No.

In the Supreme Court of the United States

BEHR DAYTON THERMAL PRODUCTS LLC, ET AL.,
PETITIONERS

v.

TERRY MARTIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether plaintiffs, having failed to demonstrate that common issues predominate over individual issues as to their cause of action under Federal Rule of Civil Procedure 23(b)(3), may nevertheless obtain certification of issue classes for that cause of action under Rule 23(c)(4).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Behr Dayton Thermal Products LLC; Behr America, Inc.; Old Carco LLC; and Aramark Uniform & Career Apparel LLC. Respondents are Terry Martin, Linda Russel, Nancy Smith, and Deborah Needham.

Petitioner Behr Dayton Thermal Products LLC is now known as MAHLE Behr Dayton LLC; petitioner Behr America, Inc., is now known as MAHLE Behr USA, Inc. Both petitioners are subsidiaries of MAHLE Behr GmbH & Co. KG, a privately held company.

Petitioner Old Carco LLC (incorrectly identified as Chrysler Motors LLC in the court of appeals' caption) was formerly known as Chrysler LLC. Old Carco LLC was dissolved on April 10, 2010, and is no longer in existence.

Petitioner Aramark Uniform & Career Apparel LLC is wholly owned by Aramark Corporation, a public company. Aramark Corporation has no parent corporation, and T. Rowe Price Group, Inc., owns 10% or more of its stock.

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Petitioners Behr Dayton Thermal Products LLC; Behr America, Inc.; Old Carco LLC; and Aramark Uniform & Career Apparel LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 896 F.3d 405. The district court's order granting class certification in relevant part (App., *infra*, 29a-69a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2018. A petition for rehearing was denied on August 20, 2018 (App., *infra*, 23a-24a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23 provides in relevant part:

> **(b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:
>
> > **(1)** prosecuting separate actions by or against individual class members would create a risk of:
> >
> > > **(A)** inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> >
> > > **(B)** adjudications with respect to individual class members that, as a practical matter, 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;
> >
> > **(2)** the party opposing the class 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; or
> >
> > **(3)** 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. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * *

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

STATEMENT

This case presents a question of paramount importance involving class actions: namely, whether plaintiffs, having failed to demonstrate that common issues predominate over individual issues as to their cause of action under Federal Rule of Civil Procedure 23(b)(3), may nevertheless obtain certification of issue classes for that cause of action under Rule 23(c)(4). In the decision under review, the court of appeals affirmed a district court's decision to certify numerous issues for class treatment after having previously decided that neither those issues nor

any others predominated over the individual issues as to the relevant claims.

The court of appeals' decision deepens a circuit conflict on the correct approach to issue classes: specifically, on whether a party can bypass the requirements of Rule 23(b)(3) by seeking class certification only as to certain issues relevant to a cause of action. The courts of appeals have taken conflicting approaches on that question for more than two decades, and the confusion has only continued to grow. Because the question implicates the fundamental mechanics of class actions, this Court's intervention is essential. The petition for a writ of certiorari should be granted.

1. As the Court is well aware, Federal Rule of Civil Procedure 23 governs class actions. Rule 23(a) provides that a proposed class action must satisfy four requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. If all of those requirements are satisfied, a court must then determine whether the class satisfies the additional requirements for the three types of class actions set out in Rule 23(b). Rule 23(b)(1) provides for class treatment in cases in which the defendant is obliged to treat class members alike or class members are making claims against a fund insufficient to satisfy all of the claims. *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 412 (5th Cir. 1998); see *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 834 (1999). Rule 23(b)(2) permits class treatment where "the party opposing the class 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."

This case concerns the most common type of class action, under Rule 23(b)(3). That provision sets out the mechanism for, *inter alia*, claims for monetary damages

on a classwide basis. A class action brought under Rule 23(b)(3) must meet the additional requirements of predominance and superiority. As to predominance, Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." And as to superiority, Rule 23(b)(3) requires that a class action be "superior to other methods for fairly and efficiently adjudicating the controversy."

Rule 23(c) contains a number of procedural requirements and tools for class actions, including specifications for certification orders, notice to class members, the form of judgments, and the creation of issue classes and subclasses. Of particular relevance here, Rule 23(c)(4) provides that, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."

2. Respondents are residents of the McCook Field neighborhood of Dayton, Ohio. They allege that their neighborhood lies atop plumes of groundwater contamination emanating from two facilities currently or previously owned by petitioners. App., *infra*, 2a-4a.

