No. 18-472

In the Supreme Court of the United States

BEHR DAYTON THERMAL PRODUCTS LLC, ET AL.,
Petitioners,

v.

TERRY MARTIN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

STEVEN P. LEHOTSKY
MICHAEL B. SCHON
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

(additional counsel listed on signature page)

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members and the broader business community in matters before Congress, the Executive Branch, and the Courts.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and de-

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

velopment 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 United States.

Many of *amici*'s members and affiliates are defendants in class actions. They therefore have a keen interest in ensuring that courts rigorously analyze, consistent with the text of Federal Rule of Civil Procedure 23 and the requirements of due process, whether a plaintiff has satisfied the prerequisites for class certification before certifying a class.

This case implicates the critically important and recurring question of whether Rule 23(c)(4) may be used as an end-run around the critical due-process safeguards for defendants and absent class members provided by Rule 23(b)(3). The answer is "no," and the result of the decision below, which further deepens an entrenched conflict among the courts of appeals, will be to invite a flood of time-consuming, expensive, and abusive litigation that would benefit only the lawyers who bring and defend class actions in which issue certification is proposed. *Amici* therefore have a strong interest in this Court's review of this issue, so the current conflicting approaches will be replaced by a uniform interpretation of Rule 23.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case brings before the Court a critically important question regarding Federal Rule of Civil Procedure 23. The holding below—that a court may certify issue classes under Federal Rule of Civil Procedure 23(c)(4) even though the relevant cause of action as a whole does not satisfy Rule 23(b)(3)'s

predominance and superiority requirements—effectively removes the most important limits on class proceedings and would allow district courts to certify "issues classes" essentially at will. That dramatic expansion in the permissibility of class proceedings would greatly expand the number of cases in which defendants are subject to the inexorable settlement pressure imposed by class proceedings. It also would eliminate the essential due process protections for both absent class members and defendants that are embodied in the standards set forth in Rule 23(b). Moreover, there is no basis for these adverse consequences: the holding below is wholly inconsistent with the structure and text of the Rule. This Court's review is plainly warranted.

The Sixth Circuit below expressly rejected the interpretation of Rule 23 adopted by the Fifth Circuit, which holds that Rule 23(c)(4) authorizes class proceedings on issues in a damages class action only when the relevant cause of action as a whole satisfies Rule 23(b)(3). See *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996); *Allison* v. *Citgo Petroleum Corp*, 151 F.3d 402, 421-22 (5th Cir. 1998).

Further, as the petition explains in detail (at 9-16), while the Sixth Circuit purported to align itself with the Second and Ninth Circuits, it is doubtful that the decision below satisfies the requirement in those circuits that the certified issue "materially advance the litigation." *E.g.*, *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008); *Rahman* v. *Mott's LLP*, 693 F. App'x 578, 579 (9th Cir. 2017). Instead, the decision below more closely resembles the multi-factor analysis employed by the Third and Seventh Circuits. See Pet. 12-14.

This conflict should not be allowed to persist: the critical question of class certification should not turn on where such lawsuits are litigated. Review is warranted for that reason alone.

The interpretation of Rule 23 adopted by the court below is wrong. If permitted to stand it will allow certification of "issues classes" in virtually every putative class action—dramatically expanding class proceedings far beyond the limitations imposed by Rule 23.

First, the decision below makes certification of an issue class action almost trivially easy and renders the limits imposed by Rule 23(b)(3) meaningless. The result of this loose approach will be to encourage inappropriate grants of class certification that do little to advance the ultimate legal and factual resolution of the case. All that will be accomplished is to generate tremendous settlement pressure on defendants regardless of the merits of the claim. Indeed, the ready availability of issue class actions in the Sixth Circuit will encourage plaintiffs' lawyers to file suit in that circuit whenever possible in order to compel such settlements.

Second, the decision below fundamentally misinterprets the text and structure of Rule 23 and fails to honor the essential due-process protections that Rule 23(b) secures.

Rule 23(c)(4) does not create a separate, standardless category for class certification; it is merely a tool available to the district courts for managing a class action that *already satisfies* the requirements of Rule 23(b). That is clear from the structure of Rule 23: Rule 23(a) sets forth the prerequisites to bringing any class action; Rule 23(b) defines the types of class

actions and the specific requirements for maintaining them; and Rule 23(c) identifies the procedures for moving forward with a class action. If Rule 23(c)(4) had been intended as a separate type of class action subject to special requirements, it would be an additional subsection of Rule 23(b), not part of Rule 23(c).

