No. 24-1869

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

KEVIN BROWN, individually and as natural parent and next friend of G.B. and D.B.; CHRISTOPHER BLUNDON, individually and as natural parent and next friend of A.B. and Z.B.; THERESA BROWN, individually and as natural parent and next friend of G.B. and D.B.; KIMBERLY PEICKER, individually and as natural parent and next friend of M.P. and A.P.; MARK PEICKER, individually and as natural parent and next friend of M.P. and A.P.; CORRIN WILSON, individually and as natural parent and next friend of K.H., L.H. and R.H.; BRIAN HARRIS, individually and as natural parent and next friend of K.H., L.H. and R.H.; OLEG GOLTSOV, individually and as natural parent and next friend of J.G.,

Plaintiffs-Appellees,

ADAM W. DYER; BRIAN MENDEZ, individually and as natural parent and personal representative for M.M.; BRENDA MORSE; JAMES BOLLENGIER; JEAN DOWLING; AMY MENDEZ, individually and as natural parent and personal representative for M.M.; BEVERLY VOLNER; JAMES VOLNER; DAWNA WORCESTER; RICHARD SLIDE, individually and as natural parent and personal representative for C.S. and M.S.; ERIN SLIDE, individually and as natural parent and personal representative for C.S. and M.S.; JONATHAN KILEY, individually and as natural parent and personal representative for A.K., K.K., E.K. 1, E.K. 2; JENNIFER KILEY; APRIL PROVENCHER; PHYLLIS PROVENCHER; RICHARD PROVENCHER; DARLENE DEBLOIS; DARLENE E. DEBLOIS LIVING TRUST; DAVID TRUE; BRIDGET HEARD,

Plaintiffs,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION; GWENAEL BUSNEL,

Defendants-Appellants,

JOHN DOES 1-5,

Defendant.

Appeal of an Order of the United States District Court for the District of New Hampshire (Laplante, J.)
Case No. 1:16-cv-00242

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 & 29(a)(4)(A), *amicus curiae* Product Liability Advisory Council, Inc. states that it has no parent corporation and that there is no publicly held corporation that owns 10% or more of the Product Liability Advisory Council, Inc.

Amicus curiae The National Association of Manufacturers states that it is a nonprofit, tax-exempt organization located in the District of Columbia. It has no parent corporation, and no publicly held company has 10% or greater ownership in it.

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INTEREST OF AMICI CURIAE

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,200 briefs as amicus curiae in both state and federal courts, including this Court, on behalf of its members, while presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.[2]

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large

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[1] *See* https://plac.com/PLAC/About_Us/Amicus/PLAC/Amicus.aspx.

[2] All parties have granted *amici* permission to file this brief. Fed. R. App. P. 29(a)(2). No counsel for any party wrote this brief in whole or in part, no person other than *amici* and their counsel contributed money that was intended to fund preparing or submitting the brief.

manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 13 million people in the U.S., contributes approximately $2.91 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the U.S.

The issues raised by this appeal are of great concern to the *amici* due to the *in torrerem* effect that improper class certification has in coercing settlements even of non-meritorious claims. While product-defect actions against *amici*'s members are often properly denied class certification because the claims do not satisfy Rule 23(b)(3)'s predominance and superiority requirements, the district court's decision in this property-damage case to certify a "liability" "issue class" under Rule 23(c)(4) threatens to establish precedent that will reverberate far beyond its particular facts. *Amici* thus submit this brief to explain why that action conflicts with the structure and text of Rule 23, as well as Article III and the Seventh Amendment, and that practical experience demonstrates that issue class certifications either force settlement or founder upon insuperable litigation difficulties.

INTRODUCTION

Class actions are, and must remain, an "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979). Because class actions can result in "potentially ruinous liability," Fed. R. Civ. P. 23(f) Advisory Comm.'s Notes to 1998 Amend., they often "unfairly place pressure on the defendant to settle even unmeritorious claims," *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 524 (2018) (quotations omitted).

To this end, a party seeking to maintain a class action must "affirmatively demonstrate his compliance with Rule 23." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). A plaintiff must prove "that there are in fact sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation" to satisfy the prerequisites of Rule 23(a) and must further "satisfy . . . at least one of the provisions of Rule 23(b)," *id.*, which set out the three "types of class actions," Fed. R. Civ. P. 23(b).

