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

MOTION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE *AMICUS* BRIEF SUPPORTING APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

MOTION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE *AMICUS* BRIEF SUPPORTING APPELLANT AND REVERSAL

The Chamber of Commerce of the United States of America respectfully requests leave to file the accompanying *Brief for Chamber of Commerce of the United States of America as* Amicus Curiae *Supporting Appellant and Reversal*. In support of the motion, the Chamber states as follows:

1. The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country.

2. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of concern to the nation's business community, including cases raising significant questions for companies subject to potential class actions. *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014); *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

3. This case is of critical importance to members of the business community, which are frequently targeted by class-action lawyers seeking to compel defendants to pay large settlements (often without regard to the merits of the claims).

4. Federal Rule of Civil Procedure 23(b)(3) provides critical due-process protections for defendants and absent class members by requiring that class actions for damages may be maintained only if the named plaintiffs establish that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

5. If accepted by this Court, the district court's interpretation of Rule 23(c)(4) in this case would allow plaintiffs to obtain certification of so-called issue class actions that do not meet the predominance and superiority requirements of Rule 23(b)(3) and therefore do not provide the essential due-process protections that Rule 23 guarantees to defendants and absent class members.

6. The Chamber's unique perspective in representing the interests of the business community across the country and its long experience with the interpretation and application of Rule 23 will allow it to offer the Court special insight into why the district court's view of Rule

23(c)(4) not only is inconsistent with the language, structure, and purposes of Rule 23, but also is likely to result in a flood of time-consuming, expensive, and abusive litigation—the very antithesis of what Rule 23 is intended to accomplish.

7. In particular, the proposed *amicus* brief presents a detailed structural analysis of Rule 23, supported by the advisory committee's notes, that is different from, but supports, the arguments in Appellant's opening brief. This structural analysis will show why Rule 23(c)(4) cannot plausibly be read to authorize "issue class actions" as a type of class action distinct from those defined in Rule 23(b), and therefore does not permit certification of a class action that does not meet the requirements of Rule 23(b).

8. Appellant's opening brief was filed on June 8, 2015, making the proposed *amicus* brief due on June 15.

9. Counsel for Appellant has authorized us to state that Appellant consents to the filing of the proposed *amicus* brief.

10. Counsel for Appellees have declined to say whether they will consent to the filing of the proposed brief, thus necessitating the filing of this motion.

CONCLUSION

The Chamber should be granted leave to file the *Brief for Chamber of Commerce of the United States of America as* Amicus Curiae *Supporting Appellant and Reversal*, and the Clerk should be directed to accept the accompanying brief for filing.

Respectfully submitted,

/s/ Evan M. Tager

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Dated: June 15, 2015

CERTIFICATE OF SERVICE

I hereby certify that that on June 15, 2015, the foregoing motion and accompanying proposed brief were served electronically on all counsel of record via the Court's CM/ECF system.

/s/ Evan M. Tager

Dated: June 15, 2015

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BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING APPELLANT AND REVERSAL

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country.[1] A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of concern to the nation's business community, including cases raising significant questions for companies subject to potential class actions. *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014); *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

This case is of critical importance to members of the business community, which are frequently targeted by class-action lawyers seeking to compel defendants to pay large settlements (often without regard to the merits of the claims). Rule 23(b) provides critical due-process protections for defendants and absent class members, who frequently receive little if

[1] In accordance with Federal Rule of Appellate Procedure 29(c)(5), *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. A motion for leave to file accompanies this brief.

any benefit from class-action litigation. If Rule 23(c)(4) may be used as an end-run around those safeguards, the result will be a flood of time-consuming, expensive, and abusive litigation that benefits no one except the lawyers who bring and defend the suits.

INTRODUCTION

Class actions can place a severe drain on the national economy, imposing on businesses the direct costs of litigation and settlement and the indirect costs of higher insurance premiums, which ultimately get passed on to consumers (in the form of higher prices and reduced availability of goods and services) and to investors. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (noting that securities class actions "injure 'the entire U.S. economy'"); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994) ("uncertainty and excessive litigation" resulting from class actions "can have ripple effects" that "may be . . . incurred by the company's investors"); *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."); *see also* Fed. R. Civ. P. 23(f), 1998 advisory committee's note (stating that "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability").