In 2008, respondents filed a class action against petitioners and others, alleging that petitioners had known of the groundwater contamination but had failed to prevent or remediate it. According to respondents, chemicals released from petitioners' facilities produced vapors that rose up through the soil and made the air in and around their properties unhealthy, a process termed "vapor intrusion." Respondents brought suit on behalf of more than 500 property owners who had allegedly been harmed by vapor intrusion. The operative version of their complaint raises eleven claims, including trespass, private nuisance, and unjust enrichment. App., *infra*, 2a-5a.

3. Under Rule 23(b)(3), respondents sought the certification of two liability-only classes—one for each plume—on five of their claims. In the alternative, respondents requested certification of seven issue classes under Rule 23(c)(4). App., *infra*, 32a-33a.

The district court refused to certify the liability-only classes under Rule 23(b)(3), but it certified the issue classes under Rule 23(c)(4). App., *infra*, 47a-69a. As to the liability-only classes, the court determined that the proposed classes satisfied the requirements of Rule 23(a) but failed the predominance requirement of Rule 23(b)(3). *Id.* at 38a-60a. With regard to the predominance inquiry, respondents conceded that "there are several issues which must be resolved on an individual basis, including whether individual class members suffered any compensable injury, and if so, to what extent." *Id.* at 48a-49a. In addition, the court determined that there were additional individual issues related to causation: specifically, the court explained that proving actual injury and proximate cause would require a "property-by-property inquiry." *Id.* at 49a-53a. As a result, although aspects of respondents' claims were susceptible to classwide proof, the district court concluded that "[h]ighly individualized issues concerning fact-of-injury and causation evidence overwhelm the few questions that are common to the class." *Id.* at 60a.

The district court then turned to respondents' alternative request to certify issue classes. App., *infra*, 61a-69a. The court recognized a circuit conflict on the relationship between Rule 23(b)(3) and (c)(4), and it adopted what it characterized as the view of the Second and Ninth Circuits: namely, that issue classes can be certified without a finding of predominance for the whole cause of action. *Id.* at 63a-65a. Citing the same allegedly common issues

that it identified in applying the predominance requirement of Rule 23(b)(3), the district court certified those issues for class treatment under Rule 23(c)(4). *Id.* at 67a.

4. a. Both petitioners and respondents petitioned the court of appeals for leave to file interlocutory appeals under Rule 23(f). The court of appeals granted petitioners' petition and denied respondents', limiting its review to petitioners' challenge to the certification of issue classes under Rule 23(c)(4). App., *infra*, 25a-27a. In denying respondents' petition, the court of appeals stated that the district court had not abused its discretion in determining that the predominance requirement of Rule 23(b)(3) was not satisfied. *Ibid.*

b. On petitioners' petition for interlocutory review, the court of appeals affirmed. App., *infra*, 1a-22a. At the outset, the court of appeals noted that "other circuits have disagreed about how Rule 23(b)(3)'s requirements interact with Rule 23(c)(4)." *Id.* at 9a. Surveying the circuit conflict, the court of appeals noted that the Second and Ninth Circuits had adopted the "broad view," which "permits utilizing Rule 23(c)(4) even where predominance has not been satisfied for the cause of action as a whole." *Ibid.* The Fifth Circuit, by contrast, had espoused the "narrow view," which "prohibits issue classing if predominance has not been satisfied for the cause of action as whole." *Id.* at 10a-11a. The court of appeals characterized two other circuits, the Third and Eighth, as using a "functional, superiority-like analysis instead of adopting either the broad or narrow view." *Id.* at 11a. The court identified several other circuits as having recognized the conflict and supported one view or the other. *Id.* at 10a-12a.

The court of appeals then purported to adopt the "broad view" of the Second and Ninth Circuits. App., *infra*, 12a-14a. In adopting the "broad view," the court of appeals relied on now-removed language from a previous

version of Rule 23(c), which had specified that, once an issue had been selected for class treatment, Rule 23's other provisions "shall then be construed and applied accordingly." *Ibid.* By contrast, the court reasoned, "the narrow view would virtually nullify Rule 23(c)(4)." *Ibid.*

The court of appeals proceeded to conduct a miniature predominance inquiry into whether common issues predominated *within the issue classes certified by the district court*. App., *infra*, 14a-18a. The court of appeals determined that petitioners had not "identified any individualized inquiries that outweigh the common questions prevalent *within each issue*." *Id.* at 16a. The court also conducted an inquiry into superiority, which it considered "a backstop against inefficient use of Rule 23(c)(4)." *Id.* at 18a-20a. As to superiority, the court analyzed whether certifying issue classes benefited the entire litigation, while also considering "the risk of prejudice to the rights of those who are not directly before the court." *Id.* at 18a. The court of appeals reasoned that "resolving the seven issues will go a long way toward [determining petitioners' liability], and this is the most efficient way of resolving the seven issues that the district court has certified." *Id.* at 19a. Because the district court's use of issue classes "took a meaningful step toward resolving [respondents'] claims," the court of appeals held that it was proper. *Id.* at 21a.

