No. 21-948

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

RESPONDENTS' BRIEF IN OPPOSITION

PATRICK A. THRONSON
Counsel of Record
BRENDA A. HARKAVY
JANET, JANET & SUGGS
4 Reservoir Circle, Suite 200
Baltimore, MD 21208
(410) 653-3200
pthronson@jjsjustice.com

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Respondents

(Additional Counsel Listed on Inside Cover)

April 2022

PAUL M. VETTORI
LAW OFFICES OF PETER G. ANGELOS
One Charles Center
100 N. Charles Street, 20th Fl.
Baltimore, MD 21201
(410) 649-2000

BRENT P. CERYES
JONATHAN SCHOCHOR
SCHOCHOR, FEDERICO & STATON
The Paulton
1211 St. Paul Street
Baltimore, MD 21202
(410) 234-1000

CORY L. ZAJDEL
Z LAW LLC
2345 York Rd, Suite B-13
Timonium, MD 21093
(443) 213-1977

NICHOLAS M. CENTRELLA
ROBIN S. WEISS
CONRAD O'BRIEN PC
1500 Market Street
Suite 3900
Philadelphia, PA 19102
(215) 864-9600

KAREN E. EVANS
DAVID E. HAYNES
THE COCHRAN FIRM
1100 New York Avenue N.W.
Suite 340, West Tower
Washington, DC 20005
(202) 682-5800

QUESTION PRESENTED

Whether it is ever permissible for a court to certify one or more issues for classwide resolution pursuant to Rules 23(b)(3) and 23(c)(4), where common questions predominate over individual ones for the certified issues but not necessarily for the case, or a cause of action asserted in it, as a whole?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules

Rulemaking Sources

Treatises

Other Authorities

INTRODUCTION

This case involves claims that petitioner Educational Commission for Foreign Medical Graduates (ECFMG) negligently certified the medical credentials of an impostor. The district court certified an issue class under Federal Rule of Civil Procedure 23(c)(4) to resolve whether ECFMG owed, and breached, duties to patients examined and treated by the impostor. On ECFMG's interlocutory appeal, the United States Court of Appeals for the Third Circuit vacated the certification and remanded for further proceedings to determine whether any class could be certified. Those proceedings are ongoing.

Meanwhile, having prevailed in the Third Circuit, and with both class certification and its own summary judgment motion pending in the district court, ECFMG asks this Court to disrupt a consensus among circuits, rulemakers, and scholars that issue classes may potentially be certified in cases where Rule 23(b)'s requirements would not permit certification for an entire cause of action. This Court has repeatedly denied certiorari petitions raising this issue, and ECFMG offers no compelling reasons for the Court to change course and intervene here, in an appeal in which ECFMG has already prevailed.

The Third Circuit's careful decision concluded the district court failed to conduct a sufficiently rigorous analysis of Rule 23(b) and two of the nine factors the Third Circuit articulated in *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011) to guide a court's exercise of discretion on issue-class certification. The court's decision, however, left open the possibility that, on a proper showing, the district court could certify an issue class. ECFMG contends the Third

Circuit's embrace of the consensus view on the proper analysis of Rule 23(b)(3) predominance for a Rule 23(c)(4) certification—under which predominance is analyzed with respect to the certified issues, not the entire case— "deepens" an "entrenched" circuit split. This view, ECFMG claims, conflicts with decisions of the Fifth and Eighth Circuits, which, ECFMG asserts, prohibit certification of an issue class unless the class's cause of action as a whole satisfies Rule 23(b)(3).

ECFMG's argument relies on out-of-context dicta in a footnote in *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). Properly understood, the *Castano* footnote is consistent with the consensus approach to issue-class certification. Recent Fifth and Eighth Circuit precedents, moreover, also align with the consensus approach.

Federal judicial rulemakers have also rejected ECFMG's proposed approach to issue-class certification. Just four years ago, the Advisory Committee on Civil Rules thoroughly examined the issues raised here, in regular deliberations and through a specially convened Rule 23 Subcommittee. It concluded that amending Rule 23 to provide the relief ECFMG seeks from this Court would be unnecessary and counterproductive and that the circuits were coalescing on a common approach to Rule 23(c)(4) issue classes. And the Committee expressly declined to adopt ECFMG's preferred approach—that issues can only be certified for class treatment if an entire action or cause of action is certified—which lacks support in the text, structure, and history of Rule 23. Changes to Rule 23(c)(4) therefore were not included in the Rule 23 amendments ultimately approved by the Judicial Conference and adopted by this Court.

This Court should not disrupt the outcome of the rulemaking process by granting review to resolve a conflict that does not exist, in a case where the lower courts have not yet decided the certification issue.

STATEMENT

ECFMG is "the central certification agency for graduates of foreign medical schools." (App. 5a.) As Respondents allege, ECFMG negligently investigated and certified a Nigerian national, Oluwafemi Charles Igberase a/k/a John Nosa Akoda (among other aliases), as eligible to enter a medical residency program, despite knowing Igberase/"Akoda" had fraudulently represented his identity and credentials. (App. 6a–9a.) Rather than informing state medical boards, residency programs, and hospitals of Igberase's fraud, ECFMG repeatedly attested that Igberase held a valid ECFMG certification. As a result, "[f]or years, a man using the name 'John Charles Akoda' passed himself off as an OB/GYN." (App. 38a.)

Igberase is now a convicted felon. (App. 41a.) ECFMG consistently refers to him as "Dr. Akoda." But "[a]n error does not become truth by reason of multiplied propagation."[1] He is not "Akoda" and not a doctor. (App. 9a.)

Plaintiffs Monique Russell, Jasmine Riggins, Elsa Powell, and Desire Evans, four of Igberase's unknowing patients, sued ECFMG in the Court of Common Pleas of Philadelphia, seeking compensation for emotional harm. They assert two causes of action—negligence and negligent infliction of emotional distress—on behalf of a putative class. They allege Igberase

---

[1] Mohandas K. Gandhi, *Young India 1924-1926*, at 1285 (1927).

"touched them without informed consent" and "performed inappropriate examinations of a sexual nature while utilizing inappropriate and explicit sexual language." (App. 41a–42a.) This case is about much more than use of a fake name and Social Security number. (Pet. 5.)

