No. 10-355

In The Supreme Court of the United States

PELLA CORPORATION, *et al.*,

Petitioners,

v.

LEONARD E. SALTZMAN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, WINDOW AND DOOR MANUFACTURERS ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN ARCHITECTURAL MANUFACTURERS ASSOCIATION, AND THE CENTER FOR CLASS ACTION FAIRNESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The *amici* are associations representing a broad cross-section of American businesses, including product manufacturers and those engaged in the housing and construction industries, as well as parties representing the interests of consumers affected by overbroad class certification decisions. The *amici* and their members have a vital interest in this case because the Seventh Circuit's ruling significantly relaxes the standards for class certification, especially in product defect and consumer fraud cases. These standards protect the procedural and substantive rights of defendant product manufacturers and home

[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), upon timely notice of the *amici*'s intent to file this brief, letters of consent to the filing of this brief by Petitioners and Respondents have been received and filed with the Clerk.

builders, as well as consumer class members. If allowed to stand, the ruling will encourage an avalanche of new class actions, dramatically increasing the class action exposure of American businesses, and harming the long run interests of American consumers.

The National Association of Home Builders (NAHB) is a nonprofit trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals are fostering a healthy and efficient housing industry and promoting policies that will keep safe, decent, and affordable housing a national priority. NAHB's membership is comprised of more than 800 affiliated state and local associations representing over 175,000 members nationally, which include contractors, subcontractors, developers and other related occupations that build houses, apartments, and condominiums for residential use. NAHB members construct approximately eighty percent (80%) of the new homes built each year in the United States.

The Window and Door Manufacturers Association ("WDMA"), founded in 1927, is the premier trade association representing the leading manufacturers of residential and commercial window, door and skylight products for the domestic and export markets. The association is focused on key member needs in the areas of advocacy, product performance, education and information, and facilitating business interactions and relationships in the fenestration ecosystem.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The Chamber of Commerce of the United States of America (the "Chamber") is the nation's largest federation of business companies and associations, representing 3,000,0000 direct members and indirectly representing the interests of businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs involving issues of national concern to American businesses.

The American Architectural Manufacturers' Association (AAMA) is a trade association representing over 250 companies and 140 individuals in the fenestration industry. AAMA has been recognized for more than sixty years as the industry's ultimate source for selection, specification, application, and performance information for aluminum, vinyl, and wood fenestration products, including windows, doors, curtain walls, skylights, siding, and other products.

The Center for Class Action Fairness (the "Center") is a non-profit public-interest law firm that represents consumers pro bono in class action litigation across the United States by objecting to unfair class action settlements on their behalf. The Center makes no effort to engage in quid pro quo settlements for profit. Instead, the Center represents consumers by objecting to unfair settlements that do not provide meaningful relief to class members and by seeking court rulings that protect consumers from class action attorneys. The Center has an interest in opposing overbroad class certification decisions, which can give putative class counsel unfair leverage *ex ante* to bring meritless class actions that hurt consumers' interests in the long run.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Seventh Circuit's opinion raises serious questions concerning courts' authority to certify Rule 23(b)(3) and (b)(2) class actions with respect to narrow issues of liability when overall resolution of the class claims turns on predominantly individual questions. This decision deepens the existing circuit conflict concerning the propriety of "issue" classes, erodes Rule 23's procedural safeguards, and threatens a proliferation of class action litigation, all of which demonstrate the pressing need for this Court to grant review.

Rule 23(b)(3) damages class actions are importantly limited by the requirement that common questions predominate over individual ones. This requirement acts as a vital check against improvident class actions, and protects the rights of defendants and absent class members alike. The Seventh Circuit's opinion erodes these protections by allowing a court to artificially manufacture predominance by certifying a class with respect to only a few common issues, while disregarding individual liability issues. Specifically, the Seventh Circuit's decision authorizes class certification in a consumer fraud case where the class' claims involve some common issue concerning an alleged design defect, even where other elements of liability, including proximate causation and injury, are too individualized to permit class certification.

