No. 21-103

In the United States Court of Appeals for the Sixth Circuit

IN RE: VEOLIA NORTH AMERICA, LLC;
VEOLIA NORTH AMERICAN OPERATING SERVICES, LLC,
Petitioners.

On Petition for Permission to Appeal from the
United States District Court for the Eastern District of Michigan
No. 5:16-cv-10444 (Hon. Judith E. Levy)

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR PERMISSION TO APPEAL

Daryl Joseffer
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, D.C. 20062

Jonathan D. Urick
Jeremy Evan Maltz
LEHOTSKY KELLER LLP
200 Massachusetts Ave. NW
Washington, DC 20001
(512) 693-8350
jon@lehotskykeller.com

Counsel for Amicus Curiae

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Amicus makes the following disclosure under Sixth Circuit Rule 26.1:

1. Is amicus a subsidiary or affiliate of a publicly owned corporation?

No. The Chamber is a nonprofit corporation organized under the laws of the District of Columbia.

2. Is there a publicly owned corporation, not a party to the appeal or an amicus, that has a financial interest in the outcome?

None known.

/s/ *Jonathan D. Urick*
JONATHAN D. URICK
Counsel of Record for Amicus Curiae
Chamber of Commerce
of the United States of America

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation.[1] It represents approximately 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. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the Nation's business community.

This is such a case because improperly certified class actions significantly harm American businesses by pressuring them to settle even meritless claims. Thousands of businesses are or may become defendants in putative class actions. The Chamber has a vital interest, on behalf of its members and

[1] No counsel for a party authored this brief in whole or in part, and no such counsel nor any party here contributed money to fund this brief or its submission. No person other than amicus, its members, or its counsel contributed money to the preparation or submission of this brief.

the broader business community, in promoting a predictable, rational, and fair legal environment. The Chamber therefore has a keen interest in ensuring that the courts rigorously and consistently analyze whether plaintiffs have properly satisfied all the requirements of Rule 23 before certifying a class.

INTRODUCTION

Improper settlement pressure is especially problematic for "issues classes" certified in this circuit under Federal Rule of Civil Procedure 23(c)(4) because this Court has held that such classes may proceed even if the case as a whole does not meet Rule 23(b)(3)'s predominance and superiority requirements. *See Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 412-13 (6th Cir. 2018).

While *Martin* instructed that superiority should nevertheless "function[] as a backstop against inefficient use of" issues classes, *id.* at 413, the district court abdicated its critical gatekeeping role at class certification. After identifying nine common questions—none of which would conclusively resolve even a single element of plaintiffs' claims—the district court certified

two issues classes despite *twice* acknowledging "the overwhelming presence of individual issues." *In re Flint Water Cases*, 2021 WL 3887687, at *37 (E.D. Mich. Aug. 31, 2021). What's more, the court certified these classes without applying a full *Daubert* analysis to the expert opinions on which it relied. *Id.* at *46-47; *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

This case thus presents a perfect opportunity to resolve two recurring and interrelated class-certification questions: (1) Under what circumstances is an issues class the "superior method of resolution" of the putative class members' claims, *Martin*, 896 F.3d at 413; and (2) may courts certify a class based on expert testimony that does not pass the full reliability analysis required by *Daubert*.

The district court's lax approaches to these two issues—both individually and combined—drastically lower Rule 23's threshold for class certification. If left uncorrected and adopted by other courts, the court's analysis will make certification of abusive issues classes trivially easy, increasing the coercive pressure on businesses to settle meritless cases. The cost of such class-action abuse reverberates throughout the economy. This Court should

grant the Rule 23(f) petition because the Court's guidance is urgently needed to rein in abusive issues classes. The Court should reverse and confirm that: (1) superiority requires an issues class to be the most efficient way of resolving the litigation, which is not the case here; and (2) a full *Daubert* analysis is required before certifying a class based on expert testimony.

ARGUMENT

I. This Court should clarify that *Martin*'s superiority requirement should be rigorously enforced when certifying issues classes under Federal Rule of Civil Procedure 23(c)(4).

Class certification exerts enormous pressure to settle even claims "which by objective standards may have very little chance of success." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). "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." *Coopers Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail"). As a result, virtually all certified class actions "end in settlement" before trial.

Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (Dec. 2010).

Issues classes are no different. "If resisting a class action requires betting one's company on a single jury verdict, a defendant may be forced to settle; and this is an argument against definitively resolving an issue in a single case if enormous consequences ride on that resolution." *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012).