ECFMG removed the case to the United States District Court for the Eastern District of Pennsylvania. After substantial discovery, Plaintiffs moved for certification under Federal Rule of Civil Procedure 23(b)(3) and 23(c)(4) 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.) Plaintiffs requested certification of the issue of liability for the two causes of action—or, in the alternative, certification of nine issues common to the class. (App. 42a–43a.)

In an extensive analysis approved by the Third Circuit and not at issue here, the district court first found Respondents had properly defined an ascertainable class that satisfied the four requirements of Rule 23(a). (App. 48a–56a.)

The district court then applied the practical considerations articulated in *Gates* to determine the appropriateness of an issue class under Rule 23(c)(4), but did not expressly find that the proposed issue class satisfied Rule 23(b)(3). (App. 56a–61a.) [2] It declined to certify the issue of liability for the class members' causes of action, finding that resolving liability would require deciding too many individualized questions of causation and harm. (App. 57a–59a.) However, the court found that common issues concerning "whether

[2] The *Gates* factors are listed at App. 17a–18a.

ECFMG had a relevant legal duty and whether it breached that duty" were appropriate for certification. (App. 59a.)

Applying *Gates*, the court concluded 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–60a.) The court found that all class members are "identical in terms of their legal relationship to ECFMG," such that "ECFMG owes the same duty (if any)" to all. (App. 59a–60a.) And whether ECFMG breached its duty "is a common question of fact for each prospective class member," because it turns on ECFMG's conduct, not that of individual class members. (App. 60a.)

Examining the utility of class certification in resolving the action, the district court concluded "there are efficiencies to be gained" through certifying a class on duty and breach. (Pet 60a.) Doing so would permit "a single, preclusive determination about ECFMG's conduct" and avoid repetitive presentation of the same extensive evidence to one jury after another. (*Id.*) Moreover, no other similarly efficient "procedural alternatives" were available. (*Id.*) Finally, the court concluded that certifying an issue class would not "trigger any of the problems about which courts must be mindful under *Gates*," including impairment of a class member's statutory or constitutional rights. (App. 60a.)

The district court accordingly certified an issue class under Rule 23(c)(4), comprising all patients treated by Igberase after he entered a residency program in 2007. (App. 36a.) The certification identified four issues for classwide resolution: (1) whether

ECFMG undertook or otherwise owed a duty to class members; (2) whether ECFMG undertook or otherwise owed a duty to hospitals and state medical boards, such that ECFMG may be held liable to class members pursuant to Restatement (Second) of Torts § 324A; (3) whether ECFMG breached any duty that it owed to class members; and (4) whether ECFMG breached any duty that it owed to hospitals and state medical boards. (*Id.*)

The Third Circuit granted ECFMG leave to appeal under Rule 23(f). It vacated the district court's class certification order on two grounds: "[T]he District Court did not determine whether the duty and breach elements of Plaintiffs' claim satisfied Rule 23(b)(3)," and (2) "the Court also failed to rigorously consider several *Gates* factors," namely "the effect certification of the issue class will have on the effectiveness and fairness of resolution of remaining issues" and "what efficiencies would be gained by resolution of the certified issues." (App. 23a–24a.)

In so holding, the Third Circuit emphasized that issue-class certification requires that the issues certified satisfy Rules 23(a) and (b), and that class resolution of those issues is appropriate in light of the practical considerations outlined in *Gates*. "Rule 23(a) and Rule 23(b) decide if the proposed issues *can* be brought or maintained as [a] class action," it held, "while the *Gates* factors determine whether they *should*." (App. 22a.)

At the same time, the court agreed with the district court's determination that plaintiffs seeking issue-class certification need not "prove that their cause of action as a whole satisfies Rule 23(b)(3)." (App. 23a.) The Third Circuit thus adhered to the "broad view,"

under which "[a] majority of the courts of appeals have concluded that in appropriate cases 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.) It rejected the "narrow view" ECFMG attributed to *Castano*—under which issue class certification is prohibited "if Rule 23(b)(3) predominance has not been satisfied for the cause of action as a whole"—because it has not been adopted by any other circuit, has been rejected by the Advisory Committee on Civil Rules, and "subsequent caselaw from the Fifth Circuit suggests that any potency the narrow view once held has dwindled." (App. 30a. & n.7.)

Accordingly, the Third Circuit remanded to the district court to analyze all *Gates* factors and determine whether the proposed issue classes satisfied Rule 23(b)(3). (App. 32a.)

REASONS FOR DENYING THE WRIT

I. The posture of this case, with class certification and dispositive motions unresolved, makes it especially unsuitable for review.

Petitioner seeks this Court's intervention *in medias res*. After the Third Circuit vacated the district court's class certification and remanded it for further consideration, the district court requested supplemental briefing from the parties on class certification.[3] The parties have submitted two rounds of supplemental briefing.[4] The district court has yet to issue a decision on class certification following remand. The standard for certifying an issue class would be best

[3] Order, ECF No. 77, *Russell v. Educ. Comm'n Foreign Med. Graduates*, No. 2:18-cv-05629-JDW (E.D. Pa. Nov. 9, 2021).

[4] *Id.* at ECF Nos. 79, 80, 95, 96.

considered in the context of a decision granting or denying certification, the propriety of which turns on resolution of a legal question suitable for this Court's determination. Those features are missing here. Meanwhile, whichever answer the Court were to give to the question ECFMG presents would merely result in affirmance of the Third Circuit's decision vacating the original certification order.

ECFMG has also filed several *Daubert* motions and a lengthy motion for summary judgment regarding the claims of the named plaintiffs. The latter seeks dismissal based on an alleged lack of duty, proximate cause, and entitlement to emotional harm damages.[5] Plaintiffs have opposed these motions,[6] and they, too, have yet to be heard.[7]

The district court's decisions on these matters may well change the shape and scope of the case. For example, the district court may deny certification, modify the issues to be certified, determine that the issues of duty and breach can only be certified as to one of the two causes of action, or even rule that Plaintiffs lack a claim altogether. Complicated additional proceedings may follow, including efforts to substitute class representatives and merits appeals.

The Court should not ground an extraordinary intervention into settled class-action doctrine on such shifting sands. This court "generally awaits final judgment in the lower courts before exercising our

---

[5] *Id.* at ECF Nos. 81–83, 87.

[6] *Id.* at ECF Nos. 93–94.