5. The court of appeals subsequently denied petitioners' petition for rehearing. App., *infra*, 23a-24a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision, which upheld the certification of issue classes despite the absence of predominance as to any cause of action, deepens an existing three-way circuit conflict. The Second and Ninth Circuits require a showing that the use of issue classes would lead to

"material advancement" of the litigation. Although the Sixth Circuit purported to align itself with the Second and Ninth Circuits, it actually joined a second group of courts, including the Third and Seventh Circuits, that have adopted more functional approaches focusing on the fairness and efficiency of issue classes. By contrast to both of those groups of circuits, the Fifth Circuit requires that predominance be satisfied for an entire cause of action before considering whether to certify an issue class.

The court of appeals erred in diverging from the Fifth Circuit's approach—the only approach that adheres to Rule 23's text and structure and faithfully applies this Court's precedent. Any approach that does not require a finding of predominance for an entire cause of action provides an end-run around the requirements of Rule 23(b)(3), which this Court has repeatedly reminded lower courts stringently to apply. The Court should grant review in this case to decide the circumstances under which issue classes are permissible—a question of exceptional legal and practical significance.

A. The Decision Below Deepens A Conflict Among The Courts Of Appeals

The courts of appeals have reached divergent conclusions about whether an issue class may be certified under Rule 23(c)(4) when the cause of action to which the issue relates does not satisfy the requirements of Rule 23(b)(3). The decision below further entrenches a three-way conflict among the courts of appeals. The Second and Ninth Circuits permit issue certification as long as it will "materially advance" the litigation. Like the court of appeals in the decision below, the Third and Seventh Circuits have taken different, more functional approaches that look to efficiency and fairness to the parties but do not require

that any efficiency gains from an issue class materially advance the litigation. And the Fifth Circuit requires a finding of predominance for the entire cause of action before certifying an issue class.

The conflict among the courts of appeals has been recognized both by courts that have taken sides in the conflict and by those that have not yet done so. See, *e.g.*, *Hohider* v. *United Parcel Service, Inc.*, 574 F.3d 169, 200 n.25 (3d Cir. 2009) (describing the question as "a difficult matter that has generated divergent interpretations among the courts"); *In re St. Jude Medical, Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) (noting "a conflict in authority" on the question); *In re Nassau County Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006) (describing the question as "a matter as to which the [c]ircuits have split"); *Gunnells* v. *Healthplan Services, Inc.*, 348 F.3d 417, 444 (4th Cir. 2003) (noting that "there is a circuit conflict as to whether predominance must be shown with respect to an entire cause of action, or merely with respect to a specific issue, in order to invoke (c)(4)"), cert. denied, 542 U.S. 915 (2004); see generally Laura J. Hines, *Codifying the Issue Class Action*, 16 Nev. L.J. 625, 639-650 (2016) (describing different standards). This Court should grant review and provide overdue guidance on the relationship between Rule 23(b)(3) and (c)(4).

1. The Second and Ninth Circuits have adopted what the court of appeals described as the "broad view." Under that test, a court "may employ Rule 23(c)(4) to certify a class as to common issues * * * regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement." *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (internal quotation marks and citation omitted), abrogated on other grounds by *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008); *Valentino* v. *Carter-Wallace, Inc.*, 97 F.3d 1227,

1234 (9th Cir. 1996). Those courts further require, however, that the certified issue must "materially advance the litigation" by "reduc[ing] the range of issues in dispute and promot[ing] judicial economy." *McLaughlin*, 522 F.3d at 234 (citation omitted); see *Rahman* v. *Mott's LLP*, 693 Fed. Appx. 578, 579 (9th Cir. 2017).

The "material advancement" standard has been applied like a "predominance lite" test, ascertaining whether resolution of the issue would significantly move the litigation forward or simply leave behind significant individual issues. Hines, 16 Nev. L.J. at 641-642. While the standard is a "broad" one, it is not automatically satisfied. For example, in *McLaughlin*, the Second Circuit considered a class action brought by cigarette smokers who alleged that manufacturers of "light" cigarettes had fraudulently represented that the cigarettes were healthier than "full-flavored" cigarettes. See 522 F.3d at 220. The court determined that whether the defendants had made misrepresentations and whether they had engaged in a "scheme to defraud" were susceptible to classwide proof. See *id.* at 223, 234. But the court nevertheless concluded that it "would not materially advance the litigation" to certify an issue class, on the ground that individual issues of reliance, injury, and damages would still require independent adjudication. See *id.* at 234.