This Court's review is therefore essential.

ARGUMENT

This Court has repeatedly recognized that abuse of the class action device imposes deeply unfair burdens on both absent class members and defendants, and it has construed Rule 23 in a manner that comports with due process to avoid that result. *E.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 363-64 (2011); *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 33-34 (2013); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 629 (1997).

Because class actions are an "'exception to the usual rule'" that cases are litigated individually, it is critical that courts apply a "rigorous analysis" to the requirements governing class certification before a lawsuit is approved for class treatment. *Dukes*, 564 U.S. at 349, 351 (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979)).

The decision below violates these basic principles; if permitted to stand, it would allow certification of some class in virtually every case. The inevitable result will be an increase in the filing, and certification, of abusive class actions designed to extract settlements without regard to the claim's underlying merits or whether the claim as a whole is suitable for class treatment under Rule 23. And that unjustifiable result is based on an interpretation of Rule 23 that is contrary to the Rule's text and structure.

I. The Question Presented Is Exceptionally Important.

This Court's review is urgently needed to prevent the substantial adverse practical consequences of the decision below and to restore uniformity in the application of Rule 23. The Sixth Circuit's construction of Rule 23(c)(4) to allow certification of issue classes virtually at will, and without regard for the essential due-process protections of Rule 23(b), inevitably will result in a flood of shakedown class actions. The consequences for businesses; their owners, customers, and employees; and the judicial system as a whole will be extraordinarily troubling and far-reaching.

Defendants in class actions already face tremendous pressure to capitulate to what Judge Friendly termed "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). The stakes of a class action, once it has been certified, immediately become so great that "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975); see also, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011) (recognizing the "risk of 'in terrorem' settlements that class actions entail"); *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims."); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation

costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

It therefore is not surprising that businesses often yield to the hydraulic pressure generated by class certification to settle even meritless claims. See, *e.g.*, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (Dec. 2010) ("virtually all cases certified as class actions and not dismissed before trial end in settlement").

That pressure is especially problematic when Rule 23(c)(4) is invoked.

This Court has recognized on multiple occasions that Rule 23(b)(3) is itself an "'adventuresome innovation'" that "is designed for situations 'in which class-action treatment is not as clearly called for.'" *Comcast*, 569 U.S. at 34 (2013) (quoting *Dukes*, 564 U.S. at 362) (quoting in turn *Amchem*, 521 U.S. at 614-15). Limiting class actions to cases that meet the requirements of Rule 23(b) restricts the types and number of cases that can generate this irresistible settlement pressure.

Where—as in this case—Rule 23(c)(4) is invoked to certify issues classes even though a cause of action does not satisfy the requirements of Rule 23(b), the categories and number of cases that can be "certified" as "class actions" becomes effectively limitless. It is almost always possible to identify at least one legal or factual issue common to any injury suffered by a group of individuals.

Under the reasoning employed below, therefore, certification of an "issues class" is virtually always permissible. And that "certification" will impose upon the defendant in a vastly expanded number of

cases the inexorable pressure to settle that this Court has identified as a consequence of class certification.

In addition, the certification of Rule 23(c)(4) issues classes expands Rule 23 beyond the breaking point by undermining the predominance and superiority safeguards that are at the heart of Rule 23(b)(3). Such "classes" do not speed the resolution of litigation—because by definition common issues are not predominant and there remain numerous individualized issues to resolve—but serve only to increase litigation and settlement costs without any possibility of final resolution of the underlying claims on the merits.

Moreover, the ripple effects of these lawsuits will be felt throughout the economy. Defending and settling this huge new category of class action lawsuits would require defendants to expend enormous resources. These costs would not, however, be borne by business and governmental defendants alone. Rather, the vast majority of the expenses would likely be passed along to innocent customers and employees (or to taxpayers) in the form of higher prices and lower wages and benefits.

