No. 19-90016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SHANNAN WHEELER, ET AL.,

Plaintiffs-Respondents,

v.

ARKEMA INC.,

Defendant-Petitioner.

On Petition for Permission to Appeal from the United States District Court for the Southern District of Texas, No. 4:17-cv-2960
Hon. Keith P. Ellison

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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CERTIFICATE OF INTERESTED PERSONS

Case No. 19-90016, *Shannan Wheeler, et al., v. Arkema Inc.*

The undersigned counsel of record certifies that, in addition to the persons and entities identified in the Petitioner's Certificate, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amicus Curiae

The Chamber of Commerce of the United States of America

The Chamber of Commerce of the United States of America has no parent corporation. No publicly held company has any ownership interest in The Chamber of Commerce of the United States of America.

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of 3 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.

Many of the Chamber's members and affiliates are or may become defendants in putative class actions. The Chamber therefore has a keen interest in ensuring that the courts rigorously and consistently analyze whether plaintiffs have satisfied all the requirements of Rule 23 before certifying a class. That did not happen here. The district court certified a class despite the highly individualized claims of each potential class member.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made a monetary contribution to fund the preparation or submission of this brief.

The Chamber has a vital interest in promoting a predictable, rational, and fair legal environment for its members. The Chamber therefore submits this brief in support of Arkema's petition and to highlight the above issues in furtherance of those interests.

SUMMARY OF THE ARGUMENT

The district court should not have certified a class, and this Court should grant the petition to review that erroneous certification for at least three reasons.

First, the mass-tort claims raised in this lawsuit depend on inherently individualized issues not suitable for class treatment. While the Court should grant the petition and reverse on that basis alone, an appeal in this case would also provide an ideal opportunity to clarify the following two significant issues in the class-certification procedure that have caused confusion in the district courts.

Second, this Court should clarify that Rule 23's predominance requirement cannot be satisfied by using procedural tools—such as a multi-phase trial—to pare down putative class claims until common issues finally predominate over the remaining individual ones. The district court here seems to have embraced plaintiffs' argument that, even if assessing injury, causation, and damages would require highly individualized inquiries, that problem could be managed by dividing the trial so that common issues are resolved first. But a multi-phase trial of this sort cannot be used to circumvent the requirement that the cause of ac-

tion be assessed as a whole. Had the district court considered the entire cause of action here, it would have recognized the predominance of individual issues over common ones. To the extent that lower courts are under the impression that multi-phase trials, "issues classes," and similar techniques can "manufacture predominance" in such a case, this Court should disabuse them of that view.

Third, this Court has never explicitly decided how the reliability of an expert witness under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), should be assessed at the class-certification stage. Other circuits have split on this issue, but the majority rule requires a *Daubert* analysis, as opposed to the circumscribed approach that some courts (like the district court here) have used. The *Daubert* approach accords with both the rigor that must be expected of a court's class-certification decision and this Court's precedent dictating that evidence must be admissible even at the class-certification stage. Because the district court relied on expert opinions in making its decision, this case provides an opportunity to spell out the standard that applies in these cases—especially because many district courts regularly face similar issues.

ARGUMENT

I. This Court should grant the petition and hold that the individualized mass-tort claims raised in this lawsuit are not suitable for class treatment.

As Arkema's petition ably explains, the plaintiff class should not have been certified. The claims here, as in most mass-tort cases, contain too many highly individualized facts and too many plaintiff-specific issues to be resolved through a class action. Pet. 8-9 (quoting *Madison v. Chalmette Ref., L.L.C.*, 637 F.3d 551, 556 (5th Cir. 2011)). Even if there are common issues, "the predominance criterion is far more demanding," and it cannot be met when the number and significance of individual issues—like causation and exposure—outweigh the common ones. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 624 (1997).

The district court glossed over these problems by making assumptions on critical points like causation. It asserted, for example, that "there are *fewer* hyper-localized alternative sources" of the specific chemicals cited by plaintiffs (as opposed to other chemicals they may have focused on), and that "alternative causes" could be litigated on a class-wide basis because the same alternative causes "would *likely* apply to large chunks or all of the class area." Op. 31 (emphases added).

This is a wobbly foundation for a class-certification decision, and it collapses as soon as contrary, disputed facts are asserted.

