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

REPLY FOR PETITIONER

Brian W. Shaffer
Elisa P. McEnroe
Matthew D. Klayman
MORGAN, LEWIS & BOCKIUS LLP
1701 Market St.
Philadelphia, PA 19103

William R. Peterson
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana St., Suite 4000
Houston, TX 77002
(713) 890-5188
william.peterson@morganlewis.com

Counsel for Petitioner

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REPLY FOR PETITIONER

Respondents cannot deny that ECFMG's petition presents an important question on which this Court has provided no guidance. And just weeks ago the D.C. Circuit, in granting a Rule 23(f) petition, recognized the question presented by this petition as "important" and "'an unsettled and fundamental issue of law relating to class actions." *In re Med. Transp. Mgmt., Inc.*, No. 21-8006, 2022 WL 829169, at *1 (D.C. Cir. Mar. 17, 2022).

Respondents' suggestion that the Court wait until after a final judgment to grant review provides no basis to deny the petition. As *Amicus* Chamber of Commerce has documented (at 6), it appears that no case certified under Rule 23(c)(4) has proceeded to trial. The time for this Court's review is now, at the class certification stage, not following some hypothetical final judgment.

Respondents do not deny that the question presented is dispositive of class certification. If an ordinary Rule 23(b)(3) analysis applies, then certification should have been denied and a different judgment entered below.

This Court has already acknowledged the importance of the limits imposed by Rule 23(b)(3). But the decision below renders Rule 23(b)(3)'s predominance test practically meaningless. Under the decision below, class counsel should always

choose the easier route of certification under Rule 23(c)(4).

The petition squarely presents an "important question of federal law that has not been, but should be, settled by this Court" and on which the circuits disagree. S. Ct. R. 10(a),(c). Immediate review is warranted.

ARGUMENT

I. No Case Certified Under Rule 23(c)(4) Has Ever Proceeded to Final Judgment.

Respondents' suggestion (at 8–9) that this Court wait for an appeal from a final judgment is truly an argument that this Court should never review the issue at all.

Counsel has identified no case involving a class certified under respondents' view of Rule 23(c)(4) that has ever proceeded to trial. Counsel for *Amicus* Chamber of Commerce represents the same. Amicus Br. 6. Nor do respondents cite any case.

This fact should confirm both the importance of the issue and the danger of using Rule 23(c)(4) to certify classes that could not otherwise be certified under Rule 23(b)(3). Rule 23(b)(3) is, itself, an "adventuresome innovation" for which certification should be particularly "demanding." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). The further innovation of using Rule 23(c)(4) to evade Rule 23(b)(3)'s requirements appears to have compelled

settlement in every case in which it has been permitted.

As a result, little precedent exists regarding how trial (and subsequent individual proceedings) should be conducted in a case involving "partial Rule 23(b)(3) certification"—a concept on which the Federal Rules provide no guidance. The procedural uncertainty brings heightened settlement pressure to bear, and it does so in cases ineligible for certification under the ordinary test. Certification under Rule 23(c)(4) undercuts "just . . . determination" of cases on their merits. Fed. R. Civ. P. 1.

The "paucity of appellate opinions or other evidence to indicate Rule 23(c)(4) has led to runaway judgments," BIO 31, only reveals the danger. These opinions and judgments do not exist because certification compels settlement. This fact confirms both the importance of the issue and that if this Court wishes to grant certiorari, it must do so now.

II. Respondents Incorrectly Describe the Positions of the Circuits.

Respondents' description of a uniform, harmonious position among the circuits is incorrect. The circuits disagree. At most, four circuits—the Second, Third, Sixth, and Ninth—share respondents' interpretation at a high level, and even within these circuits, there is significant disagreement.

A. After Rule 23(b)(3) is satisfied, Rule 23(c)(4) permits adjudicating common issues classwide.

If Rule 23(b)(3)'s requirements (including predominance) are satisfied for a cause of action,[1] Rule 23(c)(4) allows common issues to be adjudicated on a classwide basis and individual issues to be adjudicated in individual proceedings. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) ("[T]he action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately[.]").

The Question Presented is not whether Rule 23(c)(4) permits less than all of the issues in a claim to be adjudicated on a classwide basis but whether Rule 23(c)(4) permits this *when Rule 23(b)(3) cannot be satisfied for the cause of action*.