Accordingly, the Supreme Court has made clear that the stringent standards that Rule 23(b)(3) imposes on class certification for damages claims are necessary to protect the due-process rights of defendants and absent class members. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845-48 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622-23 (1997). The Court has emphasized that Rule 23(b)(3)'s protections may not be bypassed—not by employing the device of a settlement-only class, and not by attempting to repackage the class action as one for the distribution of a limited fund under Rule 23(b)(1)(B). *See Ortiz*, 527 U.S. at 845 (warning "against adventurous application of Rule 23(b)(1)(B)" to skirt Rule 23(b)(3)'s requirements); *Amchem*, 521 U.S at 622-25 (same for settlement classes).

Stymied by these holdings, class-action lawyers have begun to resort to seeking certification under Rule 23(c)(4) of so-called issue class actions

that do not meet the predominance and superiority requirements of Rule 23(b)(3). *See, e.g.*, Elizabeth J. Cabraser et al., *New Issues and Key Rulings in the Certification, Trial, Settlement, and Appeal of Class Actions* 16 (ABA CCLE Nat'l Inst. Oct. 19, 2001) (arguing that the issue class action "seems poised for a renaissance").

That is precisely what happened here. The district court found that Plaintiffs had failed to satisfy the predominance requirement of Rule 23(b)(3) because only a single element of the liability determination for one of Plaintiffs' claims was subject to common proof. Despite that shortcoming, Plaintiffs secured excessive settlement leverage by convincing the district court that the lone common issue justified certification of an issue class. For the reasons we explain below, Rule 23 does not permit that gerrymandered approach to class certification.

SUMMARY OF ARGUMENT

1. The district court's approach to certification of an issue class cannot be squared with the structure of Rule 23 or with the language and purpose of Rule 23(c)(4) itself. Rule 23(a) sets forth the prerequisites to bringing a class action; Rule 23(b) defines the types of class actions and the strict requirements for maintaining each of them; Rule 23(c) identifies the procedures for moving forward with a class action once the district court has determined that class certification is proper; Rule 23(d)

authorizes the district court to issue orders in connection with conducting a class action; and Rule 23(e) dictates the means by which a class action may be resolved short of a class-wide trial. The decision below treats Rule 23(c)(4) as an alternative to the Rule 23(b)(3) class action for damages, when it is merely a tool available to the district courts for managing class actions that have already met the requirements of Rule 23(b) and been certified. 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 Rule 23(c).

2. Under the approach taken by the court below, certification of an issue class action is almost trivially easy. All that would-be class counsel need to do is identify a single issue of law or fact that is common to the class—a standard that even the most diffuse, unmanageable class claims are likely to satisfy. The normal safeguard against improper certification of a class action for monetary damages is the predominance requirement, which operates to ensure that the proposed class is sufficiently cohesive to permit representative litigation of the claims in a single action. But by definition, the predominance requirement is satisfied when an issue class action is proposed, as all individualized issues have been severed and rendered irrelevant. *See* 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, 281 (touting issue classes because they allow all individualized issues to be "severed away cleanly and painlessly").

3. Not only is that circumvention of Rule 23(b) inconsistent with the structure of Rule 23 as a whole, but it nullifies the essential due-process protections that the Rule is meant to secure. Because of the exponentially larger stakes of class actions and the huge expense of defending such suits, class certification places tremendous pressure on defendants to settle even meritless claims. Thus, the principal consequence of the district court's drastic lowering of class-certification requirements is that the floodgates would be open to a deluge of issue class actions filed simply to extort settlements from business and governmental defendants.

In order to prevent a tidal wave of shakedown class actions, this Court should reaffirm the principle that certification of a class for damages claims is available only when the stringent predominance and superiority requirements of Rule 23(b)(3) are met. The Court should also reaffirm that one or two issues that may be subject to common legal argument or common proof are insufficient standing alone to justify certifying a class and thereby exponentially multiplying the stakes and the concomitant pressure to settle.

ARGUMENT

The court below concluded that common issues did not predominate either in the case as a whole or with respect to any one of Plaintiffs' several claims. Appellant's Addendum 48-52. Although the court determined that "common issues predominate with respect to the first element" of Plaintiffs' antitrust claim (*id.* at 50)—stated broadly as "violation of antitrust law" (*id.*)—the court held that this common issue would be just one aspect of what Plaintiffs would have to demonstrate on that one claim (*id.* at 21-23). Even if they could successfully establish a violation of the antitrust laws using common proof, Plaintiffs would still have to make individualized showings of "antitrust impact"—*i.e.*, some particularized injury for ***each*** named plaintiff and each absent class member—in order to establish liability for the violation. *Id.* at 51, 64-72. And even if some of the named plaintiffs or absent class members could surmount ***that*** high hurdle, they each would still have to prove their damages on an individualized basis in order to recover. *Id.* at 51-52. In other words, the district court found that individualized issues would swamp common issues.