Finally, only this Court can resolve the problems presented by some courts' misapplication of Rule 23(c)(4). The subcommittee tasked by the Advisory Committee on Civil Rules has expressly declined to amend Rule 23 to clarify the "tension between the predominance requirement of Rule 23(b)(3) and the invitation in Rule 23(c)(4) to certify a class with regard to particular issues." Advisory Committee on Civil Rules, Rule 23 Subcommittee Report 90-91 (Nov. 5-6, 2015), https://bit.ly/2RC06gm. The subcommittee justified its inaction based on the errone-

ous assessment that "[t]he various circuits seem to be in accord" on the issue. *Ibid.*

As the petition makes clear, however, the subcommittee's assessment of the case law is simply inaccurate. Pet. 9-16. In the words of one scholar, the subcommittee's "assertion does not bear up under close scrutiny," because "conflicting interpretations still abound" among the circuits that have left "lower courts in a continuing state of uncertainty and disuniformity." Laura J. Hines, *Codifying the Issue Class Action*, 16 Nev. L. J. 625, 628 (2016). And no revision of Rule 23 is necessary because the approach to issues-class certification endorsed by the Sixth Circuit is inconsistent with the Rule in its current form. See pages 9-17, *infra*.

Without this Court's intervention, however, the discord in the circuits will persist. The inevitable consequence will be that plaintiff's counsel will flood courts within the Sixth Circuit with lawsuits in order to obtain issues-class certification essentially on demand. The significance of the decision below—and the need for this Court's review—therefore cannot be overstated.

II. The Decision Below Is Inconsistent With Rule 23 And This Court's Precedents.

A. The Sixth Circuit's decision violates Rule 23's text and structure.

Rule 23(c)(4), which the Sixth Circuit relied upon to certify an "issues class," states: "When appropriate, an action may be brought or maintained as a class action with respect to particular issues." This provision does not provide a freestanding basis for certifying classes; that is the role of the three subsections of Rule 23(b). Rather, Rule 23(c)(4) is a subpart

of Rule 23(c), which identifies the procedures for managing a class action that a court concludes qualifies for certification under the standards of Rules 23(a) and (b).

The subparts of a single Federal Rule of Civil Procedure addressing one subject must be construed *in pari materia*. See, *e.g.*, *Yousuf* v. *Samantar*, 451 F.3d 248, 257 (D.C. Cir. 2006); *Duchek* v. *Jacobi*, 646 F.2d 415, 417 (9th Cir. 1981); cf. *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127 (1995) (reading two provisions of the statute governing appealability of remand orders "*in pari materia*"); *Smillie* v. *Park Chem. Co.*, 710 F.2d 271, 274 (6th Cir. 1983) (construing Rules 52(b) and 59(e) *in pari materia*). That common-sense rule of construction compels the conclusion that Rule 23(c)(4) cannot plausibly be construed to authorize a so-called issue class action when Rule 23(b)(3) bars class certification as to the underlying cause of action.

1. Rule 23(a) defines four "[p]rerequisites" to bringing a class action—the familiar numerosity, commonality, typicality, and adequacy requirements. Fed. R. Civ. P. 23(a). These "threshold requirements [are] applicable to all class actions." *Amchem*, 521 U.S. at 613.

If the party seeking class certification satisfies the Rule 23(a) prerequisites, it must then also "show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem*, 521 U.S. at 614. These provisions of Rule 23 define the three "[t]ypes" of permissible class actions and the special additional requirements that must be satisfied to maintain each of them.

Most relevant here, Rule 23(b)(3) authorizes class actions that are not covered by (b)(1) or (b)(2), including damages class actions, but only if the court finds that common issues predominate and that treatment of the "controversy"—*i.e.*, the cause of action as a whole—on a class-wide basis would be superior to individual actions. Damages actions are thus eligible for class treatment only if the district court undertakes a rigorous analysis and finds that the plaintiff satisfies both the four threshold requirements of Rule 23(a) *and* Rule 23(b)(3)'s two additional elements of predominance and superiority.

Rule 23(c), by contrast, does *not* set forth requirements for class certification. Rather, it establishes—in logical order—procedures and mechanisms for moving forward with a class action (that meets the requirements for certification):

- Rule 23(c)(1) calls for the certification decision to take place as soon as is practicable and requires that the certification order define the class and appoint class counsel.
- Rule 23(c)(2) specifies the notice requirements for (b)(3) damages classes and authorizes the district courts to require notice to (b)(1) and (b)(2) classes when appropriate.
- Rule 23(c)(3) provides that any judgment in a certified class action applies to all the class members, clarifying the preclusive effect of the certification order.
- Rules 23(c)(4) and (5) provide management tools, authorizing the district courts to permit class actions to be maintained "with respect to particular issues" or to divide a class into subclasses.