Arkema has identified significant problems with these assumptions, and the district court did not sufficiently grapple with these points. *See, e.g.,* Op. 26 ("[W]ind and flood patterns may have concentrated the contaminants in certain areas . . . ."); Op. 28 ("Regardless of individual differences in the concentrations and types of chemicals found on their properties, Plaintiffs all face exposure and the concomitant health risks . . . ."). Just these *known* issues already increase the risk that any class action will "degenerate . . . into multiple lawsuits separately tried." *Madison*, 637 F.3d at 556.

That is especially so in the case of the Rule 23(b)(2) injunctive-relief class certified by the court below. The injunctive relief contemplated—ongoing medical surveillance and remediation of property damage—*definitionally* offers individual remedies to individual problems, tailored to each plaintiff as an individual person or as an individual property owner. These remedies cannot even purport to be class-wide in scope, except when framed in the most generalized way possible.

Class certification under these circumstances cannot be squared with the predominance requirement. By granting an appeal under Rule 23(f), this Court can correct these errors. More importantly, the Court can also provide needed guidance and clarification to the many district courts facing similar putative class actions grounded in alleged mass-tort contamination incidents.

II. District courts cannot use case-management tools—such as multi-phase trials—to avoid Rule 23's predominance requirement.

This Court has long recognized that a "'district court cannot manufacture predominance through the nimble use of' management tools." *Ibe v. Jones*, 836 F.3d 516, 531 (5th Cir. 2016) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996)). Yet that is precisely what the district court did here by hypothesizing that it is possible to address truly common issues first and then deal with all of the messy individualized issues later.

Requiring predominance for the "cause of action, as a whole," prevents plaintiffs or courts from slicing off the pieces of a putative class action until, eventually, some common issue predominates in whatever is left behind. *Castano*, 84 F.3d at 745 n.21. Under this Court's ap-

proach, an "issues class" under Rule 23(c)(4) may be used for "housekeeping" to simplify trial; it cannot be used to evade Rule 23's predominance requirement for a class that otherwise would not pass muster. *Id.* The drafters of Rule 23 could not possibly have intended for issues classes to evade the rest of Rule 23's conditions.

To be sure, the need to determine damages on an individual basis does not *automatically* preclude a finding of predominance. But in this case, there are also individualized issues going to liability, such as injury and causation. Moreover, in many cases, "the damages issue may predominate over any common issues shared by the class," especially in a mass-tort case that involves other plaintiff-specific issues such as medical causation. *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 602-03 (5th Cir. 2006). In assessing whether individualized damages issues predominate over common issues, this Court has required district courts to carefully consider how a trial would be conducted and which issues would actually predominate at trial. *See Madison*, 637 F.3d at 557.

The district court did not do that here. Instead, it essentially concluded that it could lop off the complicated, individualized damages is-

sues, leaving behind a remnant broadly characterized as "liability" under which common issues might predominate. Op. 34 (concluding that, because individualized damages would be decided in the second phase, "common questions about liability . . . will predominate").

Salvaging a putative class like this one through procedural devices defies not just precedent, but also practicality. Rather than streamlining the issues for trial, an unwise order granting certification plus a multi-phase trial could just as easily wind up less fair—and less efficient—than simply refusing certification at the outset. Here, for instance, the proposed class trial on "liability" (or "virtually every issue prior to damages," Op. 37) risks artificially limiting Arkema's defenses as to individual claims. *See* Pet. 10-11 (noting that class certification cannot preclude challenges to individual claims, but asserting that individual issues would have to be litigated "over 20,000 times" across this class). Moreover, the approach embraced by the district court could easily spawn further individual trials or mini-trials if the seemingly common issues turn out to be less predominant than the district court expected. As discussed above with respect to causation, this is no idle concern. Rule 23 does not allow a district court to certify a class and then

repeatedly subdivide the case as it proceeds—just to compensate for the fact that the class never should have been certified to begin with.

As Arkema correctly explains, this Court's decision in *Deepwater Horizon* does not—and could not—compel a different answer. *See* Pet. 16-17 (quoting *In re Deepwater Horizon*, 739 F.3d 790, 816 (5th Cir. 2014)). Yet the district court found *Deepwater Horizon* relevant and persuasive in moving forward with certification here. To the extent there is confusion in the lower courts on how *Deepwater Horizon* affects these issues, this petition would allow this Court to clear it up.

To ensure fair and predictable results in certifying classes, this Court should grant Arkema's petition and make clear that the *Castano* rule against manufacturing predominance continues to control cases like this one. Class certification cannot occur through creative severance of issues.

III. This Court should adopt the majority rule and require a *Daubert* analysis of expert testimony at the class-certification stage.