[7] Argument on summary judgment and reargument of class certification was to be held on March 29, 2022 but was canceled. *Id.* at ECF No. 102.

certiorari jurisdiction." *Va. Mil. Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari). Here, there is no operative class certification decision, let alone a final judgment. Further developments below could alter or moot the issues ECFMG presents. If ECFMG is ultimately dissatisfied with the judgment, its objections can be addressed together, if need be, on appeal from a final judgment.

II. There is no intercircuit conflict.

A. The decision below reflects the consensus view of Rule 23(c)(4).

The view of Rule 23(c)(4) expressed by the Third Circuit below conforms to a broad agreement among the circuits that Rule 23(c)(4) certification is not, as ECFMG asserts, limited to circumstances where a cause of action or an action as a whole satisfies Rule 23(b)(3)'s requirements. *See Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 41 (1st Cir. 2003) ("[E]ven if individualized determinations were necessary to calculate damages, Rule (23)(c)(4)(A) would still allow the court to maintain the class action with respect to other issues."); *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006); *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 413 (6th Cir. 2018); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996); *see also Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 443 (4th Cir. 2003) (rejecting view that an issue class can be certified only if the entire action meets Rule 23(b)(3)'s requirements).

As discussed above, the Third Circuit in this case endorsed the consensus position, applying Rule 23(b)(3)'s predominance and superiority requirements

to the issues certified, while employing the *Gates* factors as a guide to the appropriateness of issue certification. The Seventh and Eighth Circuits have similarly declined to adopt a rigid requirement that Rule 23(b)(3)'s criteria must be assessed with respect to an entire cause of action if an issue narrower than a cause of action is proposed for certification. *See McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008).

Although ECFMG points to differences in the way courts have expressed the consensus view, it identifies no conflict among the "plurality" of circuits endorsing the consensus position—let alone explains how any alleged differences among these circuits would result in a different outcome. *Kartman v. State Farm Mutual Automobile Insurance Co.*, which Petitioner identifies as an example of the Seventh Circuit's "mixed" authority (Pet. 21–22), concerned certification of a Rule *23(b)(2)* class on "liability." 634 F.3d 883, 895 (7th Cir. 2011). The court held that Rule 23(b)(2) was "not appropriately invoked for adjudicating common issues in an action for *damages*." *Id.* Neither Rule 23(b)(3) and (c)(4) was "implicated," the court held. *Id.*

Petitioner also misquotes *Reitman v. Champion Petfoods, USA, Inc.*, 830 F. Appx. 880 (9th Cir. 2020). an unpublished Ninth Circuit disposition, as holding that "predominance was not required for certifying a class under Rule 23(c)(4)." (Pet. 19.) The quoted statement reflects the appellate court's characterization of the *district court's* position, not its own. *Reitman*, 830 F. App'x at 882. The court of appeals approvingly cited *Valentino*—the other "side" of the fictive intracircuit split ECFMG posits (see Pet. 19)—in affirming the district court's refusal to certify a liability-only issue

class where numerous individualized liability issues would make issue certification inefficient.

Academic authorities have noted the circuits' "emerging consensus" on a practical approach to Rule 23(c)(4) issue certification that does not depend on whether a cause of action as a whole meets the Rule 23(b)(3) criteria.[8] As Professor Samuel Issacharoff (Reporter of the ALI Principles of the Law of Aggregate Litigation) and Elizabeth Cabraser have concluded:

> [B]y now all federal circuits, including the Fifth Circuit, have endorsed the class treatment of specific issues (either by explicitly invoking Rule 23(c)(4), or approving the classwide adjudication of an identified liability issue as a case management technique) in a variety of contexts.[9]

This view, shared by nine circuits,[10] aligns with that of major treatises on civil procedure and class actions, which agree that Rule 23(c)(4) certification should depend on the practical benefits of class resolution of a common issue.[11]

This Court's most recent relevant precedent, *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), expressly recognized the utility of class actions to resolve

---

[8] *See, e.g.*, Elizabeth C. Burch, *Constructing Issue Classes*, 101 Va. L. Rev. 1855, 1892 (2015).

[9] Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. Rev. 846, 870–71 (2017).

[10] The Tenth, Eleventh, D.C, and Federal Circuits have not spoken definitively on the question presented.

[11] *See, e.g.* 2 Newberg on Class Actions § 4:91 (5th ed. 2020); 5 James Wm. Moore, Moore's Federal Practice § 23.86 (3d ed. 2011); Jay Tidmarsh & Roger H. Trangsrud, *Modern Complex Litigation* 490 (2d ed. 2010).

"important questions common to all class members," even where "other important matters will have to be tried separately." *Id.* at 453 (citation omitted). The issue class authorized by Rule 23(c)(4) provides a practical mechanism for such adjudication that assists district judges in managing complex litigation, consistent with all the requirements of Rule 23.

B. The Fifth and Eighth Circuits concur with the consensus view.

1. ECFMG misreads *Castano*.

ECFMG's claim that the circuits are divided rests principally on a footnote in the Fifth Circuit's 25-year-old decision in *Castano*. But a careful reading of *Castano*, the authorities it relies on, and subsequent Fifth Circuit precedents confirms that issues can indeed be certified without a finding that an action or cause of action, as a whole, satisfies Rule 23(b)(3) predominance.[12]

In *Castano*, the district court certified a class—called a "Frankenstein's monster" by Prof. Charles

---

[12] At times, the Petition appears to contend that issue certification requires satisfying predominance as to the entire *action*, not just a cause of action—regardless of the scope of the issue proposed to be certified. *See* Pet. i (question presented refers to "action" not "cause of action"); *but see* Pet. 31 (contending that "when the *claim* is considered as a whole, the individual issues—including causation, injury, and damages—[must] predominate over the narrow (allegedly-common) issues of duty and breach" (emphasis added)). No circuit supports the whole-action view seemingly advanced in the question presented, and it is unclear whether that question even encompasses ECFMG's seeming endorsement, in the body of the Petition, of applying Rule 23(b)'s requirements on the cause-of-action level rather than the certified-issue level in an issue class action.

Alan Wright[13]—of all individuals in the United States who became addicted to nicotine from 1943 onward, along with their spouses, children, and significant others. *Castano*, 84 F.3d at 737. The Fifth Circuit called it "what may be the largest class action ever attempted in federal court." *Castano*, 84 F.3d at 737. Plaintiffs sought relief "solely for the injury of nicotine addiction," under the "novel and wholly untested theory that the defendants fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature." *Id.* at 737.

