No. 15-1290

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE PROGRAF ANTITRUST LITIGATION

LOUISIANA HEALTH SERVICE INDEMNITY COMPANY, individually and all others similarly situated, d/b/a BLUECROSS/BLUESHIELD OF LOUISIANA; JANET M. PAONE, on behalf of herself and all others similarly situated,

Plaintiffs-Appellees,

BURLINGTON DRUG COMPANY, INC.; JUDITH CARRASQUILLO, on her behalf and on behalf of all others similarly situated; KING DRUG COMPANY OF FLORENCE, INC.; NEW MEXICO UFCW UNION'S AND EMPLOYER'S HEALTH AND WELFARE TRUST FUND; PLUMBERS AND PIPEFITTERS LOCAL 572 HEALTH AND WELFARE FUND, individually and on behalf of all others similarly situated; STEPHEN L. LAFRANCE HOLDINGS, INC., a/k/a SAJ DISTRIBUTORS; STEPHEN L. LAFRANCE PHARMACY, INC., a/k/a SAJ DISTRIBUTORS; UNIONDALE CHEMISTS, INC.; LOUISIANA WHOLESALE DRUG COMPANY, INC.,

Plaintiffs,

v.

ASTELLAS PHARMA US, INC.,

Defendant-Appellant.

On Appeal from a Decision of the
United States District Court for the District of Massachusetts
MDL No. 2242, Master File No. 1:11-md-02242-RWZ

BRIEF FOR PUBLIC JUSTICE, P.C. AS AMICUS CURIAE SUPPORTING APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Public Justice, P.C. is a professional corporation. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

I. INTEREST OF THE AMICUS CURIAE

Public Justice, P.C. is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. Public Justice specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and workers' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice regularly represents consumers in class actions, and its experience is that the class action device—including certification of particular issues under Rule 23(c)(4)—is often the only way to redress corporate wrongdoing where individuals by themselves lack the knowledge, incentive, or effective means to pursue their claims.[1]

[1] Public Justice certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person other than Public Justice, its members, or its counsel contributed money intended to fund the preparation or submission of the brief. *See* Fed. R. App. P. 29(c)(5). All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a).

II. INTRODUCTION

In urging this Court to reverse the decision of the district court certifying an issue class under Rule 23(c)(4), Astellas Pharma US, Inc. and its *amicus* the Chamber of Commerce of the United States of America are essentially asking this Court to blue pencil (c)(4) out of Rule 23, which expressly states that "an action may be brought or maintained as a class action with respect to particular issues." For that reason alone, their position that Rule 23 does not permit issue class actions is wrong. Nor is reading Rule 23 to prohibit issue class actions justified by the Chamber's fearmongering policy arguments—each of which can be dismantled by an examination of the facts.

III. SUMMARY OF ARGUMENT

This is a consumer class action alleging violations of antitrust laws. Defendant-Appellant Astellas Pharma US, Inc., makes and sells Prograf, a drug that helps reduce the risk of organ rejection in transplant patients. Plaintiffs-Appellees allege that Astellas acted anti-competitively when it filed with the Food and Drug Administration a sham citizen petition designed to delay the agency's approval of a

generic equivalent to Prograf. The district court certified an issue class under Rule 23(c)(4) to test the merits of that allegation.

Dissatisfied with that result, Astellas and its *amicus* the Chamber of Commerce ask this Court to hold that Rule 23(c)(4) does not, in fact, permit issue class actions. Rather, they argue that Rule 23(c)(4) permits bifurcation of a case in which the case as a whole meets the requirements for class certification; in other words, that it is a mere case management tool for classes that have already been certified. But that interpretation (1) ignores the plain text of Rule 23(c)(4); (2) renders the provision superfluous; (3) is not supported by the structure of Rule 23; and (4) is contradicted by the Advisory Committee's notes addressing Rule 23(c)(4). A holding that Rule 23(c)(4) does not permit issue class actions would also be at odds with precedent from this Court and the majority of the circuits.

The Chamber, in particular, uses scare tactics in its attempt to persuade this Court to ignore the plain language of Rule 23. But the Chamber's claim that Rule 23(c)(4) issue classes invite "a deluge of issue class actions filed simply to extort settlements from business and

government defendants" is demonstrably false and disrespects the important gatekeeping function of district courts.