A class action asserting "individualized monetary claims" must meet Rule 23(b)(3). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011). Under that subsection, a court may certify a class action only after finding "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." Fed. R. Civ. P. 23(b)(3); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 17 (1st Cir. 2015) (citing *Comcast*, *Dukes*).

In mass tort actions, when courts conduct the necessary "rigorous analysis" to determine whether to certify a Rule 23(b)(3) class, *Dukes*, 564 U.S. at 351, they appropriately deny certification due to the inherent predominance of individualized issues, including causation and damages. *See* Fed. R. Civ. P. 23(b)(3) Advisory Comm.'s Notes to 1966 Amend. ("A 'mass accident' . . . is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.").

Here, as well. The district court properly held individualized issues prevented 23(b)(3) class certification. But the court then *sua sponte* certified certain "issues" for class resolution under Rule 23(c)(4).

Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Relying on that rule, the district court purported to "bifurcate[] liability and damages," and then ruled that Rule 23(b)(3)'s predominance requirement was satisfied for some "liability" aspects of plaintiffs' trespass and negligence claims, but not for their nuisance claim. JA6613–14; A2–3, 53. In other words, after holding that individual questions

predominate over common issues, the court segregated *some* aspects of *some* claims and held that *within* those segregated aspects, common questions predominate and can be litigated on a class basis.

Nothing in Rule 23 supports the district court's splintered approach to class litigation. The rulings of other circuits that have analyzed the intersection of Rule 23(b)(3) and (c)(4) fall on a spectrum from a narrow view of (c)(4)'s scope to an extremely broad scope, like the one the district court embraced, that if taken literally would swallow (b)(3) entirely. When properly interpreted, however, Rule 23(c)(4) is a case management tool to manage a class certified under Rule 23(b)—specifically, for money-damages claims, those that meet Rule 23(b)(3)'s predominance and superiority demands. Only this interpretation of the Rule avoids the constitutional and practical problems created by the expansive interpretation adopted by the district court. This Court should limit the application of Rule 23(c)(4) to its proper scope and reverse.

ARGUMENT

I. THE COURT SHOULD ADOPT THE BETTER-REASONED INTERPRETATION THAT AN "ISSUE CLASS" UNDER RULE 23(C)(4) CAN ONLY BE MAINTAINED IN A CLASS ACTION THAT SATISFIES THE ANTECEDENT REQUIREMENTS OF RULE 23(A) AND (B).

A. Rule 23(c)(4)'s structure, text, and history show that it is a case management tool for litigating claims that satisfy the rigors of Rule 23(a) and (b), not an independent basis for certification.

The framework, text, and history of Rule 23 preclude the district court's interpretation that Rule 23(c)(4) creates an independent category of class actions, liberated from the Rule's essential constraints. Instead, this Court should adopt the interpretation of Rule 23(c)(4) that limits its scope and should require that certification of an issues class is permissible only if the predominance and superiority requirements of Rule 23(b)(3) are met.

The structure of Rule 23 supports the reading that Rule 23(c)(4) is a tool to manage adjudication of claims that a plaintiff proves satisfy one of the provisions of Rule 23(b), not a tool to circumvent a plaintiff's failure of proof by allowing class-wide adjudication of limited issues, particularly those that fail to resolve even a single claim. Like the Federal Rules as a whole, Rule 23 is "organized in a basically sequential order that implicitly contemplates satisfaction of certain antecedent provisions." *See* Laura J. Hines, *The Unruly Class Action*, 82 Geo. Wash. L. Rev. 718, 731 (2014). The criteria in subsections (a) and (b) should be understood as "conditions precedent to the directives found in [subsection] (c) and later

subsections." *Id.* at 733. Rule 23(c)(4) cannot "be interpreted as authority for altering—much less eliminating"—those pre-conditions, to permit class litigation only "with respect to particular issues." *Id.*; *see also* Veniamin Privalov, *The Anomalous Issue Class*, 90 Fordham L. Rev. Online 119, 137 (2022) ("[T]he expansive (c)(4) must be rejected in favor of a limited, historically consistent reading."); Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. 709, 714 (2003) (Rule 23(c)(4) "does not fundamentally expand the types of cases that may be certified under Rule 23" or "authorize an issue class action end-run around the important procedural safeguard of predominance[.]"); Mark A. Perry, *Issue Certification Under Rule 23(c)(4): A Reappraisal*, 62 DePaul L. Rev. 733, 734 (2013) (applying the "analytical methodology for resolving questions concerning the application of Rule 23" from *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and concluding that "issue certification . . . does not allow the certification (or exclusion) of discrete claim elements and defenses").