Because, as the district court held, Plaintiffs failed to demonstrate that common issues predominate, Rule 23(b)(3) was not satisfied. Undaunted, Plaintiffs prevailed on the district court to transmogrify its

finding that there was but one element of one claim that potentially could be established by means of common proof into the basis for certifying a massive, sprawling issue class. Plaintiffs thereby gained settlement leverage by bypassing all the essential due-process protections for defendants and absent class members that Rule 23 provides. That is just the opposite of what Rule 23 is intended to accomplish.

A. Rule 23(c)(4) Is A Tool For Managing Properly Certified Class Actions, Not An Alternative To The Types Of Class Actions Defined By Rule 23(b).

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." This provision does not exist in isolation. Rather, it is a subpart of Rule 23(c), which identifies the procedures for managing a class action. Rule 23(c) is, in turn, a subpart of Rule 23 as a whole, which sets the terms and conditions for class actions. The subparts of a Federal Rule of Civil Procedure "must be read in *pari materia*." *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 39 (1st Cir. 1999). When viewed in the context of the entire Rule, subpart 23(c)(4) cannot plausibly be read to authorize the so-called issue class action as an alternative to Rule 23(b)(3) damages class actions.

1. The modern version of Rule 23 was adopted in 1966 to address perceived shortcomings of the original 1937 Rule, which had proven

"obscure and uncertain" in its definitions of the types of class actions, had failed to "provide an adequate guide to the proper extent of the judgments in class actions," and had "not squarely address[ed] itself to the question of the measures that might be taken during the course of the action to assure procedural fairness." Fed. R. Civ. P. 23, 1966 advisory committee's note. "The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to measures which can be taken to assure the fair conduct of these actions." *Id.* (emphasis omitted). With these goals in mind, the modern Rule 23 establishes a comprehensive system governing the certification, maintenance, and resolution of class actions.

Rule 23(a) sets the four "[p]rerequisites" to bringing a class action—the familiar numerosity, commonality, typicality, and adequacy requirements. Fed. R. Civ. P. 23(a); *see, e.g.*, *In re Nexium Antitrust Litig.*, 777 F.3d 9, 17 (1st Cir. 2015). 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; *see also Nexium*,

777 F.3d at 17-18. These provisions define the three "[t]ypes" of permissible class actions and the special additional requirements that must be satisfied to maintain each of them. Fed. R. Civ. P. 23(b).

- Rule 23(b)(1) authorizes certification of a class when "separate actions by or against individual class members would risk establishing 'incompatible standards of conduct for the party opposing the class,' . . . or would 'as a practical matter be dispositive of the interests' of nonparty class members 'or substantially impair or impede their ability to protect their interests,'" such as when "numerous persons make claims against a fund insufficient to satisfy all claims." *Amchem*, 521 U.S. at 614 (quoting Fed. R. Civ. P. 23(b)(1) & 1966 advisory committee's note).

- Rule 23(b)(2) authorizes certification of a class to seek "declaratory or injunctive relief where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class.'" *Amchem*, 521 U.S. at 614 (quoting Fed. R. Civ. P. 23(b)(2)).

- Rule 23(b)(3) authorizes class actions, including damages class actions, that are not covered by (b)(1) or (b)(2), but only if the court finds that common issues predominate and that treatment of the claims on a class-wide basis would be superior to individual actions. *Amchem*, 521 U.S. at 615.

Damages class actions are thus eligible for class treatment only if the district court "undertake[s] a 'rigorous analysis'" and finds that the "plaintiffs met the four threshold requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy of representation) ***and*** Rule 23(b)(3)'s two additional prerequisites" of predominance and superiority. *Nexium*, 777 F.3d at 17 (emphasis added).

Rule 23(c) sets forth, in logical order, the procedures and mechanisms for moving forward with a class action:

- 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 the provision of 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, thus clarifying the preclusive effects resulting from the order certifying the class.
- Rules 23(c)(4) and (5) together 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.

Rule 23(d) authorizes the district court to issue whatever orders may be appropriate to streamline and ensure the fairness of the proceedings.

Rule 23(e) addresses the resolution of class actions without a trial, specifying the required procedures for "[s]ettlement, [v]oluntary [d]ismissal, or [c]ompromise." Fed. R. Civ. P. 23(e).