According to the Chamber, applying the plain language of Rule 23(c)(4) makes certifying a class "trivially easy" or "automatic." An examination of district court decisions on motions to certify issue classes under Rule 23(c)(4), however, reveals that district courts rigorously analyze whether certification is appropriate—as the district court did here. In some cases, courts find issue certification appropriate; in others they do not. Contrary to the Chamber's bluster, "Rule 23(c)(4) cannot cure every ill that troubles a putative class." *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578, 589 (S.D.N.Y. 2013).

Similarly, the myth that class certification forces defendants to settle frivolous claims is just that—a myth. The Federal Judicial Center conducted a comprehensive study of class actions in federal courts and found no evidence of the ills the Chamber describes. The study showed that district courts are excellent gatekeepers, meritless claims are dismissed long before the certification process, and certification does not inexorably lead to settlement.

In fact, the stakes for defendants facing certification of classes as to particular issues are *lower* than in cases seeking certification of an entire claim because even if the class prevails on the particular issues certified, each class member will be required to establish the other elements of his or her claim, which will usually include damages, individually. Far from permitting "damages classes" that do not satisfy Rule 23(b)(3)'s predominance requirements, issue certification permits corporate defendants to litigate (and appeal) particular issues as to the entire class without any risk that damages will be awarded against them.

For all these reasons, this Court should reject the Chamber's attempt to write section (c)(4) out of Rule 23 and affirm the district court's decision certifying an issue class.

IV. ARGUMENT

RULE 23(c)(4) PERMITS ISSUE CLASS CERTIFICATION.

A. The plain language of Rule 23(c)(4) authorizes certification of issue classes in appropriate cases, and the structure and history of Rule 23 confirms that interpretation.

Just as with statutory interpretation, a court's analysis of a federal rule of civil procedure begins with the plain text of the rule, and the

plain text of Rule 23(c)(4) provides that a court may certify an issue class. *See Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (explaining that courts are bound by the text of Rule 23 and "are not free to amend a rule").

Rule 23(c)(4) provides in full:

> **Particular Issues.** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

Fed. R. Civ. P. 23(c)(4). The key words in the rule are "brought or maintained." Brought is the past participle of bring, which means "to cause to become." Oxford English Dictionary (2d ed. 1987). A lawyer who has filed a case has brought an action. Similarly, maintained is the past tense of "maintain," the definition of which includes to "carry on, keep up, or prosecute." *Id.* The plain meaning of Rule 23(c)(4) is that, in appropriate cases, a class action can be filed (brought) or prosecuted (maintained) with respect to particular issues, leaving other issues to be litigated in subsequent proceedings. When a district court finds that all the requirements of Rule 23(a) and (b) are satisfied with respect to

particular issues, it may certify a class for the purpose of resolving those issues in one stroke.

The Chamber does not explain why Rule 23(c)(4) says that an action may be "brought or maintained" as a class action if the subsection is to be used only to manage cases that a court had already found can be "brought or maintained" as class actions. Instead, the Chamber's interpretation would blue pencil the words "brought or maintained" out of the rule.

1. The structure of Rule 23 confirms that Rule 23(c)(4) authorizes certification of issue class actions.

The Chamber's argument that the structure of Rule 23 indicates that subdivision (c)(4) is a mere "housekeeping" provision or case-management tool to be used only after a class is certified falls apart under scrutiny. It also runs afoul of the cannon of construction disfavoring interpretations that render words or provisions superfluous.

According to the Chamber, subdivisions (c)(1), (c)(2), (c)(3), and (c)(5) of Rule 23 have no effect until after a court has found that the requirements of Rule 23(a) and (b) are independently met and certified a class, and therefore subdivision (c)(4) must be treated the same way. The premise of this argument is false. For example, Rule 23(c)(5)

provides for the creation of subclasses. District courts routinely consider the option to create subclasses under Rule 23(c)(5) when determining whether the requirements of Rule 23(a) and (b) are met. *See, e.g., Tiro v. Pub. House Invs., LLC*, 288 F.R.D. 272, 278–79 (S.D.N.Y 2012) (certifying class of restaurant workers alleging wage violations and finding that creation of subclasses resolved arguments against commonality and typicality raised by defendant). Indeed, the Supreme Court's decision in *Amchem* calls for district courts to do so. 521 U.S. at 627–28; *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999).