2. The Third and Seventh Circuits, along with the Sixth Circuit in the decision below, have taken different, functional approaches to issue certification. Those approaches vary somewhat, but they share two features. These courts consider issues beyond the efficiency concerns that are the focus of the "material advancement" test. At the same time, these courts do not require the same degree of "advancement" of the litigation. On balance, the approaches of these courts are if anything more

permissive than the already "broad" approach adopted by the Second and Ninth Circuits.

a. In *Gates* v. *Rohm & Haas Co.*, 655 F.3d 255 (2011), the Third Circuit acknowledged the "circuit disagreement." *Id.* at 273. Rather than "joining either camp," however, the Third Circuit chose a third route: a multifactor test based on the American Law Institute's Principles of Aggregate Litigation. *Ibid.* Writing for the court, Judge Scirica set out a series of considerations to be taken into account, including "the efficiencies to be gained by granting partial certification in light of realistic procedural alternatives"; "the potential preclusive effect or lack thereof that resolution of the proposed issue class will have"; "the impact individual proceedings may have upon one another, including whether remedies are indivisible such that granting or not granting relief to any claimant as a practical matter determines the claims of others"; and "the repercussions certification of an issue(s) class will have on the effectiveness and fairness of resolution of remaining issues." *Ibid.* As a leading commentator on class actions has noted, the Third Circuit's multifactor test takes into account considerations "not obviously raised by the material advancement standard," and "few courts interpreting that standard have raised or applied such factors." Hines, 16 Nev. L.J. at 645-646.

Applying that standard in *Gates*, the Third Circuit ultimately affirmed the denial of a liability-only issue class. See 655 F.3d at 272-274. The court reasoned that "[c]ertification of a liability-only issue class may unfairly impact defendants and absent class members." *Id.* at 274. The plaintiffs (who, like the plaintiffs in this case, were challenging environmental contamination) could not explain "how their estimates of exposure to residents over substantial periods of time corresponds to the level of con-

tamination currently present at each home," with the result that absent class members who suffered greater contamination would be prejudiced from the certification of an issue class. *Ibid.*

b. The Seventh Circuit has taken a similar functional approach that considers a wide range of concerns, including fairness, economy, and efficiency. See, *e.g.*, *McReynolds* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir.) (Posner, J.), cert. denied, 568 U.S. 887 (2012); *Pella Corp.* v. *Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (per curiam), cert. denied, 562 U.S. 1178 (2011); *Mejdrech* v. *Met-Coil Systems Corp.*, 319 F.3d 910, 911 (7th Cir. 2003) (Posner, J.). Under that approach, issue certification can be appropriate where, for example, "the judicial economy from consolidation of separate claims outweighs any concern with possible inaccuracies from their being lumped together in a single proceeding for decision by a single judge or jury." *Mejdrech*, 319 F.3d at 911.

At the same time, the Seventh Circuit has made clear that no one factor is dispositive in its analysis. In particular, the court has noted that judicial economy does not justify issue certification "[w]hen enormous consequences turn on the correct resolution of a complex factual question, [because] the risk of error in having it decided once and for all by one trier of fact rather than letting a consensus emerge from several trials may be undue." *Id.* at 912; see *McReynolds*, 672 F.3d at 491.

c. In the decision below, the Sixth Circuit also undertook a "functional, superiority-like analysis," despite declaring that it intended to adopt the "broad view" of the Second and Ninth Circuits. App., *infra*, 12a-20a. After conducting a miniature predominance inquiry within each issue class, the court proceeded to analyze superiority for

the entire litigation. In so doing, the court considered factors such as the likely "value of individual damages awards," noting that smaller awards made class treatment more appropriate, and the "risk of prejudice to the rights of those not directly before the court." App., *infra*, 18a-19a (citation omitted). Like the Third and Seventh Circuits, therefore, the Sixth Circuit considered factors beyond those relevant to the "material advancement" test used in the Second and Ninth Circuits.

Conversely, the Sixth Circuit did not require that the issue classes advance the litigation in the more rigorous way that the Second and Ninth Circuits have. To be sure, the court stated that issue certification would "materially advance the litigation," but that was simply because it would "go a long way toward" resolving part of the issue of liability. App., *infra*, 20a. Echoing the Seventh Circuit, the court heavily relied on the fact that resolving the issues in "one fell swoop" would "conserve the resources of both the court and the parties." *Ibid.*; see, *e.g.*, *Mejdrech*, 319 F.3d at 911. In analyzing the propriety of certifying the issue classes, however, the court nowhere considered the individual issues regarding causation and damages that would require individual adjudication, even though those issues had caused the district court not to certify a liability-only class for any of the causes of action under Rule 23(b)(3). App., *infra*, 13a-22a. The considerations of causation and damages mirrored those that led the Second Circuit to *deny* certification of the issue class in *McLaughlin*. See 522 F.3d at 234.