Under *Martin*, the risk of abusive issues classes is already quite high. For an issues class to satisfy predominance, this Court has held that common issues need only "predominate within certain issues." *Martin*, 896 F.3d at 413. But because "any competently crafted class complaint literally raises common questions," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011), plaintiffs and district courts should always be able to define issues to comply with this first *Martin* requirement. The Chamber thus agrees with Petitioners that *Martin* misconstrued Rule 23. *See* Pet. at 10; Brief of the Chamber of Commerce of the United States of America, et al. as Amici Curiae in Support of Petitioners, *Behr Dayton Thermal Products LLC v. Martin*, 139 S. Ct. 1319

(2019) (No. 18-472), 2018 WL 5994153; Laura J. Hines, *The Unruly Class Action*, 82 Geo. Wash. L. Rev. 718, 729-55 (2014) (thoroughly analyzing Rule 23's text, structure, history, and drafting).

Nevertheless, the guardrails announced in *Martin* go some distance in ameliorating the potential abuse caused by that decision, and those guardrails should be enforced. In particular, *Martin* cautioned that courts should "not rely on issue certification where there exist only minor or insignificant common questions," and that "common questions [must] render issue certification the *superior method of resolution*." 896 F.3d at 413, 416 (emphasis added). To be an effective "backstop against inefficient use of Rule 23(c)(4)," district courts must—at a minimum—conclude that "[r]esolving the issues in one fell swoop would [1] conserve the resources of both the court and the parties" and "[2] materially advance the litigation." *Id.* at 416. According to *Martin*, issues classes need not "resolve the question" of ultimate liability, but they should "go a long way toward doing so" and be "the *most efficient way* of resolving the [] issues that the district court has certified." *Id.* (emphasis added). In other words, the weaker predominance requirement adopted

in *Martin* should be "offset by a corresponding increase in the importance accorded Rule 23(b)'s requirement of superiority." *In re Tetracycline Cases*, 107 F.R.D. 719, 727 (W.D. Mo. 1985).

For the reasons described in the Petition, the district court's class-certification order eviscerates this key superiority safeguard and urgently calls out for this Court's review. Pet. at 9-18. If other courts replicate the district court's lax superiority analysis, the already immense settlement pressure from abusive issues classes will grow even further. And the substantial resources that businesses will expend defending and settling such class actions will be passed along to consumers and employees through higher prices or lower wages.

This Court should thus take the opportunity to clarify the superiority requirement for a *Martin* issues class. It should hold that "a significant factor to be taken into account in analyzing the superiority requirement is the existence of a large number of individual issues which would remain for resolution despite a trial on the common issues." *Tetracycline Cases*, 107 F.R.D. at 735. In addition, the Court should confirm that issues classes cannot

proceed unless they are more efficient than *all* potential alternatives for resolving the putative class members' claims—including a process of bellwether trials. As this Court's sister circuit has explained, "When enormous consequences turn on the correct resolution of a complex factual question, the risk of error in having it decided once and for all by one trier of fact rather than letting a consensus emerge from several trials may be undue." *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 912 (7th Cir. 2003).

The district court's analysis for a *Martin* issues class breeds this undue risk. The issues classes certified here fail both of the above requirements because of "the overwhelming presence of individual issues" and the bellwether trial. *Flint Water*, 2021 WL 3887687, at *37. This Court should accordingly reverse.

II. This Court should confirm that a full *Daubert* analysis is required for all expert testimony considered at the class-certification stage.

Compounding the problems with its superiority analysis, the district court relied upon opinions from plaintiffs' experts without conducting the gatekeeping analysis required by *Daubert* and Federal Rule of Evidence 702. Four of this Court's sister circuit courts have held that Rule 702 requires a

full *Daubert* analysis of the reliability of expert testimony considered at the class-certification stage. *See infra* pp.12-13. This case provides an excellent vehicle for the Court to adopt this rule, and to explain that *Daubert* applies to all stages of a case, not just after class certification.

1. Only a full *Daubert* inquiry at the class-certification stage ensures that cases are not improperly certified (and settled) based on inadmissible evidence. As repeatedly recognized by the Supreme Court, class certification is a critically important stage of litigation. Because "a class action can result in 'potentially ruinous liability,'" *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (quoting Advisory Committee's Notes on Fed. R. Civ. P. 23), class certification creates an almost hydraulic pressure to settle even meritless claims. Indeed, in 2019, companies reported settling 60.3 percent of class actions, and they settled an even higher 73 percent the year before. *See* 2020 Carlton Fields Class Action Survey 29, https://bit.ly/2WDSTEP. These realities demand rigorous enforcement of the Federal Rules at the class-certification stage.