Rule 23(f) establishes a mechanism for interlocutory appeals from class-certification orders.

Rule 23(g) governs the appointment of class counsel—a provision that was added in 2003 in recognition of the fact that "the selection and

activity of class counsel are often critically important to the successful handling of a class action." Fed. R. Civ. P. 23, 2003 advisory committee's note.

Rule 23(h)—also added in 2003—sets forth procedures for awarding attorneys' fees to class counsel, in recognition of the fact that "[f]ee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions." Fed. R. Civ. P. 23(h), 2003 advisory committee's note.

2. Both the language of Rule 23(c)(4) and its placement in the overall structure of Rule 23 confirm that it is not an alternative to the strict requirements of Rule 23(b)(3), as the court below thought it to be, but instead is merely a tool that the district courts may employ in managing class actions that meet the prerequisites of Rule 23(a) ***and*** the additional requirements for at least one of the three types of class actions defined in Rule 23(b).

Rule 23(c)(4) provides simply that, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." That is all that is says. It does not describe an "issue class action" as a type of class action; it does not state the requirements for maintaining an issue class action; it does not set forth any limitations on issue class actions. In contrast, Rule 23(b) defines the three permissible types of class

actions, specifies that all of those types of class actions must satisfy the prerequisites of Rule 23(a), and then lists the additional, special requirements that apply to each particular category. If the Rules Committee had intended for Rule 23(c)(4) to establish a fourth type of class action for damages claims that is distinct from the (b)(3) damages class and the (b)(1) common-fund class, surely it would have said ***something*** about what that type of class action looks like or what criteria must be met to maintain one.

What is more, the Rules Committee surely would not have buried this fourth type of class action in Rule 23(c), among the procedures and case-management tools for proceeding with a certified class action. Instead, the Committee logically would have included the issue class action as a fourth subpart of Rule 23(b), and would have followed the pattern of Rule 23(b)(1)-(3) in setting forth the special requirements that must be met in order to maintain one.

The history of Rule 23(c)(4) confirms these conclusions. Until 2007, the authorization to certify classes for particular issues (now Rule 23(c)(4)) and the authorization to certify subclasses (now Rule 23(c)(5)) were conjoined twins—they appeared together as subparts (A) and (B) of Rule 23(c)(4)—thus underscoring the relationship between them. Both are case-management tools to permit the district courts to organize class actions to

run smoothly. The change in 2007 to give them separate Arabic numerals under Rule 23(c) was "part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules"; the change was "intended to be stylistic only." Fed. R. Civ. P. 23, 2007 advisory committee's note. Reading the two provisions in *pari materia* (*cf. Swiss Am. Bank*, 191 F.3d at 39), as the courts must, the provisions are two of a kind. Hence, if Rule 23(c)(4) created an "issue class action" distinct from the three types of class actions set forth in Rule 23(b), then Rule 23(c)(5) must similarly have created a "subclass action"—whatever that might be. But no decision of which we are aware holds that the ability to employ subclasses to manage a class action entirely obviates the need to satisfy Rule 23(b). Hence, Rule 23(c)(4) ought not be interpreted that way either.

"The advisory committee's explanation of the rationale behind the adoption of" what was then Rule 23(c)(4)(A)-(B) "cinches matters." *Swiss Am. Bank*, 191 F.3d at 39. The advisory committee that adopted both provisions in 1966 and placed them together explained in general that the revisions to Rule 23 were intended in part to describe "the measures which can be taken to assure the fair conduct of [class] actions" and specifically described the issue-class and subclass provisions in those terms. Fed. R. Civ. P. 23, 1966 advisory committee's note. The committee went on to

explain that the authorization for issue classes is meant only to clarify that the district court may, for example, adjudicate liability on a class-wide basis but then require the class members "to come in individually and prove the amounts of their respective claims." *Id.* And for similar reasons of administrability, the district court may divide a class into subclasses when the class members are found to have divergent interests (*id.*), rather than being stuck trying, for example, to formulate jury instructions that encompass all of those fragmentary interests.

But separating out liability and damages when only the former is susceptible to class treatment or allowing two or more subclasses that share a common core to proceed under the same docket number is worlds apart from isolating single elements of liability to be resolved on a class-wide basis and then leaving all other questions of liability and damages to individual proceedings. Nowhere does the committee suggest that the issue class or its sibling, the subclass, is a unique type of class action that exists outside the usual, strict requirements of Rules 23(a) and (b).