This decision will have far reaching implications for the construction industry and manufacturers in general, as it opens the floodgates to new product defect class actions previously thought uncertifiable. For example, construction of a new home involves the installation of thousands of building components, which are affected by the same individualized factors that the Seventh Circuit now holds may be ignored for class certification purposes. The opinion paves the way for certification in any case involving such components. Indeed, the Seventh Circuit's reasoning could be used to certify virtually any product defect case.

Moreover, the artificial bifurcation of "common" and "individual" issues in a narrow "issue" class

action raises serious questions about defendants' right to present every possible defense, including those that may hinge on individual issues. Certification of "issue" classes undermines the due process rights of absent class members as well, by eliminating the overall cohesion of interests that legitimates representative litigation. The complexities raised by these class actions also promise to create procedural nightmares for federal courts.

Equally troubling is the Seventh Circuit's approval of a nationwide (b)(2) "issue" class seeking declaratory judgments on subsidiary issues of liability, which will be governed by the substantive law of fifty different states. The Seventh Circuit's conclusion that (b)(2) certification was appropriate merely because the class seeks "declaratory relief" – without any analysis of state law differences or the need for individualized findings – opens the door to standardless certification of nationwide mandatory (b)(2) issue classes. This Court's review is needed to rein in this creative expansion of Rule 23(b)(2).

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CIRCUIT CONFLICT CONCERNING THE CERTIFICATION OF "ISSUE CLASSES" UNDER RULE 23(b)(3).

By concluding that a limited "issue" (b)(3) class can be certified merely because the class claims raised a common question "of whether the windows suffer from a single, inherent design defect," Pet. App. 5a, the Seventh Circuit's decision not only deepens an existing circuit conflict about the propriety of limited "issue" classes, it threatens a sea change in class action law and practice in product defect cases. The implications of this decision will have far reaching effects on participants in the building and construction industry and product manufacturers, and on the due process rights of all participants in class litigation.

A. The Seventh Circuit's Opinion Paves The Way For Certification Of Any Product Defect Case.

Rule 23(b)(3) requires a court to "find[ ] that the questions of law or fact common to class members predominate over any questions affecting only individual members. . . ." Fed. R. Civ. P. 23(b)(3). The requirement of predominance plays a vital role in assuring that "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without

sacrificing procedural fairness or bringing about other undesirable results." Advisory Committee's Notes to Fed. R. Civ. P. 23, 1966 amendments, Subdivision (b)(3).

Since the adoption of Rule 23(b)(3), the predominance requirement has proven a difficult hurdle in product defect cases, particularly when proximate causation turns heavily on individualized inquiries.[2] The reticence to certify product cases is even more pronounced when such claims are cast as consumer fraud claims, which commonly require individualized inquiry concerning reliance and causation. *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996).

The Seventh Circuit's decision, however, invites courts to imagine away these individualized issues by simply excluding them from the scope of the certification order. The District Court and the Seventh Circuit both recognized that proof of causation in this case would require predominantly individualized inquires, because "wood can rot for many reasons other than

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[2] *E.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996); *In re N. Dist. of Calif., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 854 (9th Cir. 1982); *see also* 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FED. PRAC. & PROC., § 1805, at 408-09 (3d ed. 2005) ("[M]ost courts confronted with Rule 23(b)(3) products-liability class suits have concluded that the standards of predominance and superiority are not satisfied and have refused certification.").

window design and is affected by specific conditions such as improper installation." Pet. App. 7a; *see also id*. at 61a ("Plaintiffs' expert Charles Still noted that improper installation and factors other than the defect may cause water infiltration. . . ."); *id*. at 80a ("It is clear that in many instances, inspection will be required, and individual inquiries will predominate."); *id.* at 81a n.13 ("I agree that issues of causation are too individualized for class certification, and I have declined to certify a class on that issue."). Nevertheless, the District Court believed it could simply disregard those individualized questions by "declin[ing] to certify a class" on those issues. *Id*. at 61a.