3. Finally, in *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), the Fifth Circuit adopted what the court of appeals described as the "narrow view," under which a cause of action must satisfy the requirements of Rule 23(b)(3) before individual issues can be certified under Rule 23(c)(4). See *id.* at 745 n.21.

The district court in *Castano* identified four issues relevant to the plaintiffs' putative class under Rule 23(b)(3): "(1) core liability; (2) injury-in-fact, proximate cause, reliance and affirmative defenses; (3) compensatory damages; and (4) punitive damages." 84 F.3d at 739. The court "analyzed each category to determine whether it met the predominance and superiority requirements," then certified issue classes on "core liability" and punitive damages under Rule 23(c)(4). *Ibid.*

The Fifth Circuit reversed. It reasoned that "[s]evering the defendants' conduct" from individualized issues such as reliance could "not save the class action" because a court "cannot manufacture predominance through the nimble use of subdivision (c)(4)." 84 F.3d at 745 n.21. Instead, the Fifth Circuit explained, "[t]he proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial." *Ibid.* The court added that interpreting Rule 23(c)(4) as "allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues" would "eviscerate the predominance requirement," leading to "automatic certification in every case where there is a common issue." *Ibid.*

The Fifth Circuit, and district courts within the circuit, has consistently adhered to that standard over the last two decades. See, *e.g.*, *Corley* v. *Orangefield Independent School District*, 152 Fed. Appx. 350, 355 (5th Cir. 2005) (per curiam); *Smith* v. *Texaco, Inc.*, 263 F.3d 394, 409 (5th Cir. 2001), withdrawn and appeal dismissed, 281 F.3d 477 (5th Cir. 2002) (per curiam); *Allison*, 151 F.3d at 422; *Colindres* v. *QuitFlex Manufacturing*, 235 F.R.D. 347, 380 (S.D. Tex. 2006).

4. The decision below squarely implicates the circuit conflict. The court of appeals expressly rejected the Fifth Circuit's approach as conflicting with its chosen standard. App., *infra*, 10a-13a. And the court of appeals did not disturb the district court's determination that respondents could not establish predominance even for the issue of *liability*, let alone for any of their claims as a whole. *Id.* at 17a; see *id.* at 60a-61a. Under the Fifth Circuit's approach, therefore, issue certification was indisputably inappropriate here.

What is more, despite the court of appeals' stated embrace of the "broad view" of the Second and Ninth Circuits, the issue classes it upheld would not survive in those circuits either. As noted above, see p. 14, the district court identified the same problems with a liability-only class in this case that the Second Circuit identified with the class in *McLaughlin*: namely, that individualized causation and damages issues would overwhelm the liability issues that involved petitioners' "common course of conduct." App., *infra*, 48a; see *McLaughlin*, 522 F.3d at 223, 234. The court of appeals' decision to uphold the issue classes cannot be reconciled with *McLaughlin* or other decisions of the Second and Ninth Circuits applying the "material advancement" test. Given the entrenched and widely recognized circuit conflict on the question presented, further review is warranted.

B. The Decision Under Review Is Erroneous

This Court's intervention is also needed because the court of appeals' approach to the relationship between Rule 23(b)(3) and (c)(4) is incorrect. In holding that class treatment can be applied to issues without determining that class treatment was appropriate for the cause of action as a whole, the decision below conflicts with the text

and structure of Rule 23, the history of that rule, and this Court's class-action jurisprudence.

1. a. As with a statute, the interpretation of Rule 23 begins with its text. See, *e.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 361-362 (2011). The language of Rule 23 confirms that Rule 23(b) establishes mandatory prerequisites to class treatment.

Rule 23 begins with subdivision (a), entitled "Prerequisites," which provides that members of a class "may sue or be sued as representative parties on behalf of all members only if" four listed criteria are satisfied. Rule 23(b), entitled "Types of Class Actions," further provides that "[a] class action may be maintained if Rule 23(a) is satisfied and if" the proposed class satisfies the additional requirements for one of the three listed categories of actions.