Rule 23's text likewise confirms that in an action seeking money damages—as this one does—predominance and superiority must be satisfied for the claim as a whole, not just within "particular issues." *See* Fed. R. Civ. P. 23(c)(4). For predominance, a court must compare "questions of law or fact common to class members" with those "affecting only individual members," with no suggestion that the court should analyze only select parts of a claim. *See* Fed. R. Civ. P. 23(b)(3).

For superiority, a court must compare class treatment with "other available methods for fairly and efficiently adjudicating the controversy," *i.e.*, the entire action. *Id.*; *see also* Fed. R. Civ. P. 23(b)(3) Advisory Comm.'s Notes to 1966 Amend. ("the court with the aid of the parties [must] assess the relative advantages of alternative procedures for handling the total controversy").

The Rule's history supports the same interpretation. The advent of (c)(4) came during the 1966 amendments to Rule 23, which were focused elsewhere, on the "adventuresome innovation" of subsection (b)(3) to allow money damages on behalf of a class. *See Dukes*, 564 U.S. at 361–62. This new subsection (b)(3) was framed for situations "in which class-action treatment is not as clearly called for" and "allows class certification in a much wider set of circumstances but with greater procedural protections." *Id.* at 362; *see also* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 Harv. L. Rev. 664, 670 (1979) (explaining that with Rule 23(b)(3) came a "shift from the pre-1966 requirement that nonparty class members opt in to . . . a 'spurious' class action to the current principle that members of a rule 23(b)(3) class are presumed participants and will be bound unless they . . . opt out").

The debate surrounding (c)(4) was scant; much of the recorded debate indicates that many committee members believed that (c)(4) merely "reflected existing Rule 23 practice." *Unruly*, 82 Geo. Wash. L. Rev. at 719–20, 746–49

(noting commentators' reference to *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), where the court bifurcated antitrust liability from the necessarily individualized proofs of damages). The resulting notes also state that (c)(4) "recognizes" the proposition "that an action may be maintained as a class action as to particular issues only." Fed. R. Civ. P. 23(c)(4) Advisory Comm.'s Notes to 1966 Amend.; *see also Unruly*, 82 Geo. Wash. L. Rev. at 749–54 ("[G]iven the importance of Rule 23(b)(3), one would expect to find within the Committee's voluminous records some consideration of exactly when and how it intended subsection (c)(4) to operate as an exception to (b)(3)'s dual mandates.").

This all makes sense. Using the (c)(4) case management tool to apply the (b)(3) factors only to pre-selected questions or issues would gobble up (b)(3)'s mandate. By definition, *all* class actions have common questions. Fed. R. Civ. P. 23(a)(2); *Dukes*, 564 U.S. at 349 ("Any competently crafted class complaint literally raises common 'questions.'") (citation omitted). So, in any action where predominance is not satisfied with respect to the entire controversy, some issue could always be carved out where predominance would be satisfied for just that portion. In other words, "the litigation unit proposed as a (c)(4) class action would perforce satisfy (b)(3)'s predominance requirement: because such an action is comprised solely of issues common to the class, no individual issues exist to be balanced against

those common issues in a predominance inquiry." *Unruly*, 82 Geo. Wash. L. Rev. at 727–28.

This risk of an improper "nimble use" of (c)(4) to sidestep (b)(3)'s protections led the Fifth Circuit to adopt a more limited view of Rule 23(c)(4) in one of the earliest cases to consider its interaction with Rule 23(b)(3). In *Castano v. Am. Tobacco Co.*, plaintiffs asserted nine claims against various tobacco companies and sought money damages for their nicotine addiction injuries. 84 F.3d 734, 737 (5th Cir. 1996). After first "organizing the class action issues into four categories: (1) core liability; (2) injury-in-fact, proximate cause, reliance and affirmative defenses; (3) compensatory damages; and (4) punitive damages" and then "analyz[ing] each category to determine whether it met the predominance and superiority requirements of rule 23(b)(3)," the district court certified a (b)(3) class "on core liability and punitive damages," "sever[ing] issues for certification under [] (c)(4)." *Id.* at 739.