The Seventh Circuit broadly endorsed the District Court's approach, observing that "[a] district court has the discretion to split a case by certifying a class for some issues, but not others. . . ." *Id*. at 7a. Accordingly, the court found "the individual issues that necessarily arise in a consumer fraud action would not prevent class treatment of the narrow liability issues here" concerning "whether the windows suffer from a single, inherent design defect leading to wood rot. . . ." *Id*. at 5a.

This decision has far reaching implications for the construction and manufacturing industries. Building a new home involves the installation and integration of thousands of component products, each potentially subject to class litigation under the Seventh Circuit's opinion. Because the performance of those components are interdependent and can be

influenced by a variety of situation-specific factors, like installation, climate, and architectural design, building component cases have often been found to be inappropriate for class treatment. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417 (E.D. La. 1997); *In re Stucco Litig.*, 175 F.R.D. 210 (E.D.N.C. 1997). Different building components may have different strengths and weaknesses, and a builder's choice of components in a particular home will typically reflect a considered judgment about the "fit" of the part for the needs and circumstances of a particular project. Nevertheless, the Seventh Circuit's opinion allows a district court to certify a class seeking an across-the-board declaration that a component is "inherently" defective, without consideration of these contextual factors. This decision not only vastly increases the exposure of the construction industry to class litigation, it ignores the reality of how the industry functions.

The implications reach far beyond the construction industry, however. The Seventh Circuit's opinion opens the door to certification of nearly *any* product defect case and promises to bring about a wave of new product defect class litigation. At a sufficiently high level of generality, *any* product defect case can be said to present a "common" question relating to product design. District courts, relying on the Seventh Circuit's opinion, could feel justified in certifying this narrow question, even if the underlying claims were predominantly individual ones on the whole. The

Seventh Circuit's opinion thus threatens to make the district courts in that circuit a magnet for product defect class actions.

Relaxing class certification standards imposes dramatic costs on businesses. Even when a claim is not meritorious, class certification orders impose intense pressures to settle on defendants before trial, because the prospect of massive liability that comes with a certified class action often makes it prohibitive to litigate. *See, e.g.*, *Castano*, 84 F.3d at 746. "These settlements have been referred to as judicial blackmail." *Id*. The costs have ripple effects throughout the economy, as litigation costs may be passed on to customers in higher prices, or may force producers to withdraw beneficial products from the market altogether. *See* Michael Moore & Kip Viscusi, *Product Liability, Research and Development, and Innovation,* 101 J. of Political Econ. 161, 174-75 (1993).

Class litigation, once initiated, can also cascade beyond the product manufacturer, spreading the costs and adverse effects to other segments of the business community. This is particularly true in building materials and component cases. Certification of a massive class action against the component manufacturer has the potential to draw legions of builders, installers and other third parties into the litigation to resolve affirmative defenses, elements of liability, or third-party claims concerning improper installation, comparative negligence issues, and indemnity. *See Lienhart*, 255 F.3d at 147 (discussing complexities raised by role of builders and installers raised by

certifying defect claims against manufacturer of stucco siding).

The Seventh Circuit's opinion demonstrates the need for this Court to address the growing divergence among the circuits concerning the appropriate interpretation of Rule 23(c)(4), which provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." *See Hohider v. UPS, Inc.*, 574 F.3d 169, 200-01 n.25 (3d Cir. 2009) ("The interaction between the requirements for class certification under [Rule 23(b)(3) and] Rule 23(c)(4) is a difficult matter that has generated divergent interpretations among the courts.").[3] The Fifth Circuit, in another product defect case, has firmly stated that "[a] district court cannot manufacture predominance through the nimble use of subdivision (c)(4)." *Castano*, 84 F.3d at 745 n.21. "[A]llowing 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." *Id*.

Other circuits, however, have adopted a broader view of Rule 23(c)(4)'s provisions concerning

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[3] *See also In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 444 (4th Cir. 2003).

certification of "issue classes." The Second Circuit has suggested that "courts may use subsection (c)(4) to single out issues for class treatment when the action as a whole does not satisfy Rule 23(b)(3)." *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006). The Ninth Circuit has echoed that view. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."). The Seventh Circuit's casual endorsement of "issue" class certification on narrow questions concerning the alleged presence of a product defect – notwithstanding its acknowledgement that injury, causation and damages present predominantly individual questions – takes this view to its logical extreme.