Public Justice agrees with the Chamber that Rule 23(c)(4) and Rule 23(c)(5) must be considered together. Doing so, however, supports the conclusion that the ability to certify an issue class—like the ability to create subclasses—is a tool district courts may use when determining whether the Rule 23(a) and (b) requirements are satisfied. The structure of Rule 23 confirms that Rule 23(c)(4) should be used exactly as the district court did here: as a means to determine whether a class should be certified in the first instance.

Further, the Chamber's construction of Rule 23 should be rejected because it is at odds with "one of the most basic interpretive cannons" in

the book: "A statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn,* 542 U.S. 88, 101 (2004)) (alteration in original) (internal quotation marks omitted). The Chamber's argument that issue certification and the creation of subclasses could be considered only after certification would render subsections (c)(4) and (c)(5) of Rule 23 superfluous. *See Gunnels v. Healthplan Servs., Inc.*, 348 F.3d 417, 439–40 (4th Cir. 2003) (rejecting the interpretation of Rule 23(c)(4) offered by the Chamber because it would render (c)(4) superfluous); *see also In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006) (same). District courts must consider manageability as part of their analysis of predominance and superiority under Rule 23(b)(3). If a court cannot use the tools found in Rule 23(c)(4) and (c)(5) until after it has found that the entire case is manageable and satisfies the requirements of Rule 23(b)(3), then what purpose do those provisions serve? The Chamber provides no answer.

2. The Advisory Committee notes confirm that Rule 23(c)(4) authorizes issue class actions.

The Advisory Committee's note explaining the adoption of Rule 23 also confirms that Rule 23(c)(4) means what it says:

> **Subdivision (c)(4).** This provision recognizes that an action *may be maintained as a class action as to particular issues only*. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Fed. R. Civ. P. 23 advisory committee's note (1966) (emphasis added). By stating that a case could be a class case for liability purposes only, the note is inconsistent with the theory that a class certification must be all-or-nothing. Further, the note expressly maps out the procedure followed by the district court in this case: certification of key issues of liability, leaving to later proceedings individual questions of antitrust impact and damages. *See also Nassau County*, 461 F.3d at 226 ("As the note points out, a court may employ Rule 23(c)(4) when it is the 'only' way that a litigation retains its class character, *i.e.,* when common issues predominate only as the 'particular issues' of which the provision speaks."). Nothing in the note's introductory description of the amendments to Rule 23 as a whole supersedes—or even contradicts—

the note's comments on Rule 23(c)(4) in particular. *See* Chamber Br. at 14 (quoting introductory section of 1966 note discussing that the goal of the amendments was "the fair conduct of [class] actions").

B. Issue certification has been the law in this Circuit for more than a decade.

This Court confirmed that Rule 23(c)(4) authorizes issue certification over a decade ago in *Smilow v. Southwestern Bell Mobile Systems, Inc.*, 323 F.3d 32 (1st Cir. 2003). *Smilow* was a class action brought by consumers who alleged they were improperly charged for incoming calls in violation of their wireless service contracts. *Id.* at 34. The district court decertified the consumer class after concluding that damages issues were too individualized to be resolved with common proof. *Id.* at 36. This Court reversed, explaining that "even if individualized determinations were necessary to calculate damages, Rule 23(c)(4)(A) would still allow the court to maintain the class action with respect to other issues." *Id.* at 41.[2]

[2] Prior to 2007, Rule 23(c)(4)(A) addressed issue certification and Rule 23(c)(4)(B) addressed subclasses. As part of the 2007 "general restyling" of the Federal Rules of Civil Procedure, the provisions were separated into subdivisions (c)(4) and (c)(5), respectively. Fed. R. Civ. P. 23 advisory committee's note (2007). This stylistic revision was not intended to change the meaning of the rule. *Id.*

The following year, this Court expressly followed *Smilow* to affirm certification of an issue class in a case challenging county jail policies that authorized strip searches of every arrestee. *See Tardiff v. Knox Cnty.*, 365 F.3d 1, 2–3 (1st Cir. 2004). In *Tardiff*, the Court identified several key, common liability issues, including: (1) identifying each jail's policy regarding strip searching arrestees; and (2) determining whether the policy was lawful as applied to certain groups of arrestees. *Id.* at 4. Though proving damages might require testimony from individual class members, the Court explained that that fact did not preclude issue certification on the liability questions only. *Id.* at 6–7. Citing *Smilow*, the Court concluded that it would be appropriate under Rule 23 to resolve common questions of liability on a class basis while leaving individual class members to pursue damages claims in separate suits. *Id.*

The district court's decision here hews closely to the principles set forth in *Smilow* and *Tardiff*. Adden. 2–6. Affirming the district court's decision will not remake class action practice in federal courts. Quite the opposite: Using Rule 23(c)(4) to isolate specific issues appropriate for class treatment, while leaving individual issues to be resolved in

subsequent proceedings, has long been the law in this and other circuits.