To the district court, the "core liability issues" included (1) the "common factual issues of whether defendants knew cigarette smoking was addictive, failed to inform cigarette smokers of such, and took actions to addict cigarette smokers"; and (2) the "[c]ommon legal issues" of "fraud, negligence, breach of warranty (express or implied), strict liability, and violation of consumer protection statutes." *Id.* Having isolated these issues, the court found "common issues predominate[d] because resolution of core liability issues would significantly advance the individual

cases." *Id.* But the court left undecided how it would resolve the remaining individual issues, "convinced that it could certify the [core liability] class and defer the consideration of how reliance would affect predominance." *Id.*

The Fifth Circuit reversed and remanded with instructions to dismiss the class complaint. It rejected the district court's "incomplete and inadequate predominance inquiry" and its attempt to "write the predominance requirement out of the rule." *Id.* at 745. For fraud claims, the court could "not save the class action" by "severing the defendants' conduct from reliance" because "[a] district court cannot manufacture predominance through the nimble use of subdivision (c)(4)." *Id.* at 745 n.21. Instead, 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." *Id.* (emphasis added). Fundamentally, "[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 would result in "automatic certification in every case where there is a common issue, a result that could not have been intended." *Id.*

This Court should, like others, adopt the better-reasoned position that Rule 23(c)(4) does not authorize certification of "issues" when the dispute cannot

otherwise satisfy Rule 23(a) and (b). *See id.* Several sister Circuits acknowledge that (c)(4) must be limited by (b)(3)'s demands. *See Harris v. Med. Transp. Mgmt., Inc.*, 77 F.4th 746, 757, 762 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 818 (2024) ("Rule 23(c)(4) does not create a fourth category of class action beyond those specified in Rule 23(b)," so "[p]laintiffs cannot effectively skirt the functional demands of the predominance requirement by seeking certification of an overly narrow issue class and then arguing that the issue (inevitably) predominates as to itself.");[3] *In re Marriott Int'l, Inc.*, 78 F.4th 677, 689 (4th Cir. 2023) (vacating issue class certification and noting that its prior issue-class case, *Gunnells*,[4] involved

[3] In *Harris*, the D.C. Circuit reversed the issue-class certification for failure to properly consider predominance and superiority and adopted a requirement that the "relationship" between any certified issues "to the dispute as a whole" be such that the issues "encompass a reasonably and workably segregable aspect of the litigation." 77 F.4th at 760–63.

[4] The Fourth Circuit, sometimes cited as supporting a broader view of issue classes, does not. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417 (4th Cir. 2003), found Rule 23(b)(3) satisfied, *id.* at 429–31, and approved of Rule 23(c)(4) to certify a *claim*, not portions of claims. *Id.* at 441, 443–44 ("we have no need to enter that fray . . . about 'pinhole' issue certification"). The court recently reaffirmed that "the Rule 23 inquiry does not end upon the identification of a common question alone," and cautioned against allowing "ill-defined and loosely constructed classes" to "bog[] down [courts] unknotting unnecessarily disparate claims." *Stafford v. Bojangles' Rest., Inc.*, No. 23-2287, 2024 WL 5131108, at *4, 8 (4th Cir. Dec. 17, 2024). Similarly, the Tenth Circuit recently affirmed a district court's determination that "an issue class, limited to the issues of antitrust violation and antitrust impact" liability, but not damages, "satisfied the requirements of Rules 23(a) and 23(b)(3)." *Black v. Occidental Petroleum Corp.*, 69 F.4th 1161, 1172 (10th Cir. 2023). This approach is more akin to the limited bifurcation used in *Union Carbide* in 1961,

certification of individual claims, not issues); *cf. Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc.*, 601 F.3d 1159, 1184 (11th Cir. 2010) (reversing certification where contract terms varied and hospital's defenses would predominate, cautioning that "creation of a number of subclasses in a Rule 23(b)(3) suit may defeat the superiority requirement by splintering the proposed class and thereby diminishing the relative value of a class action over other forms of litigation" (cleaned up)). Subsection (c)(4) cannot be used to adjudicate portions of an otherwise uncertifiable class action particularly where, as here, the liability issues carved out by the district court were inextricably linked with other liability issues.

B. This Court should not follow various other circuits that have adopted more expansive views of 23(c)(4).

1. Other circuit decisions fail to rationalize the Rule's text or, while facially broader in their interpretation, actually limit the scope of 23(c)(4).