Two conclusions follow from those provisions. First, class treatment is appropriate only if all of the criteria in Rule 23(a) and in at least one of the categories in Rule 23(b) are met. Second, the party seeking to satisfy Rule 23(b) must do so at least as to a cause of action, because Rule 23(b) refers to how a "class action may be maintained." Indeed, Rule 23(b) is entitled "Types of Class Actions." Lest there be any doubt, Rule 23(c)(1)(A) makes clear that the question a court confronts on a motion for class certification is "whether to certify the action as a class action." And even Rule 23(c)(4) acknowledges that the subject of Rule 23 is "an action." Although there is some ambiguity as to whether or not the term "action" refers to an entire case or a single cause of action, see *Jones* v. *Bock*, 549 U.S. 199, 220-221 (2007), it cannot mean anything more granular than that, such as an issue within a cause of action.

That understanding is further supported by other aspects of the text of subdivisions (a) and (b), which again

must be satisfied for any class action. Rule 23(a) allows individual parties to "sue or be sued" on behalf of a class; of course, a party does not sue on individual issues, but rather through a cause of action. Rule 23(a) also contemplates analysis of the typicality of "claims or defenses." And Rule 23(b)(3) inquires whether a class action is the superior method for "adjudicating the controversy," and takes into account the desirability of "litigation of the claims in the particular forum." All of those indicia support the proposition that a court should consider whether class treatment is appropriate for a cause of action before proceeding to certify issue classes for that cause of action.

b. The structure of Rule 23 further supports that proposition. As explained above, Rule 23 begins with a set of necessary conditions for any class action in subdivision (a). The rule then requires the party seeking class treatment to "show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 614 (1997).

Rule 23(c), by contrast, does not create new or discrete types of class actions. It instead provides instructions and tools for certification orders, notice to class members, and the form of judgments. Notably, each of the various provisions of Rule 23(c) is based on the premise that the three types of class actions in Rule 23(b) are the only types of class actions. Rule 23(c)(2), for example, provides rules relating to notice "for (b)(1) or (b)(2) [c]lasses" and "for (b)(3) [c]lasses." And Rule 23(c)(3) similarly provides separate rules relating to the form of judgments for (b)(1) and (b)(2) class actions and for (b)(3) class actions. Nowhere do those provisions suggest that there is some fourth category of class action that does not meet the requirements of Rule 23(b).

By its terms, Rule 23(c)(4), entitled "Particular Issues," does not create a new kind of class action. Instead,

it provides a tool for *managing* a class action; it authorizes a class action to proceed as a class on particular issues, even though other issues within the cause of action will be tried individually. In other words, that provision explicitly authorizes what seems implicit in Rule 23(b)(3): a class action can be maintained with respect to particular common issues even if the cause of action also contains individual issues, as long as the individual issues do not predominate over common ones. In that way, Rule 23(c)(4) is analogous to Federal Rule of Civil Procedure 42(b), which authorizes separate trials of one or more separate issues. See Laura J. Hines, *The Unruly Class Action*, 82 Geo. Wash. L. Rev. 718, 740 (2014).

c. In the decision below, the court of appeals applied the requirements of Rule 23(b)(3) after the fact, and in a stunted fashion, to the Rule 23(c)(4) issue classes that the district court had certified. App., *infra*, 14a-20a. Unsurprisingly, it determined that common issues predominated *within* each of the issue classes. *Id.* at 18a. But the court of appeals' approach was hopelessly confused and exactly backward. For a class seeking certification under Rule 23(b)(3), a court may allow the class action to proceed on particular issues only if it has first made a *threshold* determination that common issues predominate *for the cause of action as a whole*. The court of appeals' approach—which permits certification of issue classes for causes of action that do not meet the requirements of Rule 23(b)(3)—is inconsistent with the plain language of Rule 23 and "does obvious violence to the Rule's structural features." *Wal-Mart*, 564 U.S. at 363. And the same can be said of the approaches taken by circuits other than the Fifth Circuit, which focus on considerations not contained in the text of Rule 23.

2. The history of Rule 23 also supports the conclusion that the court of appeals' approach is erroneous. The advisory committee notes accompanying the addition of what is now Rule 23(c)(4) contained only limited discussion of that provision. That note stated in full:

> This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Fed. R. Civ. P. 23(c)(4) advisory committee's note (1966 amendment). In the committee's example, the "action"—*i.e.*, a cause of action—would proceed as a "class action" through the liability phase; the action would then continue even after it lost its "'class' character," as the class "members" "come in" individually to prove damages. Rule 23(c)(4) thus facilitates the maintenance of the action as a class action as to the predominating common issues.