The district court certified the proposed class, pursuant to Rules 23(b)(3) and (c)(4), on "the liability issues of fraud, breach of warranty (express or implied), intentional tort, negligence, strict liability and consumer protection and punitive damages issues." *Castano v. Am. Tobacco Co.*, 160 F.R.D. 544, 560 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996).

Under the courts' proposed four-phase trial plan, a jury would in the first phase determine 11 issues of "core liability," including the fraud cause of action. *Castano*, 84 F.3d at 738. The next three proposed phases were to involve a complex process of calculating compensatory and punitive damages. *Id.* The district court did not discuss in detail how individual plaintiffs' claims would be tried. *Id.*

Importantly, the district court expressly declined to certify numerous other issues, including the reliance element of the plaintiffs' cause of action for fraud. *Id.* at 740. The district court reasoned those "issues are so overwhelmingly replete with individual

---

[13] *Castano*, 84 F.3d at 745 n.19.

circumstances that they quickly outweigh predominance and superiority." *Id.* Paradoxically, however, the district court also found "it would be premature to hold that individual reliance issues predominate over common issues," because it mistakenly thought it was precluded under this Court's precedent from inquiring into the merits of the fraud claim, and because it was possible state law would permit a presumption of reliance. *Id.* at 739. Thus, "the court was convinced that it could certify the class and defer the consideration of how reliance would affect predominance." *Id.*

The Fifth Circuit found that the district court had erred in finding predominance and superiority *as to the issues certified*, for two main reasons: the district court "failed to consider how variations in state law affect predominance and superiority" and its "predominance inquiry did not include consideration of how a trial on the merits would be conducted." *Castano*, 84 F.3d at 740.

Footnote 21, which is dicta, related to the district court's finding that predominance was satisfied as to the entire issue of fraud liability, even as it deferred the question of whether reliance—an element of fraud liability— affected predominance. This illogical result, according to the relevant text of the Fifth Circuit's opinion, contravened circuit precedent and the Advisory Committee notes to Rule 23, which states "a fraud class action cannot be certified when individual reliance will be an issue." *Id.* at 745. And it posed case management problems: "after the class trial, [the district court] might have decided that reliance must be proven in individual trials. The court then would have been faced with the difficult choice of decertifying the class after phase 1 and wasting judicial resources, or continuing with a class action that would have failed

the predominance requirement of rule 23(b)(3)." *Castano*, 84 F.3d at 745.

Footnote 21 is specifically directed to this simultaneous certification of fraud liability while bracketing out an element of liability for analysis as to predominance in future proceedings. It reads:

> Severing the defendants' conduct from reliance under rule 23(c)(4) does not save the class action. A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The 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. Reading 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); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.

Castano v. Am. Tobacco Co., 84 F.3d 734, 745 (5th Cir. 1996) (citations omitted) (emphasis added).

As footnote 21 discloses, *Castano* found fault with the district court *not* for certifying the issue of liability for fraud, but for purporting to certify it while omitting a key element of liability (reliance) from the predominance analysis. Read in its proper context, footnote 21 stands for a simple proposition: in certifications pursuant to Rule 23(b)(3) and (c)(4), a district court must actually do what it says it is doing. A court cannot "nimbly" excise an element of liability from the

Rule 23(b)(3) predominance analysis while at the same time purporting to certify the entire issue of liability for classwide treatment.[14]

Castano does not preclude certifying issues other than a cause of action in appropriate circumstances. Indeed, in *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 471 (5th Cir. 1986), which *Castano* cites extensively with approval (including in footnote 21 itself), the Fifth Circuit had affirmed certification of the "state of the art" defense "and defense-related questions, including product identification, product defectiveness, gross negligence and punitive damages" in a complex asbestos case. In *Jenkins*, no cause of action was certified for classwide treatment, and there was no determination that a cause of action (let alone an action) as a whole satisfied predominance. And *Castano* nowhere suggests any reservations about the result in *Jenkins*.[15]

Rather, according to *Castano*—and courts that have explicitly adopted the broad view of (c)(4) certification—*the contours of the predominance analysis map onto what is certified.* If an action is certified, predominance is determined with reference to the entire case. If a cause of action or a narrower issue within an

---

[14] This is especially true when, as in *Castano*, a district court concludes the excised element (there, reliance) appears to involve many individual questions to be certified.

[15] In *Jenkins,* the district court's trial plan, which the Fifth Circuit approved, was to conduct mini-trials of seven to ten plaintiffs if the plaintiffs prevailed at the issues trial. *Id.* at 471. As *Jenkins* illustrates, the Chamber of Commerce's assertion that issues classes "undercut" bellwether proceedings lacks merit. (Chamber Br. 8.)

action is certified, predominance is determined with reference to the cause of action or issue itself.

2. More recent Fifth Circuit decisions align with the consensus view.

The most recent Fifth Circuit decisions on Rule 23(c)(4)—especially *In re Rodriguez*, 695 F.3d 360 (5th Cir. 2012), and *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014)—confirm that the Fifth Circuit embraces the consensus approach to issue-class certification.

In *Rodriguez*, the Fifth Circuit affirmed the "narrow class certification" of a Rule 23(b)(2) class on the issue of injunctive relief even though damages claims arising from the same causes of action did not satisfy Rule 23(b)(3)'s predominance requirement. 695 F.3d at 363. The court stated that "Rule 23(c)(4) explicitly recognizes the flexibility that courts need in class certification by allowing certification 'with respect to particular issues' and division of the class into subclasses." *Id.* at 369 n.13 (quoting *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000)). The court focused on whether the certified issue, not the action as a whole, satisfied Rule 23(b).