B. Under The Interpretation Of Rule 23(c)(4) Adopted Below, Virtually All Damages Class Actions Would Be Certifiable.

If the district court's ruling is allowed to stand, certification of issue classes will become routine—and the number of class actions filed will increase—because when a business has multiple customers or many

employees, a creative lawyer almost invariably will be able to identify some factual issue that may be subject to common proof or some legal issue the resolution of which would affect a large number of those customers or employees. Indeed, plaintiffs' counsel in this case had to look no further than the district court's original order denying class certification to find a single common question that potentially could be established with common proof. And under the rule adopted by the district court, certification of a class action on that single element of a single claim was a foregone conclusion. As even proponents of issue class actions acknowledge, this approach "fundamentally revamp[s] the nature of class actions." Jon Romberg, *Half a Loaf*, 2002 UTAH L. REV. at 263, 281. And not for the better.

Normally, a damages class action may be certified only if the putative class representative demonstrates, among other things, 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). As the Supreme Court explained in *Amchem*, the "mission" of the predominance requirement—which winnows out classes in which the members' claims are riddled with factual and legal idiosyncrasies that defeat class unity—is to "assure the class cohesion that legitimizes representative action in the first place." 521 U.S. at 623. The

predominance requirement is a "demanding" one to ensure that "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623-24; *see also*, *e.g.*, *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1279 (11th Cir. 2009) (predominance requires "an independent and substantial" and "rigorous[] analysis"); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008) ("predominance criterion is . . . demanding") (internal quotation marks omitted); *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006) ("predominance inquiry" is "rigorous"); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (predominance requirement is "stringent"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 186 (3d Cir. 2001) (same).

Thus, for example, this Court has held that, "[i]n antitrust class actions" like this one, "common issues do not predominate if the fact of antitrust violation ***and*** the fact of antitrust impact cannot be established through common proof." *New Motor Vehicles*, 522 F.3d at 20 (emphasis added). The predominance requirement "usually is the greatest obstacle to [Rule 23](b)(3) certification" of dubious class actions. 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 5:23 (11th ed. Supp. 2014).

That obstacle is shunted aside, however, if issue class actions may be certified on the terms that the court below did. Under that approach, Rule 23(b)(3)'s predominance requirement collapses into the bare commonality requirement of Rule 23(a), because all the individualized issues are ignored as being outside the metes and bounds of the proposed issue class. If a class action for monetary damages may be certified under Rules 23(b)(3) and (c)(4) by cherry-picking one or more common questions even though, as here, individualized issues predominate overall, then certification would seemingly become automatic: A court could always "sever issues until the remaining common issue predominates over the remaining individual issues," thus "eviscerat[ing] the predominance requirement." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).

C. Certification Of Issue Class Actions Without Regard For Rule 23(b) Would Invite A Flood Of Vexatious Litigation.

In construing 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), the court below adopted an approach that is sure to invite a flood of shakedown class actions. The consequences for businesses; their owners, customers, and employees; and the judicial system as a whole will be troubling and far-reaching.

1. 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). As the Supreme Court has observed, 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); *accord, e.g.*, *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*, 437 U.S. at 476 ("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.").[2]

[2] *Accord, e.g.*, *Castano*, 84 F.3d at 746 (because "[c]lass certification magnifies and strengthens the number of unmeritorious claims," it "creates insurmountable pressure on defendants" to agree to "settlements [that] have been referred to as judicial blackmail"); *Rutstein v. Avis Rent-a-Car Sys., Inc.*, 211 F.3d 1228, 1240 n.21 (11th Cir. 2000) ("[T]he blackmail value of a class certification . . . can aid the plaintiffs in coercing the defendant into a settlement."); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) ("[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of

And the threat of inevitably costly and disruptive class-wide discovery adds a further "*in terrorem* increment" to the settlement value of the claim. *Blue Chip Stamps*, 421 U.S. at 741; *accord Concepcion*, 131 S. Ct. at 1752; *see also* S. Rep. No. 104-98, at 9 (1995) (noting that securities class actions have "had an in terrorem effect on Corporate America" and that "[t]hese lawsuits have added significantly to the cost of raising capital and represent a 'litigation tax' on business"), *reprinted in* 1995 U.S.C.C.A.N. 679, 688. Indeed, even meritless lawsuits generally are "as costly to litigate as legitimate claims" (*Developments in the Law—The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 HARV. L. REV. 1806, 1812 (2000))—and they always carry at least some risk and uncertainty about the outcome.

