No. 21-_____

In the Supreme Court of the United States

EDUCATIONAL COMMISSION FOR FOREIGN MEDICAL GRADUATES,

Petitioner,

v.

MONIQUE RUSSELL; JASMINE RIGGINS; ELSA M. POWELL; and DESIRE EVANS,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Rule 23(b)(3) mandates that when a party seeks to certify a class action that involves both common and individual issues, certification is proper when the common issues predominate over the individual issues and a class action is a superior method of adjudicating the controversy as a whole. Fed. R. Civ. P. 23(b)(3).

The decision below holds that there is an alternate route to certification under Rule 23(b)(3), which allows certification even when the common issues do not predominate over the individual issues for a single claim. Under this theory, if certification of common issues is "appropriate" under Rule 23(c)(4), a court analyzes predominance under Rule 23(b)(3) by considering only the certified (common) issues, ignoring the uncertified (individual) issues.

The question presented is:

Whether, when an action involves both common and individual questions, a court may certify common questions for class treatment under Rule 23(b)(3) without finding that the common questions predominate over the individual questions.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings include those listed on the cover.

Educational Commission for Foreign Medical Graduates (ECFMG) has no parent corporation and no publicly held corporation owns more than 10% of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings:

- *Russell v. Educational Commission for Foreign Medical Graduates*, No. 2:18-cv-05629-JDW, United States District Court for the Eastern District of Pennsylvania. Order granting motion for class certification entered March 23, 2020; and
- *Russell v. Educational Commission for Foreign Medical Graduates*, No. 20-2128, United States Court of Appeals for the Third Circuit. Opinion and judgment entered September 24, 2021.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Educational Commission for Foreign Medical Graduates ("ECFMG") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS AND ORDERS BELOW

The panel order vacating and remanding the district court's class certification order (App. 1a) is reported at 15 F.4th 259 (3d Cir. 2021). The order of the district court (App. 35a) and the opinion of the district court (App. 38a) are unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on September 24, 2021. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 23 of the Federal Rules of Civil Procedure provides, in pertinent part:

> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
>
> . . .

> (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. . . .

(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

The decision below deepens an entrenched circuit split regarding the interaction of Rule 23(b) and Rule 23(c)(4), specifically, whether Rule 23(c)(4) may be used to evade the requirements of Rule 23(b)(3) and certify classes that cannot satisfy Rule 23(b)(3)'s predominance requirement under the ordinary test.

Respondents asserted claims on behalf of a putative interstate class against ECFMG for negligent infliction of emotional distress. For these claims, individual questions—including causation and injury—predominate over any common questions.

Nonetheless, in the decision below, the Third Circuit held that predominance of the purportedly common issues—duty and breach—over the individual issues involved in the claims is not required for class certification under Rule 23(c)(4) and Rule 23(b)(3).

1. Federal Rule of Civil Procedure 23 governs class certification. Class certification is permissible only if the party seeking certification satisfies both Rule 23(a) and one of the paragraphs of Rule 23(b).

Rule 23(a) provides that a class action must satisfy four requirements. The first two concern the proposed class action: (1) the class must be "so numerous that joinder of all members is

impracticable," and (2) there must be "questions of law or fact common to the class." The third and fourth requirements concern the representative parties, who (3) must possess "claims or defenses" that "are typical of the claims or defenses of the class" and (4) must "fairly and adequately protect the interests of the class."

Rule 23(b) creates three different types of class actions. This petition concerns the third type, a class action seeking damages under Rule 23(b)(3), "'the most adventuresome' innovation" in the 1966 class-action amendments. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614–15 (1997) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Com. L. Rev. 497, 497 (1969)).

Certification under Rule 23(b)(3) requires a court to find both *predominance*—"that the questions of law or fact common to class members predominate over any questions affecting only individual members"—and *superiority*—"that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

Rule 23(c) governs various procedural aspects of the class action device and applies whether a class action is certified under Rule 23(b)(1), (b)(2), or (b)(3). Rule 23(c) prescribes the contents of the certification order (Rule 23(c)(1)), the form of notice and any opt-out required (Rule 23(c)(2)), and the form of judgment (Rule 23(c)(3)). This petition concerns Rule 23(c)(4), which provides—as Rule

23(b)(3) contemplates—that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."