C. A majority of circuits agree that Rule 23(c)(4) authorizes certification of an issue class.

The majority of circuits agree that Rule 23(c)(4) authorizes certification of issue classes. In addition to this Circuit in *Smilow*, the Second, Third, Fourth, Sixth, Seventh, and Ninth Circuits have all approved issue certification under Rule 23(c)(4). *See Nassau County*, 461 F.3d at 221 (holding that issue class under Rule 23(c)(4) is proper); *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011) (applying multifactor test for certification of an issue class under Rule 23(c)(4)); *Gunnells*, 348 F.3d at 447 (affirming certification of issue class under Rule 23(c)(4)); *In re Whirlpool Front Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013) (affirming certification of class on liability issues only); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (reversing denial of "limited class action treatment" under Rule 23(c)(4)); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (stating that where an entire action cannot be certified because predominance is not satisfied, Rule 23(c)(4) permits courts to isolate particular issues for class

treatment). Only the Fifth Circuit has suggested that Rule 23(c)(4) may not be used to certify an issue class. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). Recently, however, the Fifth Circuit seems to have retreated from that position, recognizing that Rule 23(c)(4) authorizes certification of common issues of liability, leaving for subsequent proceedings individual issues of damages. *See In re Deepwater Horizon*, 739 F.3d 790, 816–17 (5th Cir. 2014).

The Second Circuit's opinion in *Nassau County* provides persuasive analysis of the key issues presented here. The court allowed certification as to particular issues because that interpretation is supported by "the plain language and structure of Rule 23." *Nassau County*, 461 F.3d at 226. Next the court explained that "the Advisory Committee Notes confirm this understanding." *Id.* Then the court rejected the cramped view of Rule 23(c)(4) previously held by the Fifth Circuit—and advocated by the Chamber here—because it "renders subsection (c)(4) virtually null." *Id.* Finally, the court noted that leading commentators on federal procedure and class actions agree 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)." *Id.* (citing 7AA

Wright & Miller, *Federal Practice & Procedure* § 1790 (3d ed. 2005); 6 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 18:7 (4th ed. 2002)). The Second Circuit's opinion in *Nassau County* provides a roadmap for addressing many of the issues presented in this appeal and affirming the district court's decision. *See also Gunnels*, 348 F.3d at 438–45 (applying a similar analysis and reaching the same result).[3]

The Third Circuit has taken a slightly different approach, adopting a non-exclusive list of factors district courts may consider when determining whether it is appropriate to certify particular issues under Rule 23(c)(4). *See Gates*, 655 F.3d at 273. This approach is based on a list of factors developed by the American Law Institute, rather than the

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[3] Astellas' attempts to diminish *Nassau County* are flawed. *See* Astellas Br. at 44–46. First, Astellas points to *Myers v. Hertz Corp.*, 624 F.3d 537 (2d Cir. 2010) as an example of a case where the Second Circuit did not follow *Nassau County*. *Myers*, however, does not address Rule 23(c)(4) or issue certification. 624 F.3d at 547–552. *Myers* cites *Nassau County* for the rule that issues conceded by the defendant are relevant to a court's predominance analysis. *Id.* at 551. The Second Circuit recently brushed off a direct challenge to *Nassau County*'s analysis in an unpublished decision affirming issue certification under Rule 23(c)(4). *See Jacob v. Duane Reade, Inc.*, 602 F. App'x 3, 6–7 (2d Cir. 2015) (applying *Nassau County*).

Second, Astellas argues that the 2007 amendments to Rule 23 rendered *Nassau County* "obsolete." Astellas Br. at 46. As Astellas concedes, however, the 2007 amendments were "intended to be stylistic only." Fed. R. Civ. P. 23 advisory committee's note (2007).

text of Rule 23 itself. *Id.* Public Justice does not advocate this Court's adoption of requirements beyond those set forth in Rule 23(c)(4). But the factors reflect practical considerations district courts are likely to weigh when deciding whether certification of an issue class is "appropriate" under Rule 23(c)(4). *See, e.g.*, *Jacks DirectSat USA, LLC*, 2015 WL 1087897, at *6–*7 (N.D. Ill. Mar. 10, 2015) (following Seventh Circuit precedent, but explaining that the Third Circuit had provided "a useful list of factors" and using those factors in determining whether issue certification was warranted).