2. Rule 23(c)(4)'s placement in Rule 23 confirms that it is not a stand-alone basis for class certification. Rather, it is a tool that the district courts may employ in managing class actions that otherwise satisfy all of Rule 23(a)'s prerequisites *and* the additional requirements for at least one of the three types of class actions defined in Rule 23(b)(1)-(3).

To begin with, 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." (emphasis added). That text gives district courts discretionary authority (as connoted by the language "when appropriate") to manage an action that satisfies Rule 23(b)(3)'s predominance requirement, but encompasses one or more issues that cannot be resolved on a class-wide basis. The advisory committee note to the 1966 Amendments to Rule 23 suggests that Rule 23(c)(4) can be used appropriately when a class trial allows for "the adjudication of liability to the class," but class members must then "come in individually and prove the amounts of their respective claims." The district court in that situation may issue an order providing that the action may be maintained as a class action with respect to the common issue of liability. That construction is consistent with the other paragraphs of Rule 23(c), each of which address procedures for handling class actions that are eligible for certification under Rule 23(b).[2]

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[2] As this Court's decision in *Comcast* explains, certification under Rule 23(b)(3) may still be inappropriate if, at the class certification stage, plaintiffs advance a model for measuring individual damages that is inconsistent with their theory of liability. 569 U.S. at 35-38.

Rule 23(c)(4)'s text confirms this interpretation. It does not describe an "issue class action" as a separate type of class action; it does not state the requirements for maintaining an issue class action and does not set forth any limitations on issue class actions. It therefore differs in material ways from Rules 23(b)(1), (2), and (3), each of which contains specific, detailed requirements for certification.

Finally, Rule 23(c)(2), which specifies the notice requirements for class actions, addresses Rule 23(b)(3) damages classes and the option of notice for (b)(1) and (b)(2) classes. But it does not address notice for a "(c)(4)" class—again undermining the Sixth Circuit's view that the provision creates a fourth category of class actions.

If the Rules Committee had intended to establish a fourth type of class action, it would not have buried this fourth type of class action in Rule 23(c)'s list of procedures and case-management tools. Instead, "[t]he proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial." *Castano*, 84 F.3d at 745 n.21.

B. The Sixth Circuit's interpretation of Rule 23(c)(4) renders Rule 23(b)(3)'s standards meaningless.

Rule 23 makes clear that a damages class action may be certified only if the plaintiff demonstrates, among other things, compliance with Rule 23(b)(3)'s predominance requirement. As this Court has explained, the "mission" of this "demanding" predominance requirement—which winnows out classes in

which the members' claims have factual and legal idiosyncrasies that defeat class unity—is to "assure the class cohesion that legitimizes representative action in the first place." *Amchem*, 521 U.S. at 623-24.

The interpretation of Rule 23(c)(4) by the court below and other, like-minded circuits undermines this "mission" because it renders Rule 23(b)(3)'s limitations meaningless. Rule 23(b)(3), as "the most adventuresome innovation" of the 1966 amendments to Rule 23 (*Amchem*, 521 U.S. at 615 (quotation marks omitted)), has long been viewed as the outermost limit for class proceedings. But relying on Rule 23(c)(4) for a new category of class actions stretches the limits of class certification far beyond the already "adventuresome" boundaries carefully delineated by Rule 23(b)(3).

After all, a creative lawyer almost invariably will be able to identify at least one common legal or factual issue subject to common proof when related claims are asserted by multiple plaintiffs. And any putative class claim that fails Rule (b)(3)'s predominance and other requirements will nonetheless be eligible for Rule 23(c)(4) issue class certification under the standard applied by the Sixth Circuit and other courts of appeals.

As the Fifth Circuit has explained, the approach to issue class certification accepted below "eviscerate[s] the predominance requirement" by permitting a district court to "sever issues until the remaining common issue predominates over the remaining individual issues." *Castano*, 84 F.3d at 745 n.21. In other words, the district court can peel away individual issues until the common issue or issues are left, and then certify an issue class with respect to them—even if the common issues represent a small

share of all of the issues that must be decided to resolve the case.

