan. 28, 2013). If the courts made it clear that the FRE did not apply at class certification, the parties might be less inclined to raise evidentiary objections in the first place. At the very least, it would allow the court to quickly dispose of the objections, as it did in *Pedroza*. *See id.*

241. *See* United States v. Nguyen, No. 1:07-CR-00075, 2008 WL 540230, at *9 (E.D. Cal. Feb. 25, 2008) ("While it is still possible for a Rule 403 type of error to unduly influence a judge, '[n]onjury trials present a much smaller danger of unfair prejudice than jury trials.'" (alteration in original) (quoting Carter v. Hewitt, 617 F.2d 961, 972 n.13 (3d Cir. 1980))); *see also* United States v. Caudle, 48 F.3d 433, 435 (9th Cir. 1995) ("[I]t would be most surprising if such potential prejudice had any significance in a bench trial.").

242. John Sheldon and Peter Murray noted:

> When judges sit without juries, however, there is no point either in trying to screen evidence or in issuing limiting instructions. Screening is impossible, because the person who does the screening is the very person from whom the evidence is supposed to be screened, and it makes no sense to ask judges to instruct themselves.

John Sheldon & Peter Murray, *Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials*, 86 JUDICATURE 227, 228 (2003); *see also* Anderson Living Tr. v. WPX Energy Prod., LLC, 306 F.R.D. 312, 379 n.39 (D.N.M. 2015) ("[T]here is no practical way to screen a presiding judge entirely from hearing inadmissible evidence . . . ."); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1259–60 (2005) (discussing judges' ability to deliberately disregard evidence after it has been presented).

under an admissible-at-trial rule.[243] Given the relatively low benefit gained from strictly applying the FRE, and in order to stay true to its discretionary nature, judges should maintain the discretion to consider evidence even if it might otherwise be inadmissible at trial.

CONCLUSION

The role of evidence during class certification proceedings has greatly increased. Consequently, courts and lawmakers must clarify whether the FRE apply to these proceedings. May a judge certify a class based only on evidence that would be admissible at trial? Or may she consider inadmissible evidence when debating certification? Courts that have addressed the admissibility question have done so based on incomplete analyses—they either gloss over FRE 1101, which identifies the proceedings to which the evidentiary rules apply, or overlook its broader rationale. A more comprehensive analysis of the question shows that congressional intent does not foreclose the possibility of finding the FRE inapplicable to class certification proceedings. In fact, given the nature of the proceeding, it is not only permissible but also desirable for judges to maintain the discretion to consider inadmissible evidence when determining whether to certify a class.

243. At least one court has acknowledged that it is "perhaps more realistic and more honest for the judge to consider all but the most egregiously inadmissible pieces of evidence . . . and factor any evidentiary infirmity into the weight he or she gives to them." *Anderson*, 306 F.R.D. at 379 n.39.