Some other circuits have used broader language in interpreting Rule 23(c)(4) and sanctioned issue-class certification without regard to whether the issue class complied with Rule 23(b)(3)'s predominance and superiority requirements. But these cases are problematic for various reasons. Some fail to grapple with the Rule's text at all, and most actually go on to adopt various limiting language, and then reject

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which commentators suggested was meant to be reflected in Rule 23's 1966 amendment, *see Unruly*, 82 Geo. Wash. L. Rev. at 719–20, 746–49.

certification. And the earliest cases also pre-date *Dukes* and the Rule amendments and do not provide useful guidance on allowable class actions today.

Some decisions that read Rule 23(c)(4)'s ambiguous phrase "where appropriate" to authorize issue classes that evade the requirements of subsections (a) and (b) do not engage in close analysis of the Rule. For example, the Seventh Circuit rejected the Fifth Circuit's reading on the grounds that it "would render Rule 23(c)(4) superfluous" because it "would require a court considering the manageability of a class action—a requirement for predominance under Rule 23(b)(3)(D)—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 is made." *Jacks v. DirectSat USA, LLC*, 118 F.4th 888, 897, 898 (7th Cir. 2024).[5] The Second Circuit does the same. *See In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226–27 (2d Cir. 2006) (claiming that a narrower reading "renders subsection (c)(4)

[5] The Seventh Circuit stated in *Jacks* that it had not "directly addressed" the "interaction between Rule 23(b)(3) and Rule 23(c)(4)." 118 F.4th at 896. The court had previously reversed and ordered issue-class certification on the discriminatory impact of two employment policies in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012), and had affirmed certification of certain issues of defect and warranty in *Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010). Both decisions emphasized that their certification for injunctive relief satisfied Rule 23(b)(2), and that separate litigation would be required for individual relief. *McReynolds*, 672 F.3d at 492 (contemplating "hundreds of separate suits" for damages); *Pella*, 606 F.3d at 395 ("causation and damages issues . . . will be handled individually"). On remand, the parties in both cases were compelled to settle, citing the prospect of lengthy litigation.

virtually null"). That analysis misses the point of Rule 23(b)(3)'s predominance and superiority mandates. What needs to be fairly and efficiently managed is not just trial of isolated common issues, but adjudication of *the entire controversy*. Fed. R. Civ. P. 23(b)(3) and Advisory Comm.'s Notes to 1966 Amend. This point was also seemingly lost on the district court here.

Most circuits that have adopted a more expansive reading of Rule 23(c)(4) have also simultaneously rejected the proposed issue class and acknowledged that other protections in the Rule must be maintained. *See Jacks*, 118 F.4th at 897, 899 (affirming decertification of proposed issue class because "determining liability and damages would necessitate hundreds of separate trials" and thus it was "not a superior device to resolve th[e] controversy");[6] *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259, 270 (3d Cir. 2021 (requiring that an issue class "preserves the parties' procedural and substantive rights and responsibilities, and respects the constitutional and statutory rights of all class member and defendants" and reversing certification because the district court "did not determine whether the duty and breach elements of plaintiffs' claim satisfied Rule 23(b)(3)" and "failed to

[6] The *Jacks* court seemingly endorsed dispensing with Rule 23(b)(3)'s predominance requirement for the action as a whole while retaining the rule's superiority requirement as to the entire action. There is no basis in the Rule's language, or in logic, for applying one part of (b)(3) to the entire action or claim but other parts of (b)(3) only to selected portions.

rigorously consider several *Gates*[7] factors"); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (denouncing plaintiffs' failure to show "how the [issues] class trial could be conducted"). And the most expansive reading, that of the Sixth Circuit in *Martin v. Behr Dayton Thermal Prods., LLC*, 896 F.3d 405, 413 (6th Cir. 2018), created so many practical problems that neither the parties nor the district court could determine how to constitutionally try the case. *See infra* Section I.C.

Finally, several decisions cited for an expansive interpretation of Rule 23(c)(4) predate *Dukes*' and *Comcast*'s clarifications of the mandatory procedural protections of Rule 23, as well as the 2007 amendments to the Rule, and thus lack persuasive force. *See Nassau Cnty.*, 461 F.3d at 227; *Valentino*, 97 F.3d at 1234. Those courts' expansive interpretation of Rule 23(c)(4) cannot survive the Supreme Court's tightened directives on certification under Rule 23(a) and (b).

2. Courts adopting an expansive view of Rule 23(c)(4) have failed to persuasively address the constitutional flaws in their approach.