B. Certification Of An "Issue" Class Impairs Defendants' Rights To Present A Defense.

Certification of narrow "issue" classes also invites courts to make artificial divisions between common and individual issues, which deny a defendant the opportunity to present valid individual defenses that bear on classwide claims. It is a well-established principle that "[d]ue process requires that there be an opportunity to present every available defense."

Lindsay v. Normet, 405 U.S. 56, 66 (1972) (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)). This due process principle is implicated when the aggregation of claims through the procedural device of a class action changes the proof required for class members to obtain relief, or deprives defendants of the opportunity to present individualized defenses to particular class members' claims. *Phillip Morris USA Inc. v. Scott*, ___ S.Ct. ___, 2010 WL 3724564, at *1 (Sep. 24, 2010) (Chambers Opinion); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 311 (5th Cir. 1998). "[C]hanges in substantive duty can come dressed as a change in procedure." *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990).

Certification of "issue" classes on subsidiary questions of liability invites courts to dissect "common" questions from what are otherwise individual claims, ignoring the inevitable extent to which elements of liability overlap. *Cf. In re Fibreboard Corp.*, 893 F.2d at 712 (common issues cannot be created by "lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury"). At the class phase of the proceeding, a defendant may be prevented from presenting evidence concerning elements of liability deemed to be "individual" questions, even though that evidence may overlap with the so-called "common" element. This procedure unfairly undermines a defendant's ability to present a full defense on the common issue.

This is particularly true in product defect cases. Questions about the presence of an "inherent design defect" cannot fairly be severed from individualized consideration of whether the alleged design flaw was the actual and proximate cause of any injury to any individual plaintiff. The "requirement that a plaintiff prove both causation and damage" is part of what "defin[es] the duty owed by manufacturers and suppliers of products to consumers." *In re Fibreboard Corp*., 893 F.2d at 712. Preventing a defendant from presenting evidence on individual questions of causation impairs its ability to defend the question of defect.

In this case, for example, the plaintiffs' "defect" theory is that the design of Pella's Proline windows resulted in a marginally higher rate of wood rot than if an alternative design had been chosen. The "defect" inquiry therefore asks whether the design of Pella's windows, *in general*, can cause wood rot. In an individual trial setting, a defendant might rebut such a claim with evidence that the plaintiff's particular injury was not caused by design choices, but by other factors. Such evidence – while addressed to the "individual" element of "causation" – would still be *relevant* to rebutting an inference that the design of the product was not up to the warranted standard.

But the District Court expressly excluded individual causation issues from the class phase of this trial. This procedure places a defendant like Pella in the nearly impossible position of having to prove that its design was not "defective," without being able to

contest whether the design caused any specific failures. This effort to separate the "general" causation question presented by the common "design defect" inquiry from the "specific" causation inquiry can only create confusion and prejudice. *Cf. In re Paxil Litig.*, 218 F.R.D. 242, 249 (C.D. Cal. 2003) (noting that proposal to separately try "general" and "specific" causation "provides few benefits and incurs the heavy risk of confusion and prejudice").

It is not a sufficient answer to say that a defendant may raise such individual evidence in a follow-on proceeding. While the defendant can present that evidence to rebut a finding of individual causation, the defendant nonetheless is precluded from using it to create doubt in the jury's mind on the issue of "defect." And evidence rebutting individual causation may be received by a follow-on jury in a very different light if there has already been an adjudication that the product is "defective." As a practical matter, moreover, once there has been an adjudication that an entire product line is "inherently defective," settlement pressure on a defendant will likely be well-nigh irresistible, making the opportunity to present evidence in individual proceedings a hollow safeguard.

C. Permissive Certification Of "Issue" Classes In (b)(3) Actions Compromises The Due Process Rights Of Absent Class Members.