2. Respondents—named plaintiffs Monique Russell, Jasmine Riggins, Elsa Powell, and Desire Evans—are former patients of a physician who was licensed to practice medicine by the State of Maryland in 2011, App. 9a, after completing a residency at Howard University Hospital. App. 41a.[1] Respondents do not assert claims based on the quality of the medical care they received from their physician: he delivered respondents' children and successfully performed unplanned emergency cesarean-section surgery on Russell and Riggins. App. 10a.

Respondents instead claim that even if they received capable medical treatment, they suffered emotional distress upon learning that their physician—who they knew as "John Akoda"—used a false name and misused another's social security numbers in applying for his residency program and was truly named "Oluwafemi Charles Igberase." App. 6a, 9a, 10a.

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[1] The district court incorrectly states that the physician who treated respondents "was not a doctor at all." App. 38a. To the contrary, it is undisputed that the individual who treated respondents completed a residency program and was licensed to practice medicine. Respondents' claim is that he should not have been licensed, not that he was not licensed.

Rather than suing Akoda, the hospitals that employed him, the state medical board that licensed him, or the residency program from which he graduated, respondents sued petitioner, Educational Commission for Foreign Medical Graduates, a non-profit organization based in Philadelphia that certifies international medical graduates as ready to enter post-graduate medical education in the United States by verifying (1) that a recognized foreign medical school has confirmed the authenticity of the graduate's medical school diploma and (2) that the graduate received passing grades on tests of medical knowledge and English proficiency. App. 39a.

Respondents contend that ECFMG should have performed further investigation, discovered Dr. Akoda's deception, and prevented him from treating patients. App. 9a. They claim to have suffered compensable emotional distress as a result of ECFMG's certification of Dr. Akoda.

3. Respondents sought certification under Rule 23(b)(3) of a class of "all patients examined and/or treated in any manner by Oluwafemi Charles Igberase (a/k/a Charles J. Akoda, M.D.)." App. 42a. They proposed two alternatives. They first sought certification of a class as to liability. *Id.* In the alternative, they sought certification of nine specific issues:

> (1) whether ECFMG undertook or otherwise owed a duty to class members who were patients of Igberase;

(2) whether ECFMG breached its duty to class members;

(3) whether ECFMG undertook or otherwise owed a duty to hospitals and state medical boards, such that ECFMG may be held liable for foreseeable injuries to third persons such as class members pursuant to Restatement (Second) of Torts § 324A;

(4) whether ECFMG breached its duty to hospitals and state medical boards;

(5) whether the emotional distress and other damages that Plaintiffs allege were a foreseeable result of ECFMG's conduct;

(6) whether ECFMG's conduct involved an unusual risk of causing emotional distress to others under Restatement (Second) of Torts § 313;

(7) whether ECFMG is subject to liability under Restatement (Second) of Torts § 876 for assisting Igberase in committing fraud;

(8) whether ECFMG knew or should have known that Akoda was, in fact, Igberase; and

(9) whether it was foreseeable that ECFMG's conduct could result in emotional distress experienced by class members

App. 42a-43a.

The district court first concluded that respondents satisfied the requirements of

Rule 23(a). App. 50a-56a. Rather than proceeding to address Rule 23(b)(3), however, the district court held that because the plaintiffs sought certification of particular issues, it was unnecessary to consider Rule 23(b), and a court should only consider the "*Gates* factors" (the test applied only by the Third Circuit for whether certification is "appropriate" under Rule 23(c)(4)): "[T]he Court will consider Rule 23(a) and then turn to the Gates factors in conducting its analysis." App. 45a.

Recognizing that causation and damages are individual questions, the district court readily rejected the proposed liability class: "Given the individual nature of the causation and damages inquiry, the Court will not certify a class to tackle liability as a whole." App. 58a. "There would be little efficiency to be gained from such a certification because the evidence in the class action portion of the case would overlap with the evidence in the individual portion of the case." *Id.*

The district court agreed, however, to certify a class for the issues that "relate to whether ECFMG had a relevant legal duty and whether it breached that duty." App. 59a. It concluded that issue certification under Rule 23(c)(4) was "appropriate" based on the *Gates* factors. App. 59a-61a.

The district court's analysis covers only three paragraphs. It first states that "the questions of duty and breach favor issue certification because they are questions of law and/or fact common to all class members and subject to common proof." App.