In re Deepwater Horizon—the last occasion on which the Fifth Circuit analyzed Rule 23(c)(4)—also shows that the Fifth Circuit does not adhere to the view reflected in ECFMG's erroneous reading of the *Castano* footnote. Over objections that a district court's certification of a class did not comport with Rule 23(b)(3) because common issues did not predominate, *Deepwater Horizon* held that certification was "in accordance with … Rule 23(c)(4)." 739 F.3d at 806; *see also id.* at 815–16. The Fifth Circuit stated that "'determining liability on a class-wide basis, with

separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed.'" *Id.* at 806 n.66 (quoting *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013) (Posner, J.), *cert. denied*, 571 U.S. 1196 (2014)). Revealingly, *Deepwater Horizon* approvingly cited decisions of "many circuits" that had "divided and tried" "common and individual issues" "by means of … Rule 23(c)(4), which permits district courts to limit class treatment to 'particular issues' and reserve other issues for individual determination." *Id.* at 816.

ECFMG, by contrast, cites only three dated appellate decisions as evidence of the Fifth Circuit's "steadfast adherence" to its "side" of the putative split. All support Respondents' interpretation of *Castano* and indicate no circuit split exists.

The most recent of these cases is a *nonprecedential*, unpublished opinion from 2005, *Corley v. Orangefield Indep. Sch. Dist.*, 152 Fed. Appx. 350 (5th Cir. 2005). *Corley* affirmed a district court's denial of certification of a proposed class of "all present owners of land in Louisiana, Mississippi, and Texas over which Defendants have strung (or buried) fiber optic cable, and over which communications other than electricity-related communications have occurred," on all claims, for liability and damages, pursuant to 23(b)(1)–(3). *Corley v. Entergy Corp.*, 222 F.R.D. 316, 318 (E.D. Tex. 2004). The district court also declined to certify a "composite class," which would have involved "certify[ing] the class under Rule 23(b)(2) on liability and, in turn, certify[ing] the class under Rule 23(b)(3) on damages." *Corley v. Entergy Corp.*, 220 F.R.D. 478, 490 (E.D. Tex. 2004). The district court denied this request because

"[t]he lack of a class-wide damages formula, the proximate cause requirement for Plaintiffs' RICO claims, and the limitations question prevent the court from finding that common issues predominate over individual issues for any of Plaintiffs' claims." *Id.* at 491.

The Fifth Circuit's brief, unpublished affirmance held the district court had correctly denied certification of the entire case under Rule 23(b)(3) due to the necessity of individual damages calculations, and held that certifying liability under Rule 23(b)(2) and damages under Rule 23(b)(3) fared no better. 152 F. App'x at 355–56. The single sentence in which the court cited *Castano* did not rule out the possibility of more narrowly tailored issue certification in other circumstances.

The second Fifth Circuit opinion ECFMG points to as evidence of the putative circuit split was withdrawn and is not good law. *Smith v. Texaco, Inc.*, 263 F.3d 394, 409 (5th Cir. 2001), *opinion withdrawn, cause dismissed*, 281 F.3d 477 (5th Cir. 2002). The plaintiffs did not seek certification pursuant to Rule 23(c)(4) and the district court opinion did not mention 23(c)(4). *See Smith v. Texaco, Inc.*, 88 F. Supp. 2d 663 (E.D. Tex. 2000). The appellate opinion mentions *Castano* and Rule 23(c)(4) only in passing. 263 F.3d at 409.

Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998), the third Fifth Circuit case ECFMG cites to support the putative split, is nearly twenty-four years old. In *Allison*, plaintiffs sought certification of the "case" under Rule 23(b)(2) and 23(b)(3). *Id.* at 408. The district court rejected certification of the entire case under either provision. *See id.*

The plaintiffs in *Allison* also proposed "tentative" certification of the issue of liability for classwide

treatment, which would sever—but only temporarily—issues of damages from class proceedings. But the plaintiffs specifically "preserve[d] the claims for compensatory and punitive damages as a class action issue." *Id.* at 421. According to the court, this decision "ha[d] significant implications for certification of the remaining issues," and ultimately foreclosed certification:

> [U]nder the plaintiffs' theory, certification of the first stage of the pattern or practice claim would be appropriate presumably because individual-specific issues would be "severed"—*but only temporarily*—under Rule 23(c)(4), making issues common to the class predominant (at least theoretically) for the purposes of meeting the (b)(3) requirements. But such an attempt to "manufacture predominance through the nimble use of subdivision (c)(4)" is precisely what *Castano* forbade.

Id. at 421–22 (emphasis added). *Allison* thus forbids a court from certifying an action *as a whole* by "temporarily" excluding the issue of damages in the predominance analysis. But by emphasizing the adverse consequences of retaining damages as a class issue, *Allison* indicates that plaintiffs may have been successful seeking certification only on the issue of liability, rather than both liability and damages. Issue-by-issue predominance analysis is perfectly acceptable under—and, indeed, required by—*Allison* and *Castano*, if discrete issues rather than a claim or action as a whole are proposed for certification.

In short, ECFMG's reliance on these decades-old (and mostly nonprecedential) opinions does nothing to overcome the Fifth Circuit's recent precedents

expressing support for the consensus view of Rule 23(c)(4).[16]

3. ECFMG's attempt to draft the Eighth Circuit into its putative circuit split is unfounded.

ECFMG compounds its misconception of *Castano* by advancing a novel and erroneous argument that the Eighth Circuit is on the same side of the "split" as the Fifth Circuit. The two cases it cites expressly undermine its argument.

In re St. Jude Medical, a 2008 decision, arose from injuries allegedly caused by a recalled prosthetic heart valve. 522 F.3d at 837. The district court certified a nationwide class for claims based on violations of Minnesota consumer protection law. *Id.* at 838. The class was certified on both liability and damages. *Id.*

The Eighth Circuit reversed, faulting the district court for inadequately considering the individual issues of fraud and misrepresentation implicated in the certification. Examining whether individual issues predominated *within the issue of liability*, it found they did not, because "[w]hether each plaintiff even received a representation from St. Jude about the efficacy of the heart valve is likely to be a significant issue in each case of alleged liability." *Id.* at 838–39. *St. Jude* also held that individual issues outweighed common issues as to compensatory and medical

---

[16] The Fifth Circuit's most recent citation of *Castano*, in *Prantil v. Arkema Inc.*, 986 F.3d 570, 577 & n.27 (5th Cir. 2021), does not involve issue classes, but merely holds that when a court is determining whether to certify an entire action, or entire causes of action within that action, it should analyze predominance "claim-by-claim," a point not contested in any circuit.

monitoring damages proposed for certification under Rule 23(b)(3). *See id.* at 841.

