No. 19-8026

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE LOESTRIN 24 FE ANTITRUST LITIGATION

WARNER CHILCOTT (US), LLC; WARNER CHILCOTT SALES (US), LLC; WARNER CHILCOTT COMPANY, LLC; WARNER CHILCOTT PLC; WARNER CHILCOTT LIMITED; WATSON PHARMACEUTICALS, INC.; AND WATSON LABORATORIES, INC.,

Defendants-Petitioners,

v.

CITY OF PROVIDENCE, A.F. OF L. – A.G.C. BUILDING TRADES WELFARE PLAN, ALLIED SERVICES DIVISION WELFARE FUND, ELECTRICAL WORKERS 242 AND 294 HEALTH & WELFARE FUND, FRATERNAL ORDER OF POLICE, FORT LAUDERDALE LODGE 31, INSURANCE TRUST FUND, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 35 HEALTH CARE FUND, PAINTERS DISTRICT COUNCIL NO. 30 HEALTH & WELFARE FUND, TEAMSTERS LOCAL 237 WELFARE BENEFITS FUND, AND UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1776 & PARTICIPATING EMPLOYERS HEALTH AND WELFARE FUND,

Plaintiffs-Respondents.

On Petition for Permission to Appeal from
The United States District Court for the District of Rhode Island Case No. 1:13-md-02472-WES-PAS

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-PETITIONERS

Steven P. Lehotsky
Tara S. Morrissey
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
Telephone: (202) 463-5337

Jeffrey S. Bucholtz
Counsel of Record
Ashley C. Parrish
Marisa C. Maleck
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
Telephone: (202) 626-2627
Facsimile: (202) 626-3737
mmaleck@kslaw.com

Counsel for Chamber of Commerce of the United States of America

October 22, 2019

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, *Amicus Curiae* Chamber of Commerce of the United States of America states that, in addition to the persons listed in the Certificate of Interested Persons and Corporate Disclosure Statement filed by Defendants-Petitioners on October 1, 2019, the following persons and entities have an interest in the outcome of this case:

1. Jeffrey S. Bucholtz
2. Chamber of Commerce of the United States of America
3. King & Spalding, LLP
4. Steven P. Lehotsky
5. Marisa C. Maleck
6. Tara S. Morrissey
7. Ashley C. Parrish

Amicus Curiae Chamber of Commerce of the United States of America further states that it is a non-profit membership organization with no parent company and no publicly traded stock.

/s/ *Jeffrey S. Bucholtz*
Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. 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, 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.

Businesses are always defendants in class actions. The Chamber's members and the broader business community have an interest in being able, where a district court certified a class, to exercise their appellate rights under Rule 23(f) of the Federal Rules of Civil Procedure. The effective vindication of those appellate rights depends upon receiving a written opinion from the district court contemporaneous with a class certification order that contains the findings and conclusions "rigorous[ly] analy[zing]" whether the requirements of Rule 23 have been satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011).

Here the district court issued an order certifying the class—thus triggering the fourteen-day deadline for seeking appellate review—without issuing an opinion and without explaining why Rule 23 had been satisfied. In doing so, the district court has frustrated the appellate rights of corporate defendants and also the review of this Court. The Chamber, along with any business defendant in class-action litigation, has an interest in ensuring that class certification may not proceed unless and until the district court explains for the benefit of the parties and the Court of Appeals why class certification is warranted here.[1]

STATEMENT OF COMPLIANCE WITH RULE 29(a)

No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

Defendants-petitioners have consented to the filing of this brief. Plaintiffs-respondents did not respond whether they consented to the

[1] The Chamber does not address any other aspect of class certification at this time. And the Chamber takes no position on the merits of the underlying dispute.

filing of this brief. The Chamber files this brief along with a motion made to file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(3).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court has repeatedly emphasized that a district court must engage in a "rigorous analysis" *before* it certifies a class action under Rule 23 of the Federal Rules of Civil Procedure. *See*, *e.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013); *Dukes*, 564 U.S. at 351. The procedural device of a class action cannot be used to adjudicate claims on a class-wide basis unless and until the district court explains why class members are similarly situated, individual issues will not predominate over common ones, and all the other requirements for class certification are satisfied.

But in the proceedings below, the district court certified a class without any analysis, suggesting only that it would "fully explain[]" its reasoning in a "forthcoming Opinion" to be issued at some later, unknown date. Dkt. No. 1226 at 1. As of the date of this filing (three weeks after the class certification order issued), that opinion still has not issued. This approach directly contradicts the Supreme Court's precedents establishing rigorous standards for class certification and makes meaningful appellate review impossible.

The district court's failure to provide any reasoned analysis for its decision—much less the "rigorous analysis" that the law requires—frustrates the ability of this Court to understand and review the reasons for the district court's decision. The absence of any legal analysis necessarily constitutes an abuse of discretion. Accordingly, this Court should vacate the class-certification order and remand for the district court to provide a reasoned explanation for its decision. In addition, this Court should direct the district court to issue a new order so that defendants, if necessary, may file a new Rule 23(f) petition that addresses the reasoning of the district court.