A further obstacle stands in the way of any reading of Rule 23(c)(4) that allows evasion of Rule 23(b)(3): the Constitution. "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act,

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[7] In *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011), the Third Circuit affirmed the denial of certification of a liability-only issue class but declined to "join[] either camp in the circuit disagreement," instead directing district courts to evaluate factors from the Final Draft of the ALI's Principles of Aggregate Litigation when determining whether issue class certification is "appropriate").

which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). The Rules of Civil Procedure also cannot expand the federal courts' jurisdiction. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978). Rule 23, therefore, cannot be read to permit class-wide adjudication that cannot redress class-wide injuries with a class-wide judgment. *See Ortiz*, 527 U.S. at 842, 845 (adopting a "limiting construction" instead of an "adventurous application" of Rule 23(b)(1)(B) that was supported by "the Advisory Committee's expressions of understanding, minimize[d] potential conflict with the Rules Enabling Act, and avoid[ed] serious constitutional concerns").

In the case of issue-class trials, although a defense verdict on a class issue could result in final judgment *against* all class members, a plaintiffs' verdict on a class issue cannot result in judgment *for* class members because it will not end the litigation. *Cunningham v. Hamilton Cnty., Ohio*, 527 U.S. 198, 204 (1999) ("[A] decision is not final, ordinarily, unless it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."); *see also* Fed. R. Civ. P. 54(b) (a judgment must "adjudicat[e] *all* the claims and all the parties' rights and liabilities"). For claims that seek monetary relief, final judgment requires determination not just of preliminary issues, but of liability *and* damages. *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976) ("where assessment of damages

or awarding of other relief remains to be resolved," judgments "have never been considered to be 'final'"). For a class to obtain a money judgment, therefore, every Phase I issue-class trial must be followed by individual Phase II trials, either in the same action or follow-on actions.

The district court here suggested that it would oversee the Phase II trials, stating that "[i]f and when liability is established, the court will proceed to the damages phase of the case."? A3, 55. But that begs the question: what does the "damages phase of the case" entail? That phase will require adjudication of the very individual issues the district court found precluded certification under Rule 23(b)(3)—individualities that go well beyond damages. *See* A2–3, 51–52. Complicating matters further, the absent members of the then-resolved issue class will no longer be parties, so after the class representatives' individual claims are tried, "thousands of class members" will need to intervene and "wait[] their turn to offer testimony and evidence" to prove their claims. *See In re Asacol Antitrust Litig.*, 907 F.3d 42, 51 (1st Cir. 2018); *see also id.* at 57–58 ("Nor has either party drawn to our attention any federal court allowing, under Rule 23, a trial in which thousands of class members testify. We see no reason to think that this case should be the first such case."). Either a single jury would oversee all the trials, raising vast issues of practicality and prejudice, or subsequent juries would of necessity reexamine some issues, thereby violating the Seventh Amendment. *See* Section I.C. Either way, the

Phase I determination of the court's identified class issues will have done little to "fairly and efficiently adjudicat[e] the [entire] controversy." *See* Fed. R. Civ. P. 23(b)(3).

The other option for Phase II trials of the thousands of class members' individualized claim elements is for each class member to file a follow-on suit in state or federal court. Each plaintiff would argue that the issue-class verdict, though necessarily non-final, nevertheless resolves some aspect of their individualized claims. That structure would impermissibly allow an action "conducted nominally as a class action" to then "degenerate in practice into multiple lawsuits separately tried." *See* Advisory Committee Notes to 1966 Amend. to Fed. R. Civ. P. 23(b)(3).

Interpreting Rule 23(c)(4) to allow this two-action structure—where a court enters quasi-declaratory rulings in favor of a class but without resolving the entire dispute on behalf of a class—would expand the court's jurisdiction beyond Article III's case-or-controversy limitation. Without a plan to constitutionally convert an issue-class verdict in favor of absent class members into a class-wide judgment, the verdict would be—at best—a "quasi-declaratory ruling." *See Russell*, 15 F.4th at 275. Federal courts do not have jurisdiction to adjudicate "a single issue in a dispute that must await another lawsuit for complete resolution." *See Calderon v. Ashmus*, 523 U.S. 740, 748 (1998) (finding requested declaratory relief "would simply carve out one issue in the dispute for separate adjudication" and was therefore "not a

justiciable case within the meaning of Article III"); *Foss v. Marvic, Inc.*, 103 F.4th 887, 897 (1st Cir. 2024) (affirming dismissal where requested declaratory relief "would not finally and conclusively resolve the underlying controversy").[8]