In dicta, the Eighth Circuit discussed the possibility of certification under Rule 23(c)(4), an issue not considered by the district court, which "did not limit its class certification to specific *issues* that may be amenable to class-wide resolution." *Id.* Reflecting then-common misconceptions about *Castano*, the court of appeals stated "there [was] a conflict in authority on whether such a class may properly be certified under Rule 23," with *Castano* on one side and *Nassau* and *Valentino* on the other. *Id.*

St. Jude declined to take a "side," noting that "[e]ven courts that have approved 'issue certification' have declined to certify such classes where the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation." *Id.* (citation omitted). "Given the individual issues discussed above," the court concluded, "we think this is such a case." *Id.* at 841.

The Eighth Circuit thus did not reject the consensus position of the circuits. Its analysis is fully consistent with the consensus view that an issue class may not be certified when the issues proposed for certification would not themselves satisfy Rule 23(b)(3) and when issue certification would not serve interests of efficiency.

Ebert v. General Mills, Inc., the other case ECFMG cites as evidence of the Eighth Circuit's view, concerned a district court's "hybrid" certification of liability under Rule 23(b)(2) and damages under (b)(3) in a toxic tort case. 823 F.3d 472, 477, 480 (8th Cir. 2016). The Eighth Circuit concluded that too many individualized issues of liability and damages existed to

warrant certification. *Id.* at 479–80. It analyzed predominance within the issue of liability itself, concluding that "even on the certified issue of liability, there are determinations contained within that analysis that are not suitable for class-wide determination," such as whether a property was subject to vapor contamination for which the defendant was responsible. *Id.* at 479. Neither the district court nor the Eighth Circuit in *Ebert* referenced *Castano*.

Ebert nowhere predicates issue-class certification on an entire cause of action satisfying predominance. *Ebert* expressly acknowledges the possibility of issue-class certification in the absence of broader (b)(3) predominance in the first sentence of its discussion section: "A class action serves to conserve the resources of the court and the parties by permitting *an issue* that may affect every class member to be litigated in an economical fashion." 823 F.3d at 477 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982)) (emphasis added). *Ebert* is fully consistent with certification of issues that, analyzed on their own terms, satisfy predominance.

III. A careful, extensive rulemaking process concluded there is no circuit split on Rule 23(c)(4) that warrants attention.

As the Third Circuit recognized, "the Advisory Committee on Civil Rules appears to agree that issues can be certified for class treatment even if predominance cannot be satisfied for the action as a whole." (App. 30a n.7.) The federal judiciary's rulemaking bodies have roundly rejected ECFMG's claims (1) that a circuit split exists concerning Rule 23(c)(4); and (2) that Rule 23 should be amended to adopt the approach ECFMG advocates. As the Advisory Committee on

Civil Rules concluded, "[d]issonance in the courts has subsided" regarding issue classes; "[t]here seems little need to undertake work to clarify the law"; and amending Rule 23(c)(4) "might well create new complications."[17] The Petition never mentions the conclusion of the Advisory Committee on Civil Rules and its Rule 23 Subcommittee that the "entrenched" circuit split is nonexistent. The Court should not introduce needless complication into class-action jurisprudence when the rulemaking bodies Congress authorized to consider the issue have concluded it would be unwarranted.

Congress entrusted stewardship of the Federal Rules of Civil Procedure to the federal judiciary, under the rulemaking process described by the Rules Enabling Act. This process "has important virtues," in that it "draws on the collective experience of bench and bar" and "facilitates the adoption of measured, practical solutions." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009). Congress's "determination" to entrust the civil rules to the rulemaking process "is entitled to [the Court's] full respect, in deed as well as in word." *Id.* at 119 (Thomas, J., concurring). Changes in the Civil Rules "are to come from rulemaking, … not judicial decisions in particular controversies or inventive litigation ploys." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1714 (2017).

The rulemaking process has already rejected the argument that disagreement among the circuits requires clarification of Rules 23(b)(3) and (c)(4). In 2011, the Advisory Committee on Civil Rules formed

---

[17] Advisory Comm., Minutes, Nov. 5, 2015, at 23, https://www.uscourts.gov/sites/default/files/2015-11-05-minutes_civil_rules_meeting_final_0.pdf.

a Rule 23 Subcommittee to consider whether Rule 23 required amendments considering developments in decisional law.[18] The Subcommittee began considering whether to amend Rule 23(c)(4) in August 2014, when a group of corporate counsel and defense bar practitioners proposed amending the Rule to incorporate what they deemed the approach of the *Castano* footnote.[19]

After considering the issue, the Subcommittee reported in 2015 that "recent reports suggest that all the circuits are coming into relative agreement that in appropriate cases Rule 23(c)(4) can be used even though full Rule 23(b)(3) certification is not possible due to the predominance requirement."[20] The Subcommittee then considered amending Rule 23 to confirm the "broad view" that predominance as to an entire claim or action is *not* a prerequisite to Rule 23(c)(4) certification.[21] It concluded such an amendment was unnecessary, because there was already consensus on the

---

[18] Judicial Conference of the United States, Standing Committee on Rules of Practice and Procedure, Minutes, June 12–13, 2017, at 27, https://www.uscourts.gov/file/24103/download.

[19] Lawyers for Civil Justice, Repairing the Disconnect Between Class Actions and Class Members: Why Rules Governing "No-Injury" Cases, Certification Standards for Issue Classes, and Notice Need Reform (Aug. 13, 2014), http://www.uscourts.gov/file/17648/download.

[20] Rule 23 Subcomm. Report 39, in Advisory Comm. on Civ. Rules, Agenda Book, Apr. 9–10, 2015, at 281 (emphasis added), https://www.uscourts.gov/sites/default/files/fr_import/CV2015-04.pdf.

[21] Rule 23 Subcomm., Introductory Memorandum for Mini-Conference on Rule 23 Issues, Sept. 11, 2015, at 40, in Advisory Comm. on Civ. Rules, Agenda Book, Nov. 5–6, 2015, at 226, https://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf.