59a. This essentially restates that a common issue has been identified. The district court next stated that certification would allow "a single trial with a single, preclusive determination," App. 60a, a truism about a class proceeding. And finally, the district court stated that "[p]artial certification will not damage any class member's statutory or constitutional rights." App. 60a.

The district court did not make any findings about superiority or predominance under Rule 23(b)(3).

3. After the Third Circuit granted its Rule 23(f) petition, ECFMG briefed the merits of the appeal to the Third Circuit. Respondents did not cross-appeal. In addition to challenging the district court's analysis of the Rule 23(a) factors, App. 24a n.4, ECFMG raised two arguments relating to the district court's certification under Rule 23(c)(4). First, ECFMG argued that Rule 23(c)(4) is not an alternative means of class certification and that certification under Rule 23(b)(3) is unavailable unless the common questions predominate over the individual questions for a claim. App. 23a-24a. Second, in the alternative, ECFMG argued that the district court abused its discretion in applying the *Gates* factors and refusing to consider Rule 23(b). App. 24a. ECFMG requested that the Third Circuit render judgment that no class could be certified.

The Third Circuit, in an opinion written by Judge Restrepo, rejected ECFMG's primary argument about the interaction of Rule 23(b)(3) and

Rule 23(c)(4) (which would have led to rendition of a judgment that no class certification was permissible). The opinion holds that *Gates* (and Rule 23(c)(4)) "permit[s] the certification of issues that do not resolve liability." App. 20a. Put bluntly, "Rule 23(c)(4) can be used even though full Rule 23(b)(3) certification is not possible due to the predominance infirmities." App. 28a-29a.

The Third Circuit agreed, however, that the district court erred because it "did not determine whether the duty and breach elements of Plaintiffs' claim satisfied Rule 23(b)(3)." App. 23a. And the district court "failed to rigorously consider several *Gates* factors." App. 25a. As a result, it vacated the class certification and remanded to the district court. App. 32a.

ECFMG respectfully now petitions this Court for certiorari.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Deepens an Entrenched, Acknowledged Circuit Split Regarding the Interaction of Rule 23(c)(4) and Rule 23(b)(3).

The courts of appeals are sharply divided on the interaction of Rule 23(c)(4) and Rule 23(b)(3). The split has persisted for more than a quarter century and been acknowledged by numerous decisions. *See*, *e.g., In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006); *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259, 273 (3d Cir. 2021); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 444 (4th Cir. 2003); *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 411 (6th Cir. 2018); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008). Commentators, too, have discussed this split for years. *See*, *e.g.*, Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U.L. Rev. 729, 807-15 (2013) ("[Rule 23(c)(4)] has created significant conflict and confusion among the courts[.]"). This Court's guidance on this complicated and important question of class action jurisprudence is long overdue.

At a high level, the split concerns whether Rule 23(c)(4) may be used to certify a class action under Rule 23(b)(3) when common issues do not predominate over individual issues. The Fifth Circuit and (it appears) the Eighth Circuit hold—

correctly, in petitioner's view—that certification under Rule 23(b)(3) always requires predominance to be satisfied for a cause of action as a whole.

The Second, Third, Sixth, and Ninth Circuits hold instead that if a court certifies common issues for class treatment under Rule 23(c)(4), then a class may be certified under Rule 23(b)(3), even when the (uncertified) individual questions predominate over the (certified) common questions.

Even within the plurality, however, there is significant division over both (1) when it is "appropriate" to certify issues under Rule 23(c)(4); and (2) how (and whether) the subsequent Rule 23(b)(3) inquiry should be conducted.

This Court's intervention is required to provide much needed guidance on the proper interaction between Rule 23(b)(3) and Rule 23(c)(4).

A. The Fifth and Eighth Circuits Hold That Rule 23(c)(4) Cannot Be Used to Evade the Requirements of Rule 23(b)(3).

The Fifth Circuit has rejected "the nimble use of subdivision (c)(4)" to "manufacture predominance" by first limiting the case to common issues and then applying Rule 23(b)(3). *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). Instead, the Fifth Circuit holds, a "cause of action, as a whole, must satisfy the predominance requirement of (b)(3)." *Id.*

If the common issues predominate over the individual issues, Rule 23(c)(4) then "allows courts to sever the common issues for a class trial." *Id.*

The alternative—"[r]eading 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 of Rule 23(b)(3)" and effectively allow "automatic certification in every case where there is a common issue, a result that could not have been intended." *Id.*