In sum, given the choice between a (b)(3)-compliant interpretation of Rule 23(c)(4) that would limit its application—as the drafters seemed to have contemplated—and an expansive interpretation that would eviscerate (b)(3)'s due process protections, run afoul of the Rule's structure, text, and history, violate the Seventh Amendment, and violate Article III's jurisdictional limitations, this Court should adopt the former. *See Ortiz*, 527 U.S. at 842, 845 ("The Rules Enabling Act underscores the need for caution"); *see also United States v. Davis*, 588 U.S. 445, 463 n.6 (2019) ("courts should, if possible, interpret ambiguous statutes to avoid rendering them unconstitutional" and "construe ambiguous statutes to avoid the need even to address serious questions about their constitutionality").

[8] *See also Neely v. Ethicon, Inc.*, No. 1:00-CV-00569, 2001 WL 1090204, at *13 (E.D. Tex. Aug. 15, 2001) (rejecting proposed issue class and "bifurcated trial plan," which "pose[d] threats to the Court's Art. III powers" because it would have required the court to "preside over a trial in which the Phase I jury [made] certain factual findings preliminary to a finding of liability" but that would "not [have] provide[d] absent members with an enforceable, final judgment to take to their home courts").

C. Experience demonstrates that an expansive view either improperly forces settlement or creates intractable problems in adjudicating an entire controversy to judgment for plaintiffs on a class-wide basis.

A review of issue classes certified where a claim did not meet the prerequisites for certification under Rule 23(b)(3) demonstrates that the path from a Rule 23(c)(4) "issue class" certification to a class-wide award of damages runs only through settlement—confirming the coercive power of certification, regardless of the claims' actual merits.[9] *See, e.g.*, *supra*, n. 5.[10]

Cases in the Sixth Circuit, which adopted the most expansive view of Rule 23(c)(4) in *Martin*, illustrate the point. In *Martin*, the plaintiffs asserted a putative class action against various defendants for allegedly contaminating groundwater

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[9] *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable" and "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"); *Unruly*, 82 Geo. Wash. L. Rev. at 764 ("The pressure to settle [under a broader view of (c)(4)] may increase because plaintiffs could achieve issue class certification in cases that would otherwise have been rejected for failure to satisfy Rule 23(b)(3)'s predominance test.").

[10] Other cases, on remand following some circuits' broader (c)(4) interpretations, abandoned the issue-class trial structure altogether, or never reached it. In *Nassau Cnty.*, the plaintiffs obtained partial summary judgment on liability because the defendants conceded it. No. 0:99-cv-02844, Doc. 463 at 4 (E.D.N.Y. Apr. 7, 2014). The district court then reversed its prior decision and certified a (b)(3) damages class, which proceeded to a bench trial where the judge awarded individualized damages. *Id.* at 4–7. In *Russell*, the defendants moved for summary judgment, which was granted and affirmed. 603 F. Supp. 3d 195 (E.D. Pa. 2022), *aff'd*, No. 22-1998, 2023 WL 5227103 (3d Cir. Aug. 15, 2023).

under surrounding properties by releasing various substances from their facilities. 896 F.3d at 408–09. The district court certified for trial seven issues, including each defendant's role, the foreseeability that their actions could cause the contamination, whether the contamination could have created the potential for vapor intrusion, and whether the defendants negligently failed to investigate and remediate the contamination from their respective facilities. *Id.* at 410. The Sixth Circuit affirmed, reasoning that although (b)(3) certification was unavailable, the "predominance problems within a liability-only class do not automatically translate into predominance problems within an issue class." *Id*. at 415. The court also deferred consideration of the defendants' Seventh Amendment concerns, explaining that "[b]ecause the district court ha[d] yet to select and implement a procedure for resolving plaintiffs' claims, no Reexamination Clause problems exist at this time." *Id*. at 417.