Respondents misread the circuits' positions because they erroneously treat any decision allowing a limited class as supporting their view of the law.

Consider, for example, respondents' reliance on the statement that "all federal circuits, including the Fifth Circuit, have endorsed the class treatment of specific issues." BIO 11 (quoting Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U.L. Rev. 846, 871 (2017)). This sentence says nothing about endorsing "class

[1] ECFMG understands "action" within Rule 23 to refer to a cause of action and uses the term in this sense in the Question Presented.

treatment of specific issues" without first satisfying Rule 23(b)(3).

Respondents' assumption that any decision allowing class treatment of specific issues embraces their position causes them to misread the cases.

1. The First Circuit decision cited by Respondents supports ECFMG.

For example, respondents rely on *Smilow v. Southwestern Bell Mobile Systems, Inc.*, which held that "common questions predominate" over individual issues. 323 F.3d 32, 40 (1st Cir. 2003).

Because common issues predominated, Rule 23(c)(4) "allow[ed] the court to maintain the class action with respect to [common] issues" while allowing "individualized determinations . . . to calculate damages." *Id.* at 41. This analysis captures ECFMG's view perfectly and offers no support for respondents.

2. The Fifth Circuit adheres to its view in *Castano* that Rule 23(b) must be satisfied for the cause of action as a whole.

Respondents commit the same error in discussing *Jenkins v. Raymark Industries, Inc.*, which upheld the district court's finding that "the certified questions 'predominate,' under Rule 23(b)(3)" within the cases as a whole. 782 F.2d 468,

472 (5th Cir. 1986); *see also* Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. 709, 731–32 (2003) ("[*Jenkins*] cannot be read as actually authorizing such an expansive interpretation of (c)(4)(A). There is simply no evidence the Fifth Circuit believed that its predominance analysis could be conducted only as to the certified common issues, rather than as compared to the individual issues remaining for later proceedings." (citations omitted)).

Nor do other Fifth Circuit decisions undercut *Castano*. *In re Rodriguez*, 695 F.3d 360 (5th Cir. 2012), and *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014), merely stand for the (undisputed) proposition that Rule 23(c)(4) allows adjudication of some issues on a classwide basis and others on an individual basis. Neither holds that doing so is allowed when Rule 23(b)(3) cannot be satisfied for a claim.

Deepwater Horizon held that the district court did not abuse its discretion in concluding that "common issues nonetheless predominated over the issues unique to individual claimants." 739 F.3d at 816. Only because of this predominance, Rule 23(c)(4) permitted (common) liability issues to be tried on a classwide basis and "'issues relating to damages' could and would be 'severed and tried separately.'" *Id.* at 806; *see also Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421–22 (5th Cir. 1998) (rejecting Rule 23(c)(4) certification under *Castano* because "when considered as a whole, the

plaintiffs' [claim] implicates predominantly individual-specific issues").

Castano is unambiguous: "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." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).

Respondents' attempts to introduce uncertainty in the Fifth Circuit's position is incorrect.

3. The Eighth Circuit has indicated support for the position that the predominance inquiry cannot ignore individual issues.

Ebert v. General Mills, Inc., 823 F.3d 472 (8th Cir. 2016), indicates that the Eighth Circuit shares ECFMG's view of Rule 23(c)(4).

Ebert rejects certification precisely because the district court "narrow[ed] and separat[ed]" issues in order to "manufactur[e] a case that would satisfy the Rule 23(b)(3) predominance inquiry." *Id.* at 479. Certification of the common issues was impermissible because "individual issues [would]

predominate on the matters of liability and damages." *Id.*

The analysis—comparing the common and individual issues—is inconsistent with respondents' position (and that of the decision below) that a district court can disregard uncertified issues in conducting a predominance inquiry.[2]

B. The Seventh Circuit's authority is mixed.

The Seventh Circuit's position is far from clear. The decision cited by respondents, *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012), says nothing about the interaction of Rule 23(b)(3) and Rule 23(c)(4).

If anything, the case appears to imply that Rule 23(c)(4) is a separate form of class certification, independent of any of subsection of Rule 23(b). *See id.* at 492 (reversing "the denial of class certification under Rules 23(b)(2) and (c)(4)").