Certification of narrow "issue" classes in cases where individual issues predominate on key liability questions also implicates the due process rights of absent class members. Class actions are a limited exception to "the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). The class action exception may be justified if the unnamed class member "has his interests adequately represented by someone with the same interests who is a party," but "the burden of justification rests on the exception." *Ortiz*, 527 U.S. at 846 (internal quotation omitted). The Rule 23 requirements therefore "focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 621 (1997).

A core purpose of Rule 23(b)(3)'s predominance requirement is to assure the presence of this "cohesion that legitimizes representative action." *Amchem*, 521 U.S. at 623. Allowing a court to "manufacture predominance" through the use of Rule 23(c)(4)

"issue" certification permits class certification where this cohesion is lacking. *Castano*, 84 F.3d at 745 n.21. Even where the class' claims involve one or more common issues, individual differences on other issues may result in widely divergent interests among class members in the outcome of the litigation and present differing strengths and weaknesses of their claims. These differences call into question whether the class, as a whole, is sufficiently cohesive to justify permitting a self-appointed class representative to control the claims of persons who are not before the court.

Thus, it is not sufficient to simply require, as some courts have, a finding that "issue certification would . . . 'reduce the range of issues in dispute and promote judicial economy.'" *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (quoting *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 168 (2d Cir. 2001)). Judicial economy is not the only purpose of the predominance requirement, a fact that courts endorsing "issue" class certification have overlooked.

D. "Issue" Class Certifications Create Procedural Quagmires For Federal Courts, For Which No Clear Solution Has Been Offered.

There is also good reason to question the assumption that certification of narrow liability issues can *ever* promote judicial economy when common issues do not predominate overall. More likely,

"attempts at piecemeal certification of a class action . . . ultimately result[ ] in unfairness to all because of the increased uncertainties in what is at stake in the litigation and whether the litigation will ever resolve any significant part of the dispute." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 n.17 (5th Cir. 1998).

An "issue" class trial would be an extraordinary procedure, with no clear analogues in American jurisprudence. The procedure contemplates adjudicating sub-issues of liability that, by themselves, do not create a judgment of liability, much less a final judgment. Just what class members are supposed to do with the resulting inchoate "issue" judgments is rarely considered. The lower courts' opinions in this case are no exception.

For example, the District Court offered no insight as to whether it intended to conduct all of the needed individual follow-on proceedings itself, or whether it envisioned issuing only a partial judgment to the class, which class members would take to their own districts or state courts and enforce with separate litigation. *See* Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. 709, 719-23 (2003) (discussing different models of issue class adjudication). Each of these models presents enormous procedural challenges.

The notion of issuing partial "issue" judgments to be enforced in separate suits filed in other jurisdictions raises numerous questions, such as whether

the special verdict would be immediately appealable and, if not, whether it would be reviewable following the judgment in individual proceedings. *See In re Paxil Litig.*, 218 F.R.D. at 248 (noting court "has found[ ] no precedent for this trial methodology"). The latter would call into question the uniformity value of a classwide issue judgment, and the former raises questions about the operation of the final judgment rule. Also, if class members must initiate their own follow-on lawsuits in their home fora with new counsel, the cost of initiating those proceedings may be nearly as prohibitive (in the case of negative value suits) as the cost of ordinary individual litigation would be.

If the class court intends to adjudicate all of the individual follow-on proceedings itself, a different set of problems is presented. It is difficult to describe as "efficient" or "economical" a process whereby hundreds of thousands of class members in six states must be haled to a single district court in Illinois to prove up their individual issues of injury, causation, and damages. While it is tempting to propose imaginative solutions, like various kinds of special master proceedings, these solutions must take into account the defendants' rights to a jury trial on individual issues that might result in damages verdicts. *See Cimino*, 151 F.3d at 316.

Any interpretation of Rule 23(b)(3) that permits classwide resolution of partial liability questions, leaving significant liability issues for follow-on individual

litigation, must consider these vital questions. To date, no court has done so.

II. THE SEVENTH CIRCUIT'S OPINION SETS A DANGEROUS PRECEDENT FOR CERTIFICATION OF A NATIONWIDE MANDATORY (b)(2) CLASS SEEKING ONLY PRELIMINARY DECLARATIONS OF LIABILITY.