On remand, the district court solicited input on a procedure for adjudicating the class's claims consistent with the Seventh Amendment. *In re Behr Dayton Thermal Prods.*, No. 3:08-cv-00326, Doc. 409 at 2–6 (S.D. Ohio Sept. 1, 2022). The court opined that perhaps (1) the issue-class jury could also hear all the later individual trials; (2) the parties could waive their rights to a jury in the individual trials and submit to a special master; or (3) the court could use "careful" jury instructions and "well-drawn special interrogatories" and verdict forms. *Id.*

Following the parties' responses, which eliminated the first two options, the court raised more constitutional questions:

- "There will be no [final] judgment at the conclusion of the issues trial. How does [that] . . . affect the applicability of issue preclusion?" *Id.*, Doc. 467-1 at 1–2.
- And "[i]f the doctrine of issue preclusion does not apply at all," and "subsequent juries will have to reexamine issues," "[g]iven that this would appear to violate the 7th Amendment, does this require dismissal of all Plaintiffs' remaining claims?" *Id.*
- "How does the jury resolution of foreseeability . . . implicate the 7th Amendment?" *Id*. at 2–3.
- Does the division of general and specific causation "necessarily result in a 7th Amendment violation?" *Id*. at 3.

Even asking the certified issues in a way that would be "useful to future proceedings" was proving difficult:

- How would answering each defendant's "role," affect comparative negligence? *Id*. at 2.
- If a duty arises when an injury is foreseeable, "what is the relevant injury? The creation of the plume of groundwater contamination? The risk of vapor intrusion in Plaintiffs' properties? Actual vapor intrusion?" *Id*.
- If a class-wide general causation finding offers "no efficiency to be gained," should that issue be decertified? *Id*. at 3–4.
- "With respect to special interrogatories, what specific suggestions do Plaintiffs have to ward off 7th Amendment problems?" *Id*.

With these questions pending, and citing the possibility of years, if not decades, of further litigation, the parties were driven to settle.

Contrast this result with *In re FCA US LLC Monostable Elec. Gearshift Litig*, 685 F. Supp. 3d 540, 543–44 (E.D. Mich. 2023), a multidistrict automotive consumer class action. The *Monostable* plaintiffs claimed that their vehicles, which included three different models spanning three model years purchased in 23 states, were worth less than they paid because of a purported defect (a counter-intuitive "monostable" shifter) that the manufacturer had concealed prior to sale. *Id.* at 545–47. After declining to certify any of the plaintiffs' various warranty and consumer-fraud claims under Rule 23(b)(3), the court certified for trial three issues under 19 states' laws: whether the vehicles had a defect, whether it was concealed, and whether the concealed defect was material. *Id.* at 546–47. The jury found no defect for 18 states, resulting in judgment *against* all class members in those states. *Id.* at 549. In the 19th state (Utah), the jury found a defect but also found that FCA had not concealed it. *Id.* at 542. The plaintiff moved post-trial to re-certify the Utah implied-warranty claim, this time under Rule 23(b)(3). *Id.* at 543. The court denied the motion because, even accepting that damages could be proven with common evidence, the individualized inquiries necessary to determine whether each class member had pre-purchase knowledge would "entirely predominate the liability phase of any ensuing trial[.]" *In re FCA US LLC Monostable Elec. Gearshift Litig.*, No. 16-MD-02744, 2024 WL 4511479 at *6 (E.D. Mich. Oct. 10, 2024). Thus,

judgment was entered *against* almost all of the plaintiffs and the classes they represented, with the Utah class claims left hanging but with no path to judgment.

The Sixth Circuit's experience demonstrates that courts that properly deny certification of claims for money damages because individual issues will predominate over common issues under Rule 23(b)(3) should not give in to the temptation to certify for trial specific "issues," while deferring the constitutional and practical problems that prevent fair adjudication of the full controversy in hopes that the threat of an issue trial will compel the parties to settle without regard to the claims' merit. This Court has the opportunity not just to reverse the district court's unfortunate decision but to make clear that in this Circuit, such an approach cannot stand because it requires an untenable interpretation of Rule 23(c)(4).

CONCLUSION

This Court should come down squarely on the side of the (b)(3)-compliant reading of Rule 23(c)(4) and should hold that it is an abuse of discretion to certify an issue class that does not otherwise meet the rigors of Rule 23(a) and (b).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because this brief contains 6163 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

Dated: January 7, 2025

/s/ Stephanie Douglas
Stephanie A. Douglas

CERTIFICATE OF SERVICE

I, Stephanie Douglas, hereby certify that I electronically filed the foregoing *Brief of Product Liability Advisory Council, Inc. and The National Association of Manufacturers as* Amici Curiae *in Support of Appellants and in Support of Reversal* with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 7, 2025

/s/ Stephanie Douglas
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