Thus, it is unsurprising 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

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success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere."); Fed. R. Civ. P. 23(f), 1998 advisory committee's note ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

(Dec. 2010) ("virtually all cases certified as class actions and not dismissed before trial end in settlement"); Linda S. Mullenix, *Should Mississippi Adopt A Class-Action Rule? Balancing the Equities: Ten Considerations That Mississippi Rulemakers Ought to Take into Account in Evaluating Whether to Adopt A State Class-Action Rule*, 24 MISS. C. L. REV. 217, 235, 240 (2005) (noting that "most class-action cases are settled short of trial" and explaining that "many if not most defendants that enter into class-action settlements do so in the shadow of their liability coverage"); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1292 (2002) (because "the class obtains substantial settlement leverage from a favorable certification decision," "almost all class actions settle"); Michael E. Solimine & Christine O. Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1546 n.74 (2000) ("[T]hat defendants would rather settle large class actions than face the risk . . . of crushing liability from an adverse judgment on the merits is widely recognized.").

As many commentators have recognized, the prevalence of such blackmail settlements has tainted the reputation of class-action litigation. *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370,

371-72 (2000) ("[W]here the plaintiffs' attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self-interest."); James A. Henderson, Jr., Comment, *Settlement Class Actions and the Limits of Adjudication*, 80 CORNELL L. REV. 1014, 1021 (1995) ("Rather than creating the appearance of a public confession of guilt, which might deliver a lesson in morality, settlement class action agreements more closely resemble the payment of blackmail by a corporation whose very survival is threatened by what might well, if taken to trial, prove to be groundless claims.").

2. The ability to obtain virtually automatic certification of an issue class greatly exacerbates the problem of blackmail settlements. Lawsuits that start out with serious flaws may be converted into abusive class actions any time that the would-be class counsel can point to even a single common issue. And because class members would not be able to establish liability as a consequence of the resulting class proceeding, they would have inadequate incentives to monitor the conduct of the litigation.

Commentators have long warned of the risk of abuse of the class-action mechanism when class members exercise insufficient oversight of

class counsel.[3] If the approach adopted by the court below becomes the rule in this Circuit, the problems will increase exponentially, for all sorts of damages class actions.

3. What is more, the businesses targeted by abusive issue class actions will not be the only victims. The ease of obtaining class certification—and thus blackmail settlements—will encourage the filing of many more class actions. This avalanche of lawsuits will clog court dockets, adding to the workload of an already overburdened judiciary.

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[3] *See, e.g.*, Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77 (often "what purports to be a class action, brought primarily to enforce private individuals' substantive rights to compensatory relief, in reality amounts to little more than private attorneys acting as bounty hunters"); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7-8 (1991) ("the single most salient characteristic of class and derivative litigation is the existence of 'entrepreneurial' plaintiffs' attorneys [who, b]ecause [they] are not subject to monitoring by their putative clients . . . operate largely according to their own self-interest"); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882-83 (1987) ("High agency costs" inherent in class-action litigation "permit opportunistic behavior by attorneys" and, "[a]s a result, it is more accurate to describe the plaintiff's attorney as an independent entrepreneur than as an agent of the client."); *cf.* Neil Weinberg, *Shakedown Street*, Forbes.com, Feb. 11, 2008, at http://www.forbes.com/2008/02/11/lerach-milberg-weiss-biz-cz_nw_0211lerach.html (noting that former securities-class-action attorney William Lerach once boasted, "I have the greatest practice of law in the world. I have no clients.").

Moreover, the ripple effects of these lawsuits will be felt throughout the economy. Defending and settling the lawsuits—and all the cases in which absent class members may collaterally attack the judgments—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 in the form of higher prices and lower wages and benefits (or to taxpayers); and much of the remainder of the burden would fall on innocent investors.

* * *

In sum, the decision below eviscerates class-certification requirements and thereby invites the filing of class actions with little or no merit but great potential to extort settlements that benefit no one except class counsel who bring the lawsuits and the lawyers retained to defend them. To avoid the filing of shakedown class actions, therefore, this Court should reverse the decision below.

CONCLUSION

The district court's order certifying an issue class should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for *Amicus Curiae* Chamber of Commerce of the United States of America certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 5,601 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ Evan M. Tager

Dated: June 15, 2015

CERTIFICATE OF SERVICE

I hereby certify that that on June 15, 2015, the foregoing brief was served electronically via the Court's CM/ECF system upon all counsel of record.

/s/ Evan M. Tager

Dated: June 15, 2015