This Court should also grant the petition to resolve whether expert testimony should be analyzed under the *Daubert* standard at the class-certification phase. The district court's decision to certify the class

relied on the opinions of several experts submitted by plaintiffs. *See, e.g.,* Op. 21, 28, 29. Arkema challenged these experts under Federal Rule of Evidence 702 and *Daubert*. The district court acknowledged that "[w]hether a full *Daubert* analysis at the class certification stage is required is unclear." Op. 6. The court then rejected some of Arkema's challenges by accepting some of these experts, based on "the reliability of the expert opinions *on the issues relevant to class certification*." Op. 6 (emphasis added).

The district court correctly explained that the application of *Daubert* at the class-certification phase is unclear. The Supreme Court has strongly suggested that lower courts must engage in *some form* of the *Daubert* analysis at this phase, without yet saying what exactly must be done. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354 (2011) ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so . . . ." (citation omitted)). Lower courts have not agreed on whether this analysis must be as rigorous as it would be at trial, and this Court has not resolved the question.

The Court should therefore take this opportunity to require a *Daubert* analysis with the same rigor that would be required for admissibility at trial. This position would accord with the majority of circuits to have decided this issue, and it is most consistent with this Court's precedent. If an expert's opinion is not admissible at trial, then it should not dictate the legal proceedings. Courts cannot rely on expert testimony unless it "rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597.

As Arkema's petition notes, the Third, Seventh, and Eleventh Circuits have endorsed a *Daubert* approach, demanding that an expert's conclusions be admissible at trial to serve as the basis for class certification. Pet. 25. This position is correct. It comports with the Supreme Court's requirement that "rigorous analysis" must be done when assessing class certification—as well as the requirement that the party seeking certification "prove" that it can satisfy Rule 23. *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013)).

In contrast, the Eighth and Ninth Circuits have adopted a "focused" inquiry that is not the *Daubert* standard. Under this analysis,

the Eighth Circuit only *tentatively* considers the reliability of the expert's opinions, and it focuses solely on Rule 23 certification issues. *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 611-12 (8th Cir. 2011). The Ninth Circuit similarly has held that whether expert testimony is ultimately admissible at trial is merely *a factor* in determining the weight accorded to this evidence at the class-certification phase—but not the dispositive factor. *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018).

Notably, the Ninth Circuit suggested that this Court, in particular, would probably reject anything less than a *Daubert* approach: "Other circuits have reached varying conclusions on the extent to which admissible evidence is required at the class certification stage. Only the Fifth Circuit has directly held that admissible evidence is required to support class certification." *Id.* at 1005 (citing *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005)). There is no reason for this Court to relax its established rule—that admissible evidence is required to support class certification—when it comes to expert testimony.

This Court has not yet addressed this specific issue, however. Some district courts in this Circuit have done so, but they have reached

different conclusions, as the district court here explained. Op. 6 (citing cases). This uncertainty ill-serves the lower courts and litigants alike: In many cases, the rigor with which the district court approaches expert opinions at the class-certification stage can determine whether a class may be certified at all. *See, e.g., Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 819 (7th Cir. 2010) ("Without [the expert's] testimony, Plaintiffs are left with too little to satisfy Rule 23(b)(3)'s predominance prong."). This Court should accept and decide this appeal to provide consistency and predictability that is now lacking at this critical stage of litigation.

In fact, this question is significant enough that the Supreme Court has granted certiorari to resolve it (although it was unable to because the issue was forfeited in that particular case). *Comcast*, 569 U.S. at 32 n.4; *id.* at 39-40 (Ginsburg and Breyer, JJ., dissenting). Although the Supreme Court may take up this issue again, it remains unresolved in this Circuit and is an apt subject for a Rule 23(f) appeal. *See Am. Honda*, 600 F.3d at 815 (granting Rule 23(f) petition to address this issue).

CONCLUSION

This Court should grant the petition and reverse the decision of the district court.

June 24, 2019

Respectfully submitted,

/s/ Scott A. Keller

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document was filed and served on June 24, 2019, via ECF upon counsel of record for the parties.

/s/ Scott A. Keller
Scott A. Keller

CERTIFICATIONS UNDER ECF FILING STANDARDS

Pursuant to paragraph A(6) of this Court's ECF Filing Standards, I hereby certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Scott A. Keller
Scott A. Keller

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 2,593 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in 14-point Century Schoolbook font.

Dated: June 24, 2019

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