The Fifth Circuit remains steadfast in its interpretation of the interaction between Rule 23(b)(3) and Rule 23(c)(4). *See Corley v. Orangefield Indep. Sch. Dist.*, 152 F. App'x 350, 355 (5th Cir. 2005) (applying *Castano* to hold that "plaintiffs must first show that the cause of action, taken as whole, satisfies the predominance requirement of Rule 23(b)(3)"); *Smith v. Texaco, Inc.*, 263 F.3d 394, 409–10 (5th Cir. 2001) (applying *Castano* to hold that "the cause of action, as a whole, must satisfy Rule 23(b)(3)'s predominance requirement"), *opinion withdrawn, cause dismissed*, 281 F.3d 477 (5th Cir. 2002); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421–22 (5th Cir. 1998) (applying *Castano* and declining to certify the first stage of a pattern or practice claim).

The Eighth Circuit appears also to hold that class certification requires satisfying Rule 23(b)(3)'s predominance requirement for the cause of action as a whole, regardless of Rule 23(c)(4). In *Ebert v.*

General Mills, Inc., the Eighth Circuit reversed an order certifying the issue of liability under Rule 23(c)(4) in an environmental contamination lawsuit. 823 F.3d 472 (8th Cir. 2016). It held that the district court erred in its "deliberate limiting of issues": "[B]y bifurcating the case and narrowing the question for which certification was sought, the district court limited the issues and essentially manufactured a case that would satisfy the Rule 23(b)(3) predominance inquiry." *Id.* at 479. Considering the cause of action as a whole, the Eighth Circuit held that "[a]lthough there may be common matters in this litigation that can be decided on a class-wide basis," the matter is "unsuitable for class certification under Rule 23(b)(3)" because "individual issues predominate the analysis of causation and damages." *Id.* at 480.

Although *Ebert* does not cite Rule 23(c)(4) directly, the analysis cites *In re St. Jude Medical, Inc.*, which notes the conflict regarding issue certification under Rule 23(c)(4). *See Ebert*, 823 F.3d at 480 (citing 522 F.3d at 841 (discussing "issue certification under Rule 23(c)(4)")). And at least one district court has recognized that *Ebert* bears on certification under Rule 23(c)(4). *See In re Nat'l Hockey League Players' Concussion Inj. Litig.*, 327 F.R.D. 245, 257 (D. Minn. 2018) (citing *Ebert* in rejecting certification under Rule 23(c)(4)).

Although perhaps not conclusive as to the Eighth Circuit's view, *Ebert* provides a strong indication that the Eighth Circuit shares the Fifth

Circuit's refusal to permit Rule 23(c)(4) to be used to evade Rule 23(b)(3).

B. A Plurality of Circuits Allow Class Certification Even When Common Issues Do Not Predominate Over Individual Issues.

In contrast, the Second, Third, Sixth, and Ninth Circuits hold that Rule 23(c)(4) allows issues to be certified for class treatment under Rule 23(b)(3), even when common issues do not predominate for the claim as a whole: "[W]e hold that a court may employ subsection (c)(4) to certify a class as to liability [under Rule 23(b)(3)] regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement." *Nassau Cnty.*, 461 F.3d at 227; *accord* App. 23a ("[The Third Circuit] does not require Plaintiffs seeking issue-class certification to prove that their cause of action as a whole satisfies a subsection of Rule 23(b)[.]"); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (issue certification permitted "[e]ven if the common questions do not predominate over the individual questions").

In these circuits, when a party seeking certification (ordinarily, the plaintiff) invokes Rule 23(c)(4), the district court must consider whether the common issues are "appropriate" for class certification.

If so, only these certified issues (the common issues[2]) are considered during any Rule 23(b)(3) predominance analysis. *See Nassau Cnty.*, 461 F.3d at 221 ("[A] court must first identify the issues potentially appropriate for certification and . . . then apply the other provisions of the rule, i.e., subsection (b)(3) and its predominance analysis[.]" (internal quotation marks and citation omitted)); App. 24a ("Plaintiffs [must] demonstrate that the issues they seek to certify satisfy one of Rule 23(b)'s subsections."); *Martin*, 896 F.3d at 411 (directing lower courts to "apply the Rule 23(b)(3) predominance and superiority prongs after common issues have been identified for class treatment under Rule 23(c)(4)"). The issues not identified as "appropriate" for certification are ignored, and no comparison of the individual and common issues occurs.