"broad view" and "[t]he various circuits seem to be in accord about the propriety of [issue class] treatment '[w]hen appropriate,' as Rule 23(c)(4) now says."[22] The Advisory Committee accordingly advised the Standing Committee on Rules of Practice and Procedure that there was no need to amend Rule 23(c)(4).[23] It reported "[t]he Subcommittee has concluded that whatever disagreement among the circuits there may have been on this issue at one time, it has since subsided."[24] In endorsing amendments to other parts of Rule 23, the Standing Committee expressly took note that "[a]fter extensive consideration and study, the [Rule 23] Subcommittee narrowed the list of issues to be addressed" and "declined to address … issue classes."[25]

The Judicial Conference unanimously approved the Rule 23 amendments in September 2017, and this Court followed suit in April 2018.[26] They went into effect unchanged on December 1, 2018.

---

[22] Rule 23 Subcomm. Report 4, in Advisory Comm. on Civ. Rules, Agenda Book, Nov. 5–6, 2015, at 5, https://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf.

[23] *See* Comm. on Rules of Practice and Procedure, Minutes, Jan 7, 2016, at 11–12, https://www.uscourts.gov/file/20044/download; Advisory Comm. on Civ. Rules, Report to the Standing Committee, Dec. 11, 2015, at 27 (emphasis added), https://www.uscourts.gov/sites/default/files/2015-12-11-cv_rules_committee_report_0.pdf.

[24] *Id.* at 12.

[25] Standing Committee, Minutes, June 12–13, 2017, at 27–28, https://www.uscourts.gov/file/24103/download.

[26] Judicial Conference of the United States, Report of the Proceedings of the Judicial Conference of the United States, September 12, 2017, at 23, https://www.uscourts.gov/sites/default/files/17-sep_final_0.pdf; Supreme Court of the United States, Order Amending the Federal Rules of Civil Procedure,

(*Footnote continued*)

All told, the deliberations of the Advisory Committee and Rule 23 Subcommittee involved "nearly two dozen meetings and bar conferences and … a mini-conference in September 2015 to gather additional feedback from a variety of stakeholders," as well as extensive written submissions. [27] A multi-year rulemaking process resulted in a considered judgment, without dissent, that the circuits were in accord, and no clarification of Rule 23(c)(4) was required. This Court need not second-guess this reasoned determination.

IV. ECFMG's view of issue-class certification lacks textual support.

ECFMG's argument that Rule 23(b)(3)'s requirements must be satisfied by a cause of action as a whole, even when only specific issues are certified, contradicts the plain terms of the Rule.

Rule 23(b) sets forth requirements for a "class action" to be "maintained." Rule 23(c)(4), in turn, allows "an action" to be "maintained *as a class action* with respect to particular issues" (emphasis added). In other words, the action is a "class action" only as to those issues.

A court cannot meaningfully consider whether maintaining that "class action" satisfies Rule 23(b)(3)'s predominance requirement without taking into account the bounds Rule 23(c)(4) places on the "class action." That is, the court must determine whether a "class action" limited to the certified issues satisfies predominance, not whether the rest of the

---

Rules 5, 23, 62, and 65.1, at 6-12, Apr. 26, 2018, https://www.supremecourt.gov/orders/courtorders/frcv18_5924.pdf.

[27] Standing Committee, Minutes, June 12–13, 2017, at 27, https://www.uscourts.gov/file/24103/download.

action—which is not a class action—does so. Accordingly, in applying Rule 23(b)(3) in the context of a Rule 23(c)(4) issues class, a court must consider whether common questions of law or fact predominate with respect to the issues that fall within the class action.

As originally adopted, Rule 23(c)(4) made this point explicitly. It stated: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." Fed. R. Civ. P. 23(c)(4) (1966). As the Second and Fourth Circuits explained, that language means that other provisions of Rule 23 must be applied after taking into account the class action's limitation to particular issues. *See Nassau*, 461 F.3d at 226; *Gunnells*, 348 F.3d at 439. This "sequencing directive" was eliminated in 2007 revisions of the Rules, but "the Advisory Committee made clear that the changes to the Rule's language were 'stylistic only.' Fed. R. Civ. P. 23(c)(4) adv. comm. n. to 2007 amend." *Martin*, 896 F.3d at 413.

Other elements of the Rule also support Respondents' interpretation. The title of section (c) of Rule 23 refers to "issues classes." For classes certified under Rule 23(b)(3), a court is required to direct notice to class members on a variety of matters, including "the class *claims, issues, or defenses*." Fed. R. Civ. P. 23(c)(1) (emphasis added). Rule 23(e) provides for settlement of "class claims, issues, or defenses" only with court approval. "Claim" is synonymous with "cause of action." *See* Cause of Action, Black's Law Dictionary (11th ed. 2019); *Brownback v. King*, 141 S. Ct. 740, 751 (2021) (Sotomayor, J., concurring). In its use of the

disjunctive, Rule 23 contemplates certification of issues other than claims, let alone entire actions.[28]

Likewise, the Advisory Committee Notes to Rule 23(c)(4) confirm the provision is intended to allow certification of issues without a finding of predominance as to an entire claim. The relevant note states in its entirety:

> 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 advisory committee note to subdivision (c)(4).

Read closely, this note indicates the proper inquiry in such a case is whether predominance is satisfied within the issue of "liability to the class," not the action or claim as a whole. For if a court determined that common liability questions predominated over all

---

[28] Petitioner mistakenly asserts Rule 23(c)(4) is at work in "nearly every" (b)(3) class action, and there is no distinction between partial and full (b)(3) certification. (Pet. 23–24, 28.) Neither proposition is correct. For example, entire actions have long been certified under Rule 23(b)(3) where damages can be calculated simply and efficiently (e.g., through a classwide damages model), without the need for individualized proceedings. *See, e.g.*, *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013). This differs from cases in which classwide litigation of issues is followed by individual proceedings to determine damages, as contemplated by the district court. *See, e.g.*, *Jenkins*, 782 F.2d at 471.

individual questions in the action or claim (e.g., damages), the action would "retain its 'class' character" not "only through the adjudication of liability to the class," but on *all issues*, including damages. The entire action would be certified as to Rule 23(b)(3), and Rule 23(c)(4) would not be implicated at all. Restricting the scope of certification to a discrete issue like liability necessarily implies the scope of the predominance inquiry is likewise narrowed.