In sum, this Court's sister circuits have developed a significant body of law favoring certification of particular issues in appropriate cases under Rule 23(c)(4). Neither the plain language, structure, nor purpose of Rule 23 supports a split from those precedents.

D. This Court's sister circuits are not flouting the Supreme Court.

Astellas is incorrect in arguing that applying the plain language of Rule 23(c)(4) is contrary to the Supreme Court's decisions in *Comcast*, *Halliburton*, and *Amchem*. Astellas Br. at 38–39. As a preliminary matter, decisions on class certification cannot be copied and pasted from one case to the next. Instead, whether specific classes can or cannot be

certified under Rule 23 always depends on the particular legal and factual issues presented. More importantly, none of those cases addressed Rule 23(c)(4) or issue certification.

The only place where Rule 23(c)(4) is cited in *Comcast* is in Justice Ginsberg's dissent, which notes that "a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings." *Comcast v. Behrend*, 133 S. Ct. 1426, 1437 n.* (2013) (Ginsberg, J. dissenting). The argument that *Comcast* precludes issue certification under Rule 23(c)(4) has already been expressly rejected by the Sixth and Seventh Circuits and, as far as Public Justice is aware, embraced by no court. As the Sixth Circuit explained, *Comcast*'s requirement that a damages model in an antitrust case match the plaintiffs' theory of liability has "limited application" in a case where the particular issues certified under Rule 23(c)(4) do not include damages. *In re Whirlpool*, 722 F.3d at 860; *see also Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013) (distinguishing *Comcast* because whether damages are subject to classwide proof is a non-issue when the court is not asked to determine damages on a classwide basis).

The Supreme Court's two decisions in the Halliburton securities litigation—one of which reversed the district court's *denial* of class certification—address substantive securities law, not Rule 23(c)(4). *See Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (reversing decision certifying class based on misapplication of rules governing securities class actions); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011) (reversing denial of class certification based on misapplication of securities law). The Supreme Court has never said that the proposed class in the Halliburton litigation cannot be certified. Indeed, the district court recently certified a class on a more limited basis than plaintiffs previously proposed. *Erica P. John Fund, Inc. v. Halliburton Co.*, 2015 WL 4522863, at *28 (N.D. Tex. July 25, 2015).

There is also no reason to conclude that the proposed settlement classes in *Amchem* could have been certified under Rule 23(c)(4). The Court in *Amchem* found that the proposed classes failed satisfy predominance *and* adequacy. 521 U.S. at 622–628. No one suggests that Rule 23(c)(4) permits certification of issue classes that do not satisfy all of the Rule 23(a) requirements.

To the extent that *Amchem* offers guidance on interpreting Rule 23(c)(4), it supports Appellees' position. *Amchem* explains how the requirements of Rule 23(a) and (b) are modified when parties seek certification of settlement class under Rule 23(e). *Id.* at 619–20. The Court rejected the argument that the requirements of Rule 23(a) and (b) must be satisfied without "taking into account the settlement" when parties seek certification under Rule 23(e). *Id.* Instead, the fact of settlement is relevant to whether the requirements of Rule 23(a) and (b) are satisfied. *See id.* at 620. That analysis applies equally to requests to certify particular issues under Rule 23(c)(4), where the proposal is to certify only particular issues is relevant to determining whether the requirements of Rule 23(a) and (b) are satisfied.

E. District courts rigorously analyze whether certification of an issue class is warranted.

The Chamber's scary-sounding warnings that permitting issue classes will create a "tidal wave of shakedown class actions," and that certification of issue classes is "a foregone conclusion" or "automatic" are unsupportable. Chamber Br. at 6, 16, 18. First, the Chamber's dire predictions are easily proved false by the fact that, as explained above, in this and other circuits, issue certification is nothing new—yet no

"tidal wave" has come to pass. Second, a look at what is actually happening in the district courts lays bare the Chamber's fear-mongering for what it is—a play to its base.