Notably, the advisory committee note to Rule 23(b)(3), which was adopted at the same time as Rule 23(c)(4), is to the same effect. That note expressly acknowledged that "a fraud perpetrated on numerous persons by the use of similar misrepresentations" may be appropriate for class treatment "despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class." Fed. R. Civ. P. 23(b)(3) advisory committee's note (1966 amendment). The note thus similarly contemplated a situation in which Rule 23(c)(4) could be used to facilitate the maintenance of an action as a class action despite the existence of individual issues.

At the same time, that note recognized limitations on the use of the class-action mechanism: "[a] 'mass accident'

resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." Fed. R. Civ. P. 23(b)(3) advisory committee's note. Under the court of appeals' approach in this case, however, the class-action mechanism could still be used in such cases (much like this one) under the guise of Rule 23(c)(4) issue classes.

While it may seem obvious today that a class action may proceed with respect to common issues despite the existence of non-predominating individual issues, that was decidedly not true at the time of the promulgation of Rule 23(b)(3) and (c)(4). The advisory committee note to Rule 23(b)(3) cited several cases in support of the proposition that a class action may be maintained "despite the need" for separate damages determinations. Fed. R. Civ. P. 23(b)(3) advisory committee's note. In one of those cases, the Second Circuit reversed the dismissal of a suit as a class action even though "claimants who become parties to this class suit would, if successful, be entitled to a different measure of damages." *Oppenheimer* v. *F.J. Young & Co.*, 144 F.2d 387, 390 (1944). In so holding, the Second Circuit rejected the Eighth Circuit's apparent approach of "read[ing] into [Rule 23] a requirement that each [plaintiff] must recover damages at the same rate." *Ibid.* Rule 23(c)(4) thus provided an explicit mechanism for the Second Circuit's holding: a class action may proceed with respect to particular issues, even where individual determinations will be necessary down the road.

Consistent with that understanding, Rule 23(c)(4) received relatively little attention in the rulemaking history. See Hines, 82 Geo. Wash. L. Rev. at 747-748. In one of those discussions, the advisory committee's reporter, Benjamin Kaplan, stated that Rule 23(c)(4) made "obvious

points" but would be "useful for the sake of clarity and completeness." *Ibid.* There is simply no reason to believe that the rulemakers intended Rule 23(c)(4) to provide for a new and additional form of class action, especially given the text and structure of the rest of the rule.

3. The court of appeals' decision is out of step with this Court's class-action jurisprudence. Indeed, the Court has already stated that, under Rule 23, a party seeking class certification must "show that the *action* is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem*, 521 U.S. at 614 (emphasis added); see, *e.g.*, *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 33 (2013); *Wal-Mart*, 564 U.S. at 345.

The Court has also repeatedly emphasized the importance of rigorously enforcing the requirements of Rule 23(b)(3). Rule 23(b)(3) provides a mechanism for pursuing claims for monetary damages; as such, it was the "most adventuresome innovation" of the 1966 class-action amendments, and it reaches "situations in which class-action treatment is not as clearly called for as it is in Rule 23(b)(1) and (b)(2) situations." *Amchem*, 521 U.S. at 614-615 (internal quotation marks and citation omitted). While Rule 23(b)(3) "allows class certification in a much wider set of circumstances" than Rule 23(b)(1) and (b)(2), it also provides "greater procedural protections." *Wal-Mart*, 564 U.S. at 362. Specifically, it includes two requirements—predominance and superiority—that the other provisions of Rule 23(b) do not. See *Comcast*, 569 U.S. at 33-34. This Court has stated that a court has a "duty to take a close look" at whether common questions predominate over individual ones. *Id.* at 34 (internal quotation marks and citation omitted).

If allowed to stand, the court of appeals' approach to Rule 23(c)(4) would "reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Comcast*, 569 U.S. at 36. Under that approach, a plaintiff can proceed on behalf of a class

simply by identifying one or more common issues, without any threshold determination of whether those issues predominate over individual ones in the cause of action as a whole. That approach not only renders some form of class certification a "foregone conclusion" in many cases, but it also renders the predominance requirement an effective bystander to the analysis. *Gunnells*, 348 F.3d at 451 (Niemeyer, J., concurring in part and dissenting in part); see *Castano*, 84 F.3d at 745 n.21.

The Court has already rejected similar attempts to end-run the requirements of Rule 23(b)(3). In *Amchem*, the Court held that a settlement class must satisfy the predominance requirement, or else "that vital prescription would be stripped of any meaning in the settlement context." 521 U.S. at 623. Similarly, in *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999), the Court held that a Rule 23(e) fairness hearing cannot "swallow" the "protective requirements of Rule 23 in a subdivision (b)(1)(B) action." *Id.* at 858.