For these reasons, the Sixth Circuit's assurance that its decision will "not risk undermining the predominance requirement" (Pet. App. 12a) is entirely hollow. If the predominance lens is not focused on the cause of action as a whole but instead on one or more discrete issues of a court's choosing, it will be trivially easy to satisfy predominance *as to that issue or issues*. That watered-down approach to predominance makes *some* question in virtually every case classable—nullifying Rule 23(b)(3).

"[T]he result would be automatic certification in every case where there is a common issue, a result that could not have been intended." *Castano*, 84 F.3d at 745 n.21. And that nullification of Rule 23(b)(3) violates the fundamental canon that "[c]ourts should not render statutes nugatory through construction." *United States* v. *Tohono O'Odham Nation*, 563 U.S. 307, 315 (2011); cf. *Pavelic & LeFlore* v. *Marvel Entertainment Grp.*, 493 U.S. 120, 123 (1989) ("We give the Federal Rules of Civil Procedure their plain meaning, and generally with them as with a statute, when we find the terms unambiguous, judicial inquiry is complete.") (citation, alterations, and quotation marks omitted).

Even proponents of issue class actions acknowledge that this approach "fundamentally revamp[s] the nature of class actions." Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 Utah L. Rev. 249, 263 (2002). And not for the better. If the Sixth Circuit's approach stands, issue classes will become routine in that Circuit and the other circuits that misconstrue Rule

23(c)(4)—and the number of abusive class actions filed will increase.

C. The Sixth Circuit's decision raises serious Seventh Amendment concerns.

The Seventh Amendment's Reexamination Clause provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. But that forbidden approach is exactly what the decision below contemplates: the facts found by the jury deciding the certified issues may be reexamined by subsequent juries deciding individualized questions that overlap with the common issues.

Causation provides an obvious example. One of the seven certified issues here is whether the defendants' conduct or inaction "*caused* class members to incur the potential for vapor intrusion." Pet. App. 6a (emphasis added). The court of appeals insisted that this issue did not overlap "with the liability elements that the district court found incompatible with class treatment," including "proximate causation." *Id.* at 7a, 15a-16a. Yet there can be no doubt that the certified causation issue is an integral part of assessing proximate cause for purposes of any liability determination.

The lower courts' effort to slice the issues thinly in order to generate common questions is unconvincing. Contrary to the Sixth Circuit's ruling, the inevitable reexamination by subsequent juries of overlapping issues would raise serious constitutional concerns. See, *e.g.*, *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995). As the Seventh Circuit explained in *Rhone-Poulenc*, a district court's

proposal to have an initial class-wide trial on the issue of negligence followed by individual trials on proximate causation and comparative negligence runs afoul of the Seventh Amendment because the individualized issues "overlap" with the issue decided by the first jury. *Ibid.* In other words, for reexamination purposes, "a jury verdict can have collateral estoppel effect," and the issues decided by the first jury "should not be reexamined by another finder of fact." *Ibid.*

The court of appeals dismissed the reexamination concern as premature because the district court had not yet announced a "specific procedure" for addressing Seventh Amendment issues. Pet. App. 20a-21a. But Rule 23 does not permit this "wait-and-see" approach: instead, it is "critical * * * to determine how the case will be tried," including as to individualized issues, *prior* to class certification. See Fed. R. Civ. P. 23, advisory committee note on 2003 amendments. Assuming that obvious Seventh Amendment issues can somehow be avoided later in the case, without identifying any plan for doing so, falls far short of the "rigorous analysis" Rule 23 requires.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEVEN P. LEHOTSKY
MICHAEL B. SCHON
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*

H. SHERMAN JOYCE
LAUREN SHEETS JARRELL
American Tort Reform Association
1101 Connecticut Ave N.W., Suite 400
Washington, DC 20036
(202) 682-1163

Counsel for Amicus Curiae *the American Tort Reform Association*

PETER C. TOLSDORF
Manufacturers' Center for Legal Action
733 10 St. NW, Suite 700
Washington, DC 20001
(202) 637-3100

Counsel for Amicus Curiae *the National Association of Manufacturers*

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

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