To begin with, district courts do not rubber stamp requests to certify classes as to particular issues. District courts take their role as gatekeepers seriously. They do not use certification of particular issues to allow classes to "evade" the other requirements of Rule 23. Astellas Br. at 39. Instead, with respect to the particular issues certified, classes must meet the requirements of Rule 23(a) and the requirements of Rule 23(b), *including predominance under (b)(3)*, in cases where the class members seek damages. Satisfying those requirements is far from "automatic" for an issue class—district courts *do* reject proposed issue classes when they fail to meet the (b)(3) requirements. Further, courts have respected Rule 23(c)(4)'s express requirement that issue certification be "appropriate" in a particular case, only certifying issue classes when doing so will materially advance the resolution of the litigation. *See Mullins v. Direct Digital, LLC*, ___F.3d ___, 2015 WL 4546159, at * 8 (7th Cir. July 28, 2015) (explaining that district courts have "considerable experience with and flexibility in engineering

solutions to difficult problems of case management []" presented by class actions).

Indeed, examples abound of district courts putting real meat on the bones of Rule 23(c)(4)'s requirement that issue certification be "appropriate" and subjecting (b)(3) issue classes to rigorous (b)(3) analysis. In *Parker v. Asbestos Processing, LLC*, 2015 WL 127930 (D.S.C. Jan. 8, 2015), for example, the district court held that although Rule 23(c)(4) permitted issue class actions, the issue class had to meet all the requirements of Rules 23(a) and (b). *Id.* at *11. After finding that the proposed issue class met the Rule 23(a) requirements, the court did an extensive analysis of whether choice-of-law issues complicated the case such that it did not meet the predominance requirement of Rule 23(b)(3). *Id.* at *12–*14. Though the court ultimately ruled that the predominance requirement was met, it denied the motion for class certification because the proposed class failed to meet Rule 23(b)(3)'s superiority requirement—given the diverse liability and damage determinations that would have to be made in the workers' compensation case, "there was only minimal advantage gained from the resolution of the threshold common issues." *Id.* at *15. The court

explained that issue class certification is not warranted "where the prevalence of individual issues is such that limited class certification would do little to increase the efficiency of the litigation." *Id.* at 16 (citing *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008)).

The district court conducted a similar analysis in *Morris v. Davita Healthcare Partners, Inc.*, ___ F.R.D. ___, 2015 WL 3814361 (D. Colo. June 18, 2015), and reached a similar conclusion. *Morris* involved claims brought by heart attack victims against a dialysis center, and the plaintiffs proposed an issue class to deal with common questions of negligent monitoring by the center. *Id.* at *12. Once again, the proposed issue class met the Rule 23(a) and Rule 23(b)(3)'s predominance requirements, but faltered on (b)(3)'s superiority requirement. *Id.* The court noted that the class claims would require expert evidence—a fact that weighed in favor of certification—but that the "myriad of individual causation issues" and the fact that "individual cases provide[d] a realistic alternative to a class action" meant that the class action device was not superior to individual actions. *Id.* at *12, *14. "In sum," the court explained, "this is a case in which individual issues are

so central to plaintiffs' claims that classwide treatment of even the issues on which plaintiffs seek certification would not achieve significant economies of time, effort, and expense." *Id.* at *13.

Finally, contrary to the dire predictions of the Chamber, courts have found that proposed issue classes fail the *predominance* requirement. Chamber Br. at 18. In *In re Yasmin and Yaz (Drospirenone) Marketing*, 275 F.R.D. 270, 278 (S.D. Ill. 2011), the district court declined to grant certification under Rule 23(c)(4) because the "putative common questions are enmeshed with . . . individual questions of law and fact," and, therefore, "individual issues predominate." *Id.* The district court took a hard look at the issue the "creative lawyer," Chambers Br. at 16, had claimed was predominant and found it wanting.

On the flip side, where class certification on particular issues does create significant efficiencies in the litigation by materially advancing the litigation—is "appropriate"—and does meet all the other requirements of Rules 23(a) and (b), district courts *do* certify issue classes. For example, in *Jacob*, 293 F.R.D. 578, the district court certified a class for the purpose of determining whether assistant store

managers were misclassified as employees exempt from overtime pay. Though the calculation of any damages in the form of lost overtime pay proved especially complicated and "not capable of classwide proof," *id.* at 592, the court found that the misclassification, "if proved, will have necessarily caused a uniform type of injury to class members" and "clearly advance the litigation in a meaningful way," *id.* at 593. The court explained that "[w]hile Rule 23(c)(4) cannot work an end-run around the requirement that there be a linkage between a class's theory of liability and its theory of damages, or lessen the rigor of a traditional 23(b)(3) analysis, it can act as a tool that is appropriate and useful when classwide proof and predominance exists as to some, but not all issues" and when Rule 23(c)(4) certification "materially advance[s] a disposition of the litigation as a whole." *Id.* (internal quotations omitted). Because the misclassification question was the largest liability question in the case and all the plaintiffs' claims would rise or fall primarily on that issue, the court found it was "appropriate" for certification.