In these circuits, then, when Rule 23(c)(4) is cited, the focus of the class certification inquiry has shifted from Rule 23(b)(3)'s requirements to whether certification is "appropriate" under Rule 23(c)(4).

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[2] This assumes that the movant has successfully identified common issues. In this case, ECFMG denies that the certified issues of breach and duty are truly common and is opposing class certification on remand on this basis. For purposes of this petition, ECFMG assumes that the certified issues on which certification is sought—breach and duty—are "common" and would, if considered without reference to the uncertified issues, satisfy Rule 23(b)(3).

But although the circuits agree on this approach at a high level, within the plurality, there is significant disagreement, both about (1) when issue certification is "appropriate"; and (2) how issue certification affects the Rule 23(b)(3) inquiry. Indeed, it appears that no two circuits apply precisely the same the test in all respects.

1. Within the plurality, the circuits disagree about the test for when issue certification is "appropriate."

The Sixth and Ninth Circuits hold that certification of an issue class is "appropriate" (and thus permissible under Rule 23(c)(4)) when it would "materially advanc[e] the disposition of the litigation as a whole." *Rahman v. Mott's LLP*, 693 F. App'x 578, 579 (9th Cir. 2017); *see also D.C. by & through Garter v. County of San Diego*, 783 F. App'x 766, 767 (9th Cir. 2019), *cert. denied sub nom. D. C. by & through Garter v. San Diego County*, 141 S. Ct. 255 (2020) ("significantly advance the resolution of the underlying case"); *Martin*, 896 F.3d at 416 ("materially advance the litigation").

The Second Circuit appears to agree: "Certifying, for example, the issue of defendants' scheme to defraud, would not materially advance the litigation[.]" *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008), *abrogated on other grounds*, *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S.

639 (2008); *see also Robinson v. Metro–N. Commuter R.R.*, 267 F.3d 147, 168 (2d Cir. 2001) ("reduce the range of issues in dispute and promote judicial economy").

These circuits thus reduce issue class certification to an essentially functional inquiry.

The Third Circuit, as shown in the decision below, stands alone in applying a multi-factor test—the "*Gates* factors"—under Rule 23(c)(4). *See* App. 17a–18a. This analysis, the Third Circuit has held, is "analytically independent" from Rule 23(b)(3). App. 31a (quoting *Gonzalez v. Corning*, 885 F.3d 186, 202 (3d Cir. 2018), *as amended* (Apr. 4, 2018)). To determine whether issue class certification is "appropriate," a district court must consider a "non-exclusive" list of nine factors that the Third Circuit adopted a decade ago. *Id.*; *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011).

No other circuit has adopted the *Gates* factors—or any other list of factors—to determine whether certification is "appropriate" under Rule 23(c)(4). Even among the circuits that generally agree that Rule 23(c)(4) permits certification of classes otherwise impermissible, the Third Circuit stands alone.

2. Within the plurality, the circuits disagree about how Rule 23(b)(3) applies.

Similarly, if a court determines that certification of issues under Rule 23(c)(4) is "appropriate," there is a conflict among the plurality regarding how the Rule 23(b)(3) analysis should be performed.

The Ninth Circuit appears to hold that no analysis of predominance is necessary: "[P]redominance was not required for certifying a class under Rule 23(c)(4)." *Reitman v. Champion Petfoods USA, Inc.*, 830 F. App'x 880, 882 (9th Cir. 2020); *see also Reitman v. Champion Petfoods USA, Inc.*, No. CV181736DOCJPRX, 2019 WL 7169792, at *14 (C.D. Cal. Oct. 30, 2019) ("[P]redominance need not be met to be certified under Rule 23(c)(4)."); *Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.*, 308 F.R.D. 630, 633 (N.D. Cal. 2015) ("[A] Rule 23(c)(4) issues class must still meet the requirements of Rule 23(a) and (b) (except for the predominance requirement of Rule 23(b)(3))."). *But see Valentino*, 97 F.3d at 1234 ("The district court abused its discretion by not adequately considering the predominance requirement before certifying the [issue] class."). The decisions do not appear to address how superiority should be considered.

The Sixth Circuit, in contrast, requires "a robust application of predominance and superiority

to the issues . . . certified for class treatment." *Martin*, 896 F.3d at 413.

The Second Circuit appears to apply the predominance inquiry to the issues certified under Rule 23(c)(4) but the superiority inquiry to the litigation as a whole. *Nassau Cnty.*, 461 F.3d at 230.