This Court has warned of the "serious constitutional concerns raised by the mandatory class resolution of individual legal claims," *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999), a concern that calls for caution before expanding the scope of Rule 23(b)(2). The Seventh Circuit's opinion is anything but cautious, however. To the contrary, the opinion approves a (b)(2) class with no precedent – a nationwide, non-opt out class seeking "declaratory relief" that amounts to nothing more than a partial adjudication of subsidiary liability issues, which are governed by fifty different states' laws. This ruling renders meaningless Rule 23(b)(2)'s requirements that a class seek "final" relief with respect to the class "as a whole." The Seventh Circuit's opinion therefore highlights the need for this Court to clarify that, while terse, the language of Rule 23(b)(2) does impose serious limitations on the scope of such classes.

A. The History And Purpose Of Rule 23(b)(2) Demonstrate The Need For Strict Construction Of The Rule's Requirement That The Class Seek "Final" Injunctive Or Declaratory Relief With Respect To The Class "As A Whole."

Rule 23(b)(2) permits certification of a class only if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." This limitation on the nature of the relief available to a Rule 23(b)(2) class is the primary safeguard for ensuring the cohesiveness of the class, and explains the absence from Rule 23(b)(2) of the more detailed Rule 23(b)(3) safeguards. *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1157 (11th Cir. 1983); *Allison v. Citgo Petroleum Co.*, 151 F.3d 402, 413 (5th Cir. 1998).

Specifically, the "final injunctive or corresponding relief" contemplated by the Advisory Committee is a *unitary* injunction or declaration directing a defendant to change its conduct in a way that will automatically affect all members of the class *uniformly*, whether or not they are parties to the action. "The examples provided by the Advisory Committee illustrate that Rule 23(b)(2) applies only where the class treatment is 'clearly called for,' i.e., in situations where a court, through a single injunction or declaration, can redress 'group, as opposed to individual, injuries. . . . '" *In re Methyl Tertiary Butyl Ether*

Prods. Liab. Litig., 209 F.R.D. 323, 341-42 (S.D.N.Y. 2002) (quoting *Holmes,* 706 F.2d at 1155); *see also Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 614 (1997); *Allison*, 151 F.3d at 413; *Bolin v. Sears, Roebuck & Co.,* 231 F.3d 970, 976 (5th Cir. 2000); *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994). Where such a unitary injunction is sought, "[o]pting out of a (b)(2) suit for injunctive relief would have little practical value or effect. Even class members who opted out could not avoid the effects of the judgment. A (b)(2) injunction would enjoin all illegal action, and all class members would necessarily be affected by such broad relief." *Holmes*, 706 F.2d at 1157.

This limitation ensures that all members of the class will be affected the same way by the relief, and will have the identity of interests required for representative adjudication. *Allison*, 151 F.3d at 413. Thus, "even greater cohesiveness generally is required than in a Rule 23(b)(3) class." *In re St. Jude Med. Inc.*, 425 F.3d 1116, 1121-22 (8th Cir. 2005).

B. A (b)(2) Class Cannot Be Certified Where Class Members' Claims Arise Under Fifty Different States' Laws.

Properly understanding the intent behind Rule 23(b)(2)'s limitation on remedies, it is inconceivable that a class whose claims for declaratory relief may be governed by fifty different states' laws could ever qualify for certification under Rule 23(b)(2). The

members of the (b)(2) class seek declarations concerning the scope of Pella's warranty obligations that will inevitably be governed by many different states' laws. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Under these circumstances, no "single injunction or declaration" can redress the plaintiff class' claims for purposes of (b)(2). *Holmes*, 706 F.2d at 1155. Different class members will have different entitlements to the declaratory relief sought, depending on the substantive state law governing their claims. Some states, for example, do not recognize any warranty claim for unmanifested defects. *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 729 (5th Cir. 2007) ("[S]ome jurisdictions require that the alleged defect manifest itself regardless of whether the claim is brought under contract or tort."). Under these circumstances, class members' varying rights to relief implicate (b)(2)'s assumption of homogeneity of interests.