So too in *Jacks*, 2015 WL1087897. In that case for wage and hour violations, the district court certified a class as to the following issues:

determination of the employer's policies on compensable time, whether the employees should have been compensated for additional activities under state law, and whether federal law preempted some claims. *Id.* at *7. The court found that the factors laid out by the Third Circuit in *Gates* were "a useful list of factors" and that the proposed issue class met them. *Id.* at *6–*7. The district court explained that issue certification was the most efficient course of action, would materially advance the litigation, and would ensure consistency in the result, even though each plaintiff's claims for injury and damages would be subject to individual proof and defenses. *Id.* at *7. *See also Brown v. City of Detroit*, 2014 WL 7074259 (E.D. Mich. Dec. 12, 2014) (certifying issue class on the question of what a jail's policies were and whether those policies violated civil rights laws, but leaving injury and damage determinations for individual adjudication).

In contending that issue certification is virtually automatic, the Chamber ignores the rigorous analysis actually taking place in the district courts and disrespects their important gatekeeping role. As the foregoing sample of the many Rule 23(c)(4) decisions demonstrates, issue class certification is far from "automatic." The Chamber's

sky-is-falling predictions have not and will not come to pass if this Court affirms the district court's decision certifying an issue class.

F. Class certification does not force defendants to settle meritless claims.

The Chamber also takes issue with the class action device in general, trotting out the well-worn complaint that class certification forces defendants to settle meritless claims. That policy concern is not a reason to ignore the plain language of Rule 23. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1201–02 (2013) (rejecting the addition of "atextual" requirements for class certification on the basis of policy concerns over "vexatious" securities fraud class actions). The Chamber's policy concern is also unsupported by fact. The best empirical evidence about class-action litigation shows that pressure to settle frivolous claims is greatly exaggerated, if it exists at all. *See* Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 Baylor L. Rev. 681, 693 (2005) ("The available empirical evidence and a consideration of how federal judges typically manage class actions each suggest that the alleged 'hydraulic pressure on defendants to settle' is itself more myth than reality.").

For starters, the Chamber's concern about the forced settlement of meritless claims once again disregards the gatekeeping role of the district courts. Federal district courts do not see frivolous claims through to class certification, and defendants are not shy about filing motions to dismiss. Indeed, "[t]he single most effective weapon that defendants have against class actions whose underlying claims have little or no merit is the dispositive motion," and the evidence bears that out. Kanner & Nagy, *supra*, at 693. In one of the most comprehensive studies of class actions filed in federal court, the Federal Judicial Center (FJC) expressly found that meritless suits filed as class actions were never certified, but rather "were terminated by rulings on motions to dismiss or motions for summary judgment, not by settlements, coerced or otherwise." Federal Judicial Center, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 90 (1996) *available at* http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$file/rule23.pdf (hereinafter "FJC Study"). Among the facts supporting that conclusion were data revealing that (1) in about 80% of suits filed as class actions, the district court ruled on a motion to dismiss *before* certification; and

(2) in about half of suits filed as class actions, the case was terminated by dispositive motion. *Id.* at 124, 126. In other words, meritless class actions don't make it to the certification stage, much less to post-certification settlement.[4]

Second, the empirical evidence indicates that court-certified classes are settled at roughly the same rate as non-class civil litigation, and nothing about those settlements indicates that defendants are "forced" into them by class certification. *Id.* at 19, 90 (settlement and trial rates are about the same in class and nonclass civil litigation). It is not true that virtually all court-certified class actions settle: In both state and federal court, that number is around 70%—a far cry from 100%. Administrative Office of the Courts, Class Certification in California: Second Interim Report from the Study of California Class Action Litigation 26 (2010), available at

[4] The FJC Study was conducted in response to a request from the rules advisory committee to examine possible abuses and whether modifications to Rule 23 were needed. FJC Study 3. The study, which examined every putative class suit filed in four of the busiest district courts over the period of several years, was designed in part to investigate anecdotal claims made by legislators and an ABA committee that meritless class actions coerced defendants into settling—the same claim made by the Chamber here. *Id.* at 2-3. The FJC Study went looking for "blackmail" settlements, but found no evidence that these mythical creatures actually exist. *Id.* at 90.