The decision below appears to expand the split even further, apparently holding that when issues are certified under Rule 23(c)(4), not only all of Rule 23(b)(3)—but also Rule 23(a)[3]—must be evaluated only with respect to those issues. *See* App. 14a ("A party seeking to certify 'particular issues' for class treatment must show . . . that those issues satisfy Rule 23(a)'s prerequisites and that those issues are maintainable under Rule 23(b)(1), (2), or (3)." (internal quotation marks and citation omitted)).

3. These holdings have created confusion among the cases and among the district courts.

The description above represents our best understanding of the positions of the different circuits, but their positions are far from clear.

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[3] There is no textual basis for this statement. Rule 23(a)(3) plainly requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class," not typical with respect to issues within those claims or defenses.

The Fourth Circuit, for example, is often described as joining with the Second, Sixth, and Ninth Circuits. *See Martin*, 896 F.3d at 412 ("In addition to the Second and Ninth Circuits, the Fourth and Seventh Circuits have supported this approach."); App. 29a ("That view, the so-called 'broad view,' has been adopted or supported by the Second, Fourth, Sixth, Seventh, and Ninth Circuits.").

But in the case ordinarily cited as support for this proposition, *Gunnells v. Healthplan Services, Inc.*, the Fourth Circuit made clear that it was not taking sides in the split:

> [W]e have no need to enter that fray . . . because . . . Plaintiffs' cause of action as a whole against TPCM satisfies the predominance requirements of Rule 23. Thus even if the view adopted by the Fifth Circuit (that predominance must be established within a given cause of action to invoke (c)(4)) rather than that of the Ninth Circuit (that this is not necessarily required) constituted the law of this circuit, our holding here would be in full accordance with the Fifth Circuit view.

348 F.3d at 444–45.

Similarly, the Seventh Circuit's authority appears to be mixed. In *Kartman v. State Farm Mutual Automobile Insurance Co.*, the Seventh

Circuit held that certification under Rule 23(c)(4) was not "appropriate," explaining that because "the ultimate relief sought is money damages, . . . the requirements for certification of a damages class under Rule 23(b)(3) must be satisfied." 634 F.3d 883, 886 (7th Cir. 2011). The case explained class certification consistently with petitioner's view: "A damages class may be certified under Rule 23(b)(3) and particular issues identified for resolution on a class-wide basis pursuant to Rule 23(c)(4)." *Id.* at 895.

But the decision below reads the Seventh Circuit as consistent with the Second, Sixth, and Ninth Circuits. App. 29a n.6.

C. The Circuit Split Is Acknowledged and Entrenched.

The circuits have repeatedly acknowledged the divide in their understandings of Rule 23(c)(4)(A). *See Robinson*, 267 F.3d at 167 n.12. The Third Circuit, in the decision below, reaffirmed its unique approach (i.e., the *Gates* factors). No circuit has reconsidered its position, and there is no reasonable prospect that one will do so.

The circuits have not provided—and will not provide—a clear and definitive answer to the interaction of Rule 23(c)(4) and Rule 23(b)(3). Further percolation will not be helpful, and the necessary guidance can come only from this Court.

II. Rule 23(c)(4) Does Not Permit Evasion of Rule 23(b)(3).

Review is warranted all the more because the plurality understanding of Rule 23(c)(4) is incorrect. This Court has explained that "[c]onsidering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011) (citation omitted). There is no basis for limiting the predominance inquiry to only some of the elements of the underlying cause of action.

A. The plurality view would nullify the predominance requirement of Rule 23(b)(3).

Most obviously, the plurality view cannot be correct because it would nullify the predominance requirement of Rule 23(b)(3).

As the decision below indicates, the plurality view relies on a false dichotomy between "partial Rule 23(b)(3)" certification under Rule 23(c)(4) and "full Rule 23(b)(3) certification." *See* App. 29a (holding that certification under Rule 23(c)(4) "can be used even though full Rule 23(b)(3) certification is not possible due to the predominance infirmities").

Not only do the concepts of "partial" and "full" Rule 23(b)(3) certification have no basis in the rules, but the distinction makes no difference. Both forms of certification have exactly the same effect: If a claim receives "full" Rule 23(b)(3) certification

because the common questions predominate over individual questions, then the common question will be resolved classwide and the individual questions resolved in subsequent individual proceedings. If a claim receives "partial" Rule 23(b)(3) certification of the common questions under Rule 23(c)(4), the common questions will be resolved classwide, and the individual questions resolved in subsequent individual proceedings.