Rule 702 is particularly important at class certification because the admission of expert testimony departs from both the usual requirement that a witness testify only from firsthand knowledge and the general principle that opinion testimony is unreliable. As *Daubert* recognized, such a departure necessarily requires "regulation of the subjects and theories about which an expert may testify" and a "preliminary assessment" of the expert's qualifications—as well as the reasoning, methodology, and application of the expert's testimony to the case's facts. *Daubert*, 509 U.S. at 589, 592-93. Yet a district court that fails to exercise its gatekeeping responsibility at the class-certification stage may never do so. Class certification is, in many instances, the entire ballgame. *See, e.g.*, *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 670 (6th Cir. 2020) (citation omitted). And the failure to follow *Daubert* at class certification allows district courts to ratchet up the pressure to settle litigation—at tremendous cost to defendants—based on potentially inadmissible evidence. The Federal Rules demand more.

2. The Supreme Court has repeatedly signaled support for full *Daubert* analysis at class certification. As an initial matter, the Supreme Court has

repeatedly emphasized that "plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014).

"Proof" requires admissible evidence. Thus, it is no surprise that the Court cast "doubt" on the proposition "that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings" in *Dukes*, 564 U.S. at 349. Indeed, it reversed class certification where plaintiffs' expert-prepared damages model was deficient. *Comcast Corp. v. Behrend*, 569 U.S. 27, 38 (2013). And in considering whether an expert's statistical approach may be accepted at the class-certification stage as a means of establishing classwide liability, the Court cited Rule 702 and observed that inferences from expert studies have "been permitted by the Court so long as the study is *otherwise admissible*." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 460 (2016) (emphasis added).

Taken together, these statements and holdings from the Supreme Court "should remove any vestigial doubt about the appropriateness of full-

blown *Daubert* analysis at the class certification stage." 1 McLaughlin on Class Actions § 3:14 (16th ed. 2019).

3. As noted above, the weight of authority from this Court's sister circuits is consistent with this Supreme Court guidance. The Third, Fifth, Seventh, and Eleventh Circuits expressly require full a *Daubert* analysis at class certification. *See Prantil v. Arkema, Inc.*, 986 F.3d 570, 575 (5th Cir. 2021) ("the *Daubert* hurdle must be cleared when scientific evidence is relevant to the decision to certify" a class action); *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) ("Expert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot 'prove' that" a proposed class meets Rule 23's criteria) (citation omitted); *Messner v. Northshore University HealthSystem*, 669 F.3d 802, 812 (7th Cir. 2012) ("a district court must make a conclusive ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification"); *Sher v. Raytheon Co.*, 419 F. App'x 887, 890-91 (11th Cir. 2011) ("the district court erred as a matter of law by not sufficiently evaluating and weighing conflicting expert testimony on class certification [and by] refus[ing] to conduct a *Daubert*-like

critique of the proffered expert's qualifications"). And while two circuits allow a modified *Daubert* inquiry at the class-certification stage, none allow district courts to certify a class without any reliability analysis at all.[2]

Indeed, the Second Circuit (like the Supreme Court) has only refrained from endorsing the rule that *Daubert* fully applies at the class-certification stage because it has not yet had occasion to address the issue. *See Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008) ("the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements"); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 129-30 (2d Cir. 2013) (declining to decide *Daubert* issue because the district court conducted a *Daubert* analysis).

[2] The Eighth Circuit embraces a "tailored" *Daubert* analysis "in light of the criteria for class certification and the current state of the evidence." *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613-14 (8th Cir. 2011). The Ninth Circuit has stated that the class-certification stage "warrant[s] greater evidentiary freedom," treating admissibility under *Daubert* as a non-dispositive factor that "go[es] to the weight that evidence is given." *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1005-06 (9th Cir. 2018).

* * *

This petition presents an excellent vehicle for the Court to join the majority of its sister circuits and require district courts to apply *Daubert* at the class-certification stage. Instead of evaluating the only evidence supporting class certification against the *Daubert* standard, the court applied a "more relaxed" standard that failed to subject the proffered expert testimony to the rigorous evaluation it deserved. *See* Pet. at 19 (quoting transcript). This Court should thus grant the petition and reverse the district court, which wholly failed to exercise its gatekeeping function over the admissibility of expert evidence at the class-certification stage.

CONCLUSION

The Court should grant the Petition for Permission to Appeal.

Respectfully submitted,

Daryl Joseffer
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, D.C. 20062

/s/ Jonathan D. Urick
Jonathan D. Urick
Jeremy Evan Maltz
LEHOTSKY KELLER LLP
200 Massachusetts Ave. NW
Washington, DC 20001
(512) 693-8350
jon@lehotskykeller.com

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

CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 5(c)(1) and 29(a)(5) because it contains 2583 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

/s/ Jonathan D. Urick
JONATHAN D. URICK

CERTIFICATE OF SERVICE

On September 1, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. This brief was also served by email on counsel identified in the Petition's service list.

/s/ Jonathan D. Urick
JONATHAN D. URICK