The Seventh Circuit opinion did not even reference the need for choice-of-law analysis with respect to the nationwide (b)(2) class' claims, despite expressly discussing the need for such analysis for the more limited six-state (b)(3) class. The opinion equates the absence of an express predominance requirement in (b)(2) to the absence of any need to consider state-law differences.

The implications of this decision are enormous. Under prevailing law, courts have consistently refused to certify nationwide Rule 23(b)(3) classes asserting state-law claims, because variations in state law destroy predominance. *See, e.g., Amchem*, 521

U.S. at 622; *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1178 (11th Cir. 2010); *In re Am. Med. Sys.,* 75 F.3d at 1085. The Seventh Circuit opinion resurrects the nationwide state-law class action under the auspices of Rule 23(b)(2). The risk of certification of a nationwide class, as opposed to the statewide classes that have increasingly become the norm under (b)(3), dramatically increases the "bet the company" nature of class action filings, magnifying the potential for plaintiffs' class action lawyers to obtain extortionate settlements that harm the interests of businesses and consumers alike.

C. Allowing Certification Of (b)(2) "Issue" Classes Requesting "Declarations" On Subsidiary Questions Of Liability Is An Abuse Of Rule 23(b)(2).

The text and purpose of (b)(2) also makes clear that a (b)(2) class cannot be certified to seek partial declarations of narrow liability "issues" that do not provide final relief to any member of the class. Certification of a (b)(2) class is inappropriate if relief would vary among class members or individualized inquiries are needed to establish entitlement to relief. *See Holmes*, 706 F.2d at 1157; *Hohider v. UPS, Inc.*, 574 F.3d 169, 200 (11th Cir. 2009).

The Seventh Circuit's opinion holds that Rule 23(b)(2) was satisfied because the "class would benefit uniformly from the declarations," even though it

recognized that the declarations would not create any automatic entitlement to relief since "only once the windows experience any manifest defect, if ever, will the class members be able to submit a claim to Pella for repair." Pet. App. 8a. However, the need for individual proof of causation and injury demonstrates that this relief is neither "final," nor beneficial to the class "as a whole." The benefit class members receive from this declaration will vary greatly, depending on such factors as whether their windows are still under warranty, or whether they are subject to a further defense for improper installation.

The reasoning of this opinion would permit certification of a (b)(2) class in every case, since any class that presents a single common issue on liability could claim to "benefit uniformly" from a favorable declaration on that issue. One cannot read the opinion and conclude that the requirements of "final" relief, or relief flowing to the class "as a whole," have any independent meaning, apart from the requirement that the class request "declaratory relief."

Ultimately, the (b)(2) class certified in this case is nothing more than a nationwide, mandatory version of the (b)(3) "issue class" certified for resolution of common subsidiary questions of liability, except that the court felt unconstrained to even consider how variations in state law or individual circumstance might apply to the plaintiffs' claims, given the absence of Rule 23(b)(3)'s specific procedural safeguards.

In *Ortiz*, this Court recognized the need to rein in creative efforts to expand the mandatory limited fund class action under Rule 23(b)(1)(B). 527 U.S. at 842. The Court recognized that although "the text of Rule 23(b)(1)(B) is on its face open to a more lenient limited fund concept" than was contemplated by the Rule's drafters, "the greater the leniency in departing from the historical limited fund model, the greater the likelihood of abuse. . . ." *Id*. at 842. Accordingly, the "prudent course" was to "stay close to the historical model" in order to "minimize[ ] potential conflict with the Rules Enabling Act, and avoid[ ] serious constitutional concerns raised by the mandatory class resolution of individual legal claims." *Id*.

This case likewise demonstrates that, while the absence of the explicit Rule 23(b)(3) safeguards may make Rule 23(b)(2) open to more creative interpretations and uses than originally envisioned, such expansion of Rule 23(b)(2) gives rise to "serious constitutional concerns" that compel this Court's intervention.

CONCLUSION

For these reasons, and for those stated by the Petitioners, the Writ of Certiorari should be granted.

Respectfully submitted,

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