So too here. It would be untenable to conclude that Rule 23(c)(4) provides an alternative avenue to class certification, effectively unencumbered by the careful protections of Rule 23(b)(3). Indeed, aside from the prefatory phrase "[w]hen appropriate," Rule 23(c)(4) contains no explicit requirements or restrictions for the certification of issue classes. While some courts have filled the void by crafting requirements of their own, each of those tests is untethered to the text of the rule.

In light of the text and structure of Rule 23 and this Court's precedents, the court of appeals' interpretation of Rule 23(c)(4), which permits the certification of issue classes where the requirements of Rule 23(b)(3) are not satisfied for the cause of action, is "simply implausible." *Ortiz*, 527 U.S. at 844. This Court should grant review and rein

in the overbroad use of issue classes by the lower courts, including the court below.

C. The Question Presented Is An Exceptionally Important One, And This Case Is An Ideal Vehicle To Address It

1. The question presented in this case is a recurring one of substantial legal and practical importance. Modern class actions present the most significant "exception to the usual rule" that "litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart*, 564 U.S. at 348 (citation omitted). Rule 23(b)(3) represents the "most adventuresome innovation" in that regard. *Amchem*, 521 U.S. at 614 (internal quotation marks and citation omitted). It is also the most commonly used means of bringing class actions. See Christine P. Bartholomew, *The Failed Superiority Experiment*, 69 Vand. L. Rev. 1295, 1299 (2016). And because class actions can consist of potentially millions of claims, they can result in "blackmail settlements," *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)), cert. denied, 516 U.S. 867 (1995), where even defendants facing "questionable claims" must settle given the possibility of "devastating loss[es]." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011); see *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Insurance Co.*, 559 U.S. 393, 455 n.3 (2010) (Ginsburg, J., dissenting).

The question presented in this case has become all the more pressing since this Court's decision in *Comcast*, which has caused some lower courts to doubt the ability to certify classes under Rule 23(b)(3) without a classwide measure of damages. See *Jacob* v. *Duane Reade, Inc.*, 293 F.R.D. 578, 583-585 (S.D.N.Y. 2013), aff'd, 602 Fed. Appx.

3 (2d Cir. 2015) (collecting cases). That, in turn, has increased the use of Rule 23(c)(4) as a means of circumventing Rule 23(b)(3)'s requirements. See, *e.g.*, *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838, 860 (6th Cir. 2013) (noting the "limited application" of *Comcast* where Rule 23(c)(4) is used), cert. denied, 571 U.S. 1196 (2014); *Jacob*, 293 F.R.D. at 592-594. If the court of appeals' decision is allowed to stand, lower courts will have a powerful incentive to bypass the "rigorous analysis" this Court's precedents require by certifying issue classes. *Comcast*, 569 U.S. at 33.

It is therefore of vital importance that this Court clarify the circumstances under which issue classes are permissible—and, specifically, whether an issue class can be certified where the predominance requirement of Rule 23(b)(3) is not met for the relevant cause of action. Given the entrenched conflict on that question, this Court's review is urgently needed.

2. This case is an ideal vehicle to address the question presented. The question was pressed and passed upon at length by both the district court and the court of appeals. App., *infra*, 9a-20a, 61a-68a. The district court also carefully considered whether broader classes would satisfy Rule 23(b)(3) and determined that they did not satisfy the predominance requirement, a determination that the court of appeals left undisturbed. *Id.* at 27a, 47a-61a. And because respondents' issue classes would not have been certified under the Fifth Circuit's approach (or even under the approach of the Second and Ninth Circuits), the choice of standard is outcome-determinative in this case. See pp. 14-16, *supra*. This case cleanly presents the Court with a long-overdue opportunity to address a fundamental issue of class-action procedure.

The question presented needs no further ventilation in the lower courts, as the arguments on both sides of the conflict are well-developed. See Hines, 16 Nev. L.J. at 628-650. Some of the leading cases in the conflict were decided more than twenty years ago. See *Castano*, 84 F.3d at 745 n.21; *Valentino*, 97 F.3d at 1234. And there is no prospect of the conflict resolving itself without the Court's intervention: courts that have considered the question on multiple occasions have maintained their positions. See, *e.g.*, *McLaughlin*, 522 F.3d at 234; *Rahman*, 693 Fed. Appx. at 579; *Smith*, 263 F.3d at 409. The value of further percolation on the question presented is thus exceedingly slim.

* * * * *

The decision under review deepened an entrenched and widely recognized circuit conflict on the question presented among the courts of appeals. It also ignored the letter and spirit of Rule 23. Whether an issue class may be certified when the cause of action to which the issue relates does not satisfy the requirements of Rule 23(b)(3) is an exceptionally important question, and this case is an ideal vehicle for resolving it. Further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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