http://www.courts.ca.gov/documents/classaction-certification.pdf. *See also* Kanner & Nagy, *supra*, at 697 ("if the Blackmail Myth were true—if it had any factual veracity at all—one would expect the settlement rate for certified class actions to be nearly one hundred percent"). Given the evidence, the FJC Study concluded that, "although certified cases in the study settled at a higher rate than cases not certified as class actions, there were no objective indications that settlement was coerced by class certification. Rather, we found that settlements often appeared to be the combined product of a case surviving a motion to dismiss and/or a motion for summary judgment as well as being certified as a class action." FJC Study, at 90. As any litigator well knows, there is nothing extraordinary or nefarious about settling claims that have survived dispositive motions, whether those cases involve certified classes or individual plaintiffs. Charles Silver, "*We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1359 (2003) ("Nothing is self-evidently wrong with a settlement that occurs because a defendant fears losing at trial."). And, in the face of an improper certification, settlement, trial, and summary judgment are not the only options: Defendants may also immediately appeal. Kanner & Nagy,

supra, at 688–89 (explaining that Rule 23(f), which allows permissive interlocutory appeal of orders granting or denying class certification, was adopted to ease concerns about settlement pressure).

Third, there is tension in the Chamber's argument that certification of issue class actions is problematic both because issue classes do not decide damage awards and because they increase the pressure to settle claims. If anything, the fact that no damages can be awarded on a class-wide basis in a Rule 23(c)(4) class should *reduce* the pressure to settle because even if the plaintiffs win on the common issue, no plaintiff is awarded damages until individual determinations are made. In other words, even if the plaintiffs here win their antitrust claim against Astellas on a classwide basis, they will not be able to recover any damages until they can individually prove they are entitled to them. *See Jacks*, 2015 WL 1087897, at *7 (speculating that the cost of litigating damages claims would likely result in few issue-class plaintiffs actually pursuing their claims to damages). A defendant could lose the liability question and still not have to pay *any* damages,

depending on which and how many plaintiffs come forward and are able to prove their damages.[5]

In fact, since no class damages are at stake, it is hard to imagine *any* significant incentive for defendants to settle damage claims on a classwide basis either before or after the certified issue is resolved. If the defendant believes it will prevail on the certified class issue, a judgment to that effect is extremely valuable to a defendant because it prevents any class member from recovering without undergoing the hassle and expense of classwide discovery. And why settle the damages question when it is uncertain how many plaintiffs will come forward and be able to prove their individual claims? The only exception would be where the defendant believes it will lose the certified issue and believes that there is a significant chance that a large number of plaintiffs will ultimately recover. And then, yes, settlement is a reasonable option, but there is nothing wrong with a party that believes

[5] There is also tension between the Chamber's argument here that settlement is bad and its position in other cases that it is important for drug manufacturers to be able to enter into settlement agreements, even where there are differing legal standards. *See* Br. of Chamber of Commerce as *Amicus Curiae* at 9, *In re Cipro Cases I & II*, 61 Cal. 4th 116, 348 P.3d 845 (2015).

it will be found to have engaged in widespread wrongdoing using settlement to limit its losses in the face of likely liability.

* * *

In sum, interpreting Rule 23(c)(4) to permit issue class certification will not result in the apocalyptic visions outlined in the Chamber's amicus brief. District courts are demonstrably vigilant about limiting issue certification to situations where it is "appropriate"—exactly as the rule requires—and where the issue class meets the rest of Rule 23's requirements. Nor is there any evidence supporting the notion that massive settlements of meritless claims will likely occur. Rather, affirming certification here will ensure that district courts and parties have all the tools the framers of the rule intended to efficiently and effectively manage class claims.

V. CONCLUSION

The decision of the district court certifying an issue class should be affirmed.

RESPECTFULLY SUBMITTED AND DATED this 17th day of August, 2015.

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DATED this 17th day of August, 2015.

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CERTIFICATE OF SERVICE

I, Leah M. Nicholls, certify that on 17th day of August, 2015, I electronically filed the foregoing document entitled Brief for Public Justice, P.C. as Amicus Curiae Supporting Appellees and Affirmance with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF System, which will serve electronic notice of said filing.

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