The only difference between "full Rule 23(b)(3) certification" and the "partial certification" (wrongly permitted by some courts of appeals) is that partial certification is a far less difficult standard for achieving exactly the same result.[4]

Under the reasoning of the Second, Third, Sixth, and Ninth Circuits, if certifying the common issues is "appropriate" under Rule 23(c)(4), then there is no need to prove that those common issues predominate over the (uncertified) individual issues.

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[4] For example, courts have held that liability-only classes can be created both under the orthodox Rule 23(b)(3) analysis and (more easily) through Rule 23(c)(4). *Compare Seijas v. Republic of Argentina*, 606 F.3d 53, 58 (2d Cir. 2010) (holding that a liability-only class satisfies Rule 23(b)(3)'s predominance requirement for the claim as a whole even though "damages may have to be ascertained on an individual basis") *with Nassau Cnty.*, 461 F.3d 227 ("[A] court may employ [Rule 23(c)(4)] to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement."). There is no difference between the liability-only classes created by these two different routes to certification.

If a claim involves both common issues and individual issues, class counsel should always cite Rule 23(c)(4) and seek certification only of common issues under that provision. Indeed, it would verge on malpractice for class counsel to intentionally choose the more difficult route of "full Rule 23(b)(3) certification" rather than the easier "partial" Rule 23(c)(4) route. There is no reason that the predominance comparison expressly mandated by Rule 23(b)(3) should ever take place.

As a result, every word that this Court has written about predominance should be meaningless. *E.g., Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (discussing predominance); *Comcast Corp. v. Behrend*, 569 U.S. 27, 30 (2013) (same); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013) (same). If the plurality view were correct, this Court discussed predominance in each of these cases only because plaintiffs' counsel erred in failing to invoke Rule 23(c)(4). Had plaintiffs' counsel invoked Rule 23(c)(4) in those cases, whether the common questions predominated over (uncertified) individual questions would have been irrelevant.

Rule 23(b)(3) expressly requires that when a claim involves common and individual issues, class certification is appropriate only if the common questions predominate over "any individual questions." A reading of the Rules that renders this provision superfluous cannot be correct.

B. The error arises from a misreading of the Advisory Committee Notes.

The genesis of the error appears to be a misreading of the Advisory Committees Notes regarding Rule 23.

As this Court has explained, the predominance requirement of Rule 23(b)(3) does not require that there be no individual questions. "The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson*, 577 U.S. at 453 (internal quotation marks and citation omitted). When common issues predominate, "the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately[.]" *Id.*; *see also Comcast Corp.*, 569 U.S. at 41 (Ginsburg and Breyer, JJ., dissenting) ("This predominance requirement . . . scarcely demands commonality as to all questions.").

Thus, the Advisory Committee Notes to subdivision (b)(3) explain, class certification is proper where "questions common to the class predominate over the questions affecting individual members." Fed. R. Civ. P. 23, Advisory Committee Notes to Subdivision (b)(3). The Notes use a fraud claim as an example of circumstances in which common liability questions might predominate over individual damages questions: "[A] fraud perpetrated on numerous persons by the use of

similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class." *Id.*

Later, in discussing subdivision (c)(4), the Advisory Committee Notes return to this example: "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, Advisory Committee Notes to Subdivision (c)(4).

The Advisory Committee Notes confirm petitioner's understanding of Rule 23(b). In a fraud claim involving the use of similar misrepresentations on numerous persons, the common liability questions may predominate over individual damages questions and certification may be proper under Rule 23(b)(3). If so, Rule 23(c)(4) allows the common issue of liability to be adjudicated on a classwide basis and the individual issues to be adjudicated individually.

In other words, in the fraud example in the Advisory Committee Notes, Rule 23(c)(4) could be employed to adjudicate liability on a classwide basis *because* (as Rule 23(b)(3) required) the common liability questions predominated over the individual damages questions.