The Rule's structure and context, and the purposes evident from its text, thus indicate it cannot be read to allow certification of an issue class only when Rule 23(b)(3) would permit certification of an entire action or cause of action. Rule 23(c)(4)'s broad grant of authority to certify issues "when appropriate" incorporates the "flexibility in application" generally appropriate under Rule 23. *Gunnells*, 348 F.3d at 424 (quoting *In re A.H. Robins*, 880 F.2d 709, 740 (4th Cir. 1989)). The Rule permits courts to give common treatment to common issues to advance fair and efficient resolution of a case even when a broader certification would be impermissible. *Gates*, 655 F.3d at 273.

Permitting issue certification only when an entire cause of action can be certified under Rule 23(b)(3) would undermine that objective and "render[] subsection (c)(4) virtually null." *Nassau*, 461 F.3d at 226; *accord Martin*, 896 F.3d at 413. If an entire cause of action satisfied Rule 23(b)(3)'s requirements of predominance and superiority, a district court would not need to certify a narrower issue class. Moreover, under ECFMG's portrayal of the *Castano* footnote's approach, "a court considering the manageability of a class action—a requirement for predominance under Rule 23(b)(3)(D)—[would have] to pretend 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*, 461 F.3d at 227 (quoting *Gunnells*, 348 F.3d at 439). Thus, "a court could only use subsection (c)(4) to manage cases that the court had already determined would be manageable *without* consideration of subsection (c)(4)." *Id.* (emphasis added by *Nassau*). Such a reading would leave Rule 23(c)(4) "without any practical application, thereby rendering it superfluous." *Gunnells*, 348 F.3d at 439. Accepting ECFMG's reading would thus violate one of the most basic interpretive canons: that a rule or statute "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *Corley v. United States*, 556 U.S. 303, 314 (2009) (citations and quotation marks omitted).

V. ECFMG's dire predictions about issue-class certification ignore its longstanding use and the other procedural protections in Rule 23.

ECFMG and its amicus curiae, the Chamber of Commerce, posit that issue-class certification will proceed willy-nilly, risking great economic harm, if the Third Circuit's opinion is permitted to stand. These arguments fail to recognize both the longstanding use of Rule 23(c)(4) as a tool for efficiently and fairly deciding significant common issues, and the paucity of appellate opinions or other evidence to indicate Rule 23(c)(4) has led to runaway judgments since it was enacted in 1966.

ECFMG and the Chamber falsely contend the circuit consensus on Rule 23(c)(4) enables a "new" or less stringent path for class certification. In fact, courts have employed issue-class certification for decades to

advance the resolution of damages class actions—including in the Fifth Circuit, which affirmed such a certification in *Jenkins* in 1986. The Chamber adduces studies and data on class-action settlements, but none of them are specific to Rule 23(c)(4) certification.

Other aspects of class-action jurisprudence ensure fair and efficient use of issue-class certification. This Court's jurisprudence on commonality, for example, requires identification of a common issue as to which "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke," ensuring that class proceedings "generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The requirement of rigorous analysis of all elements, including Rule 23(b)(3) predominance and superiority, along with the availability of interlocutory appeal under Rule 23(f), provide additional protections from casual or misguided use of issue-class certification. ECFMG has already benefited from these protections in this very case.

VI. This Court has repeatedly denied certiorari on the question ECFMG raises.

This Court has repeatedly denied certiorari to resolve the claimed inter-circuit conflict over the interaction between the predominance requirement of Rule 23(b)(3) and Rule 23(c)(4), including as recently as 2019. This case marks at least the fifth time in the last eighteen years that class-action defendants have asked the Court to grant certiorari to resolve the claimed interpretive division over Rule 23(c)(4). *See Martin v. Behr Dayton Thermal Products, LLC*, No. 17-472 (filed Oct. 12, 2018); *Healthplan Servs., Inc. v. Gunnells,* No. 03-1282 (filed Mar. 11, 2004); *Merrill*

Lynch, Pierce, Fenner & Smith, Inc. v. McReynolds, No. 12-113 (filed July 25, 2012); *Pella Corp. v. Saltzman*, No. 10-355 (filed Sept. 13, 2010).

These petitions, like ECFMG's, asked the Court to determine whether certification of an issue class under Rule 23(c)(4) requires a finding that the action or cause of action as a whole satisfies Rule 23(b)(3)'s predominance requirement. As here, the petitioners in each of these cases asserted that the circuits were irreconcilably split over whether Rule 23(c)(4) allows a court to certify an issue class without finding that the entire action or cause of action would satisfy Rule 23(b)(3). This Court denied certiorari in each case.[29]

No subsequent developments support granting the Petition. The Third Circuit's embrace of the consensus position in this case makes the alleged split even less real or compelling. And the disposition below, which vacated certification of the class, together with the pending dispositive and renewed certification motions, renders this case an unsuitable vehicle for addressing the issue.

CONCLUSION

For the foregoing reasons, Respondents respectfully request the petition for a writ of certiorari be denied.

---

[29] *See Behr Dayton Thermal Products, LLC v. Martin*, 139 S. Ct. 1319 (2019); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McReynolds*, 568 U.S. 887 (2012); *Pella Corp. v. Saltzman*, 562 U.S. 1178 (2011); *Healthplan Servs., Inc. v. Gunnells*, 542 U.S. 915 (2004).

Respectfully submitted,

PATRICK A. THRONSON
Counsel of Record
BRENDA A. HARKAVY
JANET, JANET & SUGGS
4 Reservoir Circle,
Suite 200
Baltimore, MD 21208
(410) 653-3200
pthronson@jjsjustice.com

SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

PAUL M. VETTORI
LAW OFFICES OF PETER G.
ANGELOS
One Charles Center
100 N. Charles Street
20th Floor
Baltimore, MD 21201
(410) 649-2000

BRENT P. CERYES
JONATHAN SCHOCHOR
SCHOCHOR, FEDERICO
& STATON
The Paulton
1211 St. Paul Street
Baltimore, MD 21202
(410) 234-1000

CORY L. ZAJDEL
Z LAW LLC
2345 York Rd, Suite B-13
Timonium, MD 21093
(443) 213-1977

NICHOLAS M. CENTRELLA
ROBIN S. WEISS
CONRAD O'BRIEN PC
1500 Market Street
Suite 3900
Philadelphia, PA 19102
(215) 864-9600

KAREN E. EVANS
DAVID E. HAYNES
THE COCHRAN FIRM
1100 New York Avenue N.W.
Suite 340, West Tower
Washington, DC 20005
(202) 682-5800

Attorneys for Respondents

April 2022