ARGUMENT

As the Supreme Court has explained, class "certification is proper only if the trial court is satisfied, after a rigorous analysis, that Rule 23's prerequisites have been satisfied." *Comcast*, 569 U.S. at 33 (quotation marks and alterations omitted). At a minimum, "a 'rigorous analysis' of class certification prerequisites . . . requires a district court to state its reasons for certification in terms specific enough for meaningful appellate review." *In re Target Corp. Customer Data Sec. Breach Litigation*, 847 F.3d 608, 612 (8th Cir. 2017). Without a "meaningful

analysis of class certification," the "record is inadequate for . . . review" by an appellate court. *Id.* at 614.

Where, as here, a district court certifies a class without providing a reasoned explanation for its decision, the district court necessarily abuses its discretion. For example, the Eighth Circuit in *In re Target* held that the district court abused its discretion because it "replace[d] analysis of the certification prerequisites with a recitation of Rule 23 and a conclusion that certification is proper." 847 F.3d at 612. The Eighth Circuit explained that the district court's "lack of legal analysis . . . suggests that class certification was the product of summary conclusion rather than rigor." *Id.* at 613. "[A]t this point," the panel concluded, "the record is inadequate for our review." *Id.* at 614. Taking "no position on the propriety of class certification," the Eighth Circuit remanded for the court "to conduct and articulate a rigorous analysis of Rule 23(a)'s certification prerequisites as applied to this case." *Id.* at 614–15.

Similarly, the Sixth Circuit has explained that a district court's "absence of analysis" in granting class certification "result[s] in reversible error." *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Michigan*, 654 F.3d 618, 630 (6th Cir. 2011). In *Pipefitters*, the district court certified a class action during a hearing, after orally explaining why

Rule 23's requirements were satisfied. In reversing the district court, the Sixth Circuit explained that the lower court's analysis was not nearly as "rigorous" as it needed to be, especially "[g]iven the huge amount of judicial resources expended by class actions." *Id.* The panel explained that it "[n]ormally . . . would reverse and remand for the failure to conduct a rigorous analysis," but it reversed class certification outright because "the record [wa]s clear that a class action [wa]s not a superior method of adjudication" in the case. *Id.*

Other courts have likewise held that that a district court abuses its discretion when it fails to provide a reasoned analysis of Rule 23's requirements. *See, e.g.*, *New England Health Care Employees Pension Fund v. Woodruff*, 512 F.3d 1283, 1290–91 (10th Cir. 2008) (district court's decision overruling objections to a partial class settlement on the express basis of the reasons stated in the settling defendants' reply brief was an abuse of discretion); *Bonlender v. American Honda Motor Co., Inc.*, 286 Fed. Appx. 414 (9th Cir. 2008) ("district court abused its discretion by *sua sponte* certifying a nationwide class without making any findings regarding Rule 23's requirements for class certification").

In this case, the district court's orders are an even clearer example of an abuse of discretion. The district court certified a class "[f]or reasons

that will be fully explained in a forthcoming Opinion." Dkt. No. 1226 at 1. The court did not discuss—or even mention—Rule 23 or its requirements. It thus failed to provide *any* explanation for its decision, much less a "rigorous analysis" of Rule 23's prerequisites. *Comcast*, 569 U.S. at 33. The district court's lack of any legal analysis makes it impossible for this Court to conduct "meaningful appellate review" of the class-certification decision, and it constitutes reversible error. *In re Target*, 847 F.3d at 612. This Court need not take a "position on the propriety of class certification," but instead should vacate the class-certification decision and "remand for the court to conduct and articulate a rigorous analysis of Rule 23[]'s certification prerequisites as applied to this case." *Id.* at 613–14.

In addition to depriving this Court of the ability to conduct meaningful appellate review, the district court's lack of analysis also prevents defendants from understanding the district court's reasons for class certification. Under Rule 23(f), a party must appeal a class certification decision within 14 days of the district court's "order." Although the district court promised to issue an order explaining its reasoning, it still has not done so, almost one month after issuing its order. Without written reasoning explaining why it certified a class,

defendants and this Court are left to speculate about the reasons for the district court's certification decision. This Court should thus remand for a reasoned explanation by the district court and, if necessary, defendants should have an opportunity to address the district court's reasoning in a new Rule 23(f) petition.

CONCLUSION

This Court should vacate the district court's order certifying the class and remand for the district court to provide a reasoned explanation for its decision. In addition, this Court should direct the district court to issue a new order regarding class certification so that defendants may, if necessary, file a new Rule 23(f) petition.

Respectfully submitted,

Steven P. Lehotsky
Tara S. Morrissey
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
Telephone: (202) 463-5337

/s/ *Jeffrey S. Bucholtz*
Jeffrey S. Bucholtz
Ashley C. Parrish
Marisa C. Maleck
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
Telephone: (202) 626-2627

Counsel for Chamber of Commerce of the United States of America

October 22, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(g)(1), Fed. R. App. P. 32(a)(7)(B), and Fed. R. App. 29(a)(5) because this brief contains 1544 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

/s/ *Jeffrey S. Bucholtz*
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Jeffrey S. Bucholtz*
Counsel for Amicus Curiae