The Second Circuit misread the note to subdivision (c)(4). Overlooking the fraud example in subdivision (b)(3), the Second Circuit assumed that the fraud example in (c)(4) was an exception to Rule 23(b)(3). *See Nassau Cnty.*, 461 F.3d at 226 (relying on the fraud liability example as circumstances "when common questions predominate only as to the 'particular issues' of which the provision speaks"). In other words, the Advisory Committee Notes describe certification under subdivision (c)(4) in circumstances where subdivision (b)(3) *has been satisfied* for the claim as a whole. But the Second Circuit misread the example to justify certification under subdivision (c)(4) even though subdivision (b)(3) *was not satisfied*.

C. The correct reading does not nullify subdivision (c)(4).

As the Advisory Committee Notes demonstrate, the proper understanding of Rule 23(b)(3) and Rule 23(c)(4) does not "rende[r] subsection (c)(4) virtually null." *Nassau Cnty.*, 461 F.3d at 226. To the contrary, Rule 23(c)(4) is employed—either explicitly or implicitly—nearly every time a class action is certified under Rule 23(b)(3).

By definition, an "individual question" cannot be certified for class treatment or resolved on a classwide basis. "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member[.]'" *Tyson Foods*, 577 U.S. at 453 (quoting 2

W. Rubenstein, Newberg on Class Actions § 4:50, pp. 196–97 (5th ed. 2012)).

Any time a claim involves both common and individual questions, a court certifying a Rule 23(b)(3) class necessarily uses Rule 23(c)(4) to certify only the common questions for class adjudication. As discussed above, the decision below rests on a false dichotomy between "full Rule 23(b)(3) certification" and cases involving Rule 23(c)(4). App. 28a-29a.

Nor does the correct approach require "pretend[ing] that subsection (c)(4)—a provision specifically included to make a class action more manageable—does not exist until after the manageability determination [has been] made." *Nassau Cnty.*, 461 F.3d at 227 (citation omitted). Petitioner's view is that Rule 23(c)(4) is what authorizes courts to separate common issues from individual issues for class treatment. The ability of a court (under Rule 23(c)(4)) to resolve only the common issues on a classwide basis is critical to the Rule 23(b)(3) superiority and manageability analyses, regardless of whether the provision is cited expressly.

III. The Interaction of Rule 23(b)(3) and Rule 23(c)(4) Is an Important Question That Should Be Decided by this Court.

This issue is important and recurring, and this area of the law warrants clarity from this Court.

Whether Rule 23(b)(3)'s predominance requirement must always be satisfied by comparing common issues to individual ones—or whether Rule 23(c)(4) can allow certification of a class even when these requirements are not met—will dramatically affect the scope of permissible class certification.

If respondents are correct, then certification is theoretically permissible for any case involving a common issue, limited only by the creativity of plaintiffs' counsel in identifying common issues for class treatment.

This Court has already recognized the "risk of 'in terrorem' settlements" created by class actions. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). And the decision below recognizes the potential pressure that certification exerts on the facts of this case: "If an issue-class jury finds that the Commission owed Plaintiffs a legal duty that it subsequently breached, the Commission may face undue pressure to settle, even if their breach did not cause Plaintiffs' harm." App. 25a.

Class actions are tremendously powerful procedural tools, but that power requires strict rules and vigilance against their misuse. Particularly for important oft-arising issues of federal procedure, the circuits should be in harmony, and they should be correct. Uniformity and clarity can come only from this Court.

IV. This Case Is an Excellent Vehicle.

This case provides an ideal vehicle for this Court to consider the issue. The argument is determinative. It is difficult to imagine a claim less suitable for class treatment than a claim for negligent infliction of emotional distress, and when the claim is considered as a whole, the individual issues—including causation, injury, and damages—predominate over the narrow (allegedly-common) issues of duty and breach that respondents seek to certify. If ECFMG is correct that predominance under Rule 23(b)(3) requires comparing the common questions against the individual questions, then certification is unavailable and judgment should have been rendered denying class certification (rather than remanding for additional consideration by the district court).

This case is a perfect example of a matter in which "full Rule 23(b)(3) certification is not possible due to the predominance infirmities." App. 29a. Certification is possible only if the decision below was correct to hold that Rule 23(c)(4) creates some special form of "partial" Rule 23(b)(3) certification.

This case also illustrates the dangers of the incorrect interpretation of Rule 23(c)(4), in which plaintiffs' counsel seek (and receive) certification of an issue class for the purpose of settlement pressure, without any real plan for trying the case.

The issue is important, and it is ripe for decision. The split is implicated in this case, and a decision on the legal rule in favor of ECFMG would lead to a different result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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