But a party seeking certification must "satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast*, 569 U.S. at 33. If *McReynolds* truly reflects the Seventh Circuit's

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[2] In any event, respondents' suggestion (at 10) that the Eight Circuit adopted their view in *In re St. Jude Medical, Inc.*, 522 F.3d 836 (8th Cir. 2008), is incorrect. The decision makes clear that it was not adopting a position on the "conflict in authority" that it recognized. *Id.*

view that Rule 23(c)(4) allows class certification independent of Rule 23(b), then certiorari is all the more warranted.

When the Seventh Circuit has discussed the interplay between Rule 23(b)(3) and Rule 23(c)(4), its statements have been consistent with ECFMG's view of the law. *Kartman v. State Farm Mutual Automobile Insurance Co.* holds that an "'issues' class under Rule 23(c)(4)" would need to satisfy "the requirements for certification of a damages class under Rule 23(b)(3)." 634 F.3d 883, 886 (7th Cir. 2011) (rejecting an issues class as inappropriate because the requirements of Rule 23(b)(3) were not satisfied). And recently, *Simpson v. Dart* cited Rule 23(c)(4) for the proposition that if the requirements of Rule 23(b) are "satisfied as to some of the class representative's claims but not others," then only the claims for which Rule 23(b)(3) is satisfied "become 'class claims.'" 23 F.4th 706, 713 (7th Cir. 2022). The decision offers no support for respondents' view that certification is allowed without a claim satisfying Rule 23(b)(3).

C. Respondents cannot deny the significant variations within the plurality.

Even within the circuits that generally share respondents' position, there is significant disagreement. Pet. 17–20.

Respondents accuse ECFMG of misquoting *Reitman v. Champion Petfoods, USA, Inc.*, 830 F.

Appx. 880 (9th Cir. 2020). BIO 10. Although the quoted sentence (that predominance is unnecessary) describes the district court's analysis, the opinion's preceding sentence states that "the district court applied the correct standard." *Id.* at 882.

District courts within the Ninth Circuit regularly hold that "a Rule 23(c)(4) issues class" need not meet "the predominance requirement of Rule 23(b)(3)." *E.g.*, *Tasion Communications, Inc. v. Ubiquiti Networks, Inc.*, 308 F.R.D. 630, 633 (N.D. Cal. 2015)

This view contrasts with the Sixth Circuit's requirement of "a robust application of predominance and superiority." *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 413 (6th Cir. 2018).

Nor do respondents answer the fact that the Third Circuit's position is unique: no other circuit applies its "*Gates* factor" test. And respondents offer no defense for the statement in the decision below—not adopted by any other circuit—that Rule 23(a) must be evaluated only with respect to certified issues. App. 14a.

Even among the four circuits respondents characterize as agreeing with them, there is significant disagreement.

D. The D.C. Circuit recently and correctly recognized certification under Rule 23(c)(4) as "an unsettled and fundamental issue of law."

Only weeks ago, on March 17, the D.C. Circuit granted a Rule 23(f) petition presenting the same issue presented in this petition: "[W]hether the requirements of predominance and superiority must exist as to the entire claim, or only regarding the issue certified for class treatment." *In re Med. Transp. Mgmt., Inc.*, No. 21-8006, Dkt. 1 at 17 (D.C. Cir. Mar. 17, 2022).

The D.C. Circuit recognized that issue certification under Rule 23(c)(4) is "an unsettled and fundamental issue of law relating to class actions." *In re Med. Transp. Mgmt., Inc.*, 2022 WL 829169, at *1 (internal quotation marks omitted).

This recent decision refutes respondents' suggestion that there is settled law in this area or that guidance from this Court is unnecessary. And the D.C. Circuit is right. Whether Rule 23(c)(4) allows Rule 23(b)(3)'s requirements to be evaded is an unsettled and fundamental question. Certiorari is warranted.

III. This Court Does Not Defer to the Advisory Committee's Decision Not to Amend the Rules.

The heart of respondents' opposition appears to be that this Court should defer to the Advisory Committee on Civil Rules. BIO 23–27.

This Court has never, to the best of counsel's knowledge, cited (much less provided any deference to) a decision of the Advisory Committee not to propose an amendment to the rules.

This Court has relied on the Advisory Committee Notes as a source of legislative intent. *See United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002) ("a reliable source of insight . . . especially when, as here, the rule was enacted precisely as the Advisory Committee proposed"); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 165–66 n.9 (1988) ("relevant in determining the meaning of the document Congress enacted").

But there is a significant difference between considering notes transmitted to Congress accompanying an enacted rule and the (unadopted) deliberations of a body that chose not to propose an amendment. These deliberations are not the product of the full "extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

No deference is owed by this Court to the decision *not* to propose an amendment, and to the extent that the Advisory Committee views the law as settled and harmonious, it is incorrect.

IV. Respondents' View Renders Rule 23(b)(3) Practically Superfluous.

The importance of this issue to the ordinary class certification process cannot be overstated. If respondents are correct, the predominance inquiry of Rule 23(b)(3) should never occur. When a claim involves individual issues, class counsel should always seek certification of the common issues through Rule 23(c)(4), avoiding any need to prove predominance by comparing the common and individual issues.

Respondents offer no reason why counsel would ever choose to pursue class certification under the ordinary Rule 23(b)(3) test if the less-demanding Rule 23(c)(4) route were available to them.

In a footnote, respondents suggest that there is a difference between cases where "damages can be calculated simply and efficiently (e.g., through a classwide damages model), without the need for individualized proceedings" and cases "in which classwide litigation of issues is followed by individual proceedings to determine damages." BIO 29 n.28. But respondents fail to connect this distinction to whether certification is under Rule 23(b)(3) or Rule 23(c)(4). If damages can be calculated on a classwide basis through a common

damages model, there is no reason that damages could not be certified as a common "issue" under Rule 23(c)(4). And "individualized damages determinations are a feature of most Rule 23(b)(3) class actions." Cabraser & Issacharoff, *The Participatory Class Action*, 92 N.Y.U.L. Rev. at 870 n.102.

Any classwide proceeding under Rule 23(b)(3) could, if respondents are correct, be achieved more easily through Rule 23(c)(4). Put simply, if respondents are correct, Rule 23(c)(4) "authorize[s] an issue class action end-run around the important procedural safeguard of predominance." Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. at 714.

When discussing the Advisory Committee Notes, respondents quote the note to Rule 23(c)(4) concerning a liability-only class for a fraud claim, BIO 29, but they overlook the connection of this example to the note to Rule 23(b)(3). Pet. 26–28. Read together, Rule 23(c)(4) may be employed *because* predominance exists under Rule 23(b)(3), not *in the absence of* predominance under Rule 23(b)(3).

The "sequence" argument under the prior version of the rules, BIO 28, is easily answered. Under the prior version, after determining that an action "may be brought or maintained as a class action with respect to particular issues," then "the provisions of [Rule 23] shall then be construed and applied accordingly." Fed. R. Civ. P. 23(c)(4) (1966).

The step of "constru[ing] and appl[ying]" the provisions comes after determining whether a class action may be "maintained," an inquiry governed by Rule 23(b). The provisions that must be "construed and applied accordingly" are those about how a class action will be conducted, not whether a class action may be brought or maintained.

This understanding does not "nullify" Rule 23(c)(4). It gives Rule 23(c)(4) its full effect as a crucial manageability tool: Rule 23(c)(4) makes Rule 23(b)(3) classes possible by allowing certification of common issues for class treatment when they predominate over individual issues. Refusing to distort Rule 23(c)(4) into a new form of class certification does not nullify the provision.

V. Certiorari Is Warranted Now.

That this Court has received other petitions on the issue only confirms its persistence and that further percolation is unwarranted and unnecessary.

In the decision below, the Third Circuit adhered to its test—the *Gates* factors—shared by no other circuit and deepened the split further by stating that even Rule 23(a) must be evaluated only with respect to the certified issues. Pet.App. 14a. No other circuit shares this view of Rule 23(a), and respondents are unwilling to defend it.

The issue has not resolved itself and will continue to create uncertainty for courts and

litigants until addressed by this Court. Further percolation is unnecessary.

The fact that these cases are settled rather than tried should only invite further scrutiny from this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

William R. Peterson
Counsel of Record
Morgan, Lewis & Bockius LLP
1000 Louisiana St., Suite 4000
Houston, TX 77002
T: 713.890.5188
F: 713.890.5001
william.peterson
@morganlewis.com

Counsel for Petitioner

APRIL 2022