Nos. 21-103 & -104

In the United States Court of Appeals for the Sixth Circuit

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

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)

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

Jonathan D. Urick
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, D.C. 20062

Steven P. Lehotsky
Scott A. Keller
Jeremy Evan Maltz
LEHOTSKY KELLER LLP
200 Massachusetts Ave. NW
Washington, DC 20001
(512) 693-8350
steve@lehotskykeller.com

Counsel for Amicus Curiae

The Chamber of Commerce of the United States of America respectfully moves for leave to file an amicus brief in support of the Veolia Defendants' Petition for Rehearing En Banc pending before this Court.[1] Counsel for Petitioners has consented to the filing of this amicus brief. The Chamber contacted counsel for Respondents that have made an appearance in the Sixth Circuit, but did not receive consent from all Respondents before filing this Motion.[2]

The 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, 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

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

[2] At the time of filing, Plaintiffs-Respondents do *not* consent to the relief requested in this Motion.

that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the Nation's business community.

This case raises such issues 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 the broader business community, in promoting a predictable, rational, and fair legal environment. The Chamber therefore has a keen interest in ensuring that courts rigorously analyze, consistent with Federal Rule of Civil Procedure 23, whether a plaintiff has satisfied the prerequisites for class certification before certifying a class.

The Chamber is well-positioned to aid this Court's understanding of the important issues raised by Petition for Rehearing En Banc. The Chamber has submitted multiple briefs about this Court's decision in *Martin*, and can offer the broader perspective of class-action defendants more generally. *See* Brief of the Chamber of Commerce of the United States of America, et al. as Amici Curiae in Support of Petitioners, *Martin v. Behr Dayton Thermal*

Products LLC, 896 F.3d 405 (2018) (urging this Court to reconsider *Martin* en banc). *See also* 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), 2018 WL 5994153. This Court also granted the Chamber's motion to submit an amicus brief in favor of the underlying Petition for Permission to Appeal.

In conclusion, the Chamber respectfully requests that this Court grant the Chamber leave to file its amicus brief in support of the Veolia Defendants' Petition for Rehearing En Banc.

Respectfully submitted,
/s/ *Steven P. Lehotsky*

Jonathan D. Urick
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, D.C. 20062

Steven P. Lehotsky
Scott A. Keller
Jeremy Evan Maltz
LEHOTSKY KELLER LLP
200 Massachusetts Ave. NW
Washington, DC 20001
(512) 693-8350
steve@lehotskykeller.com

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

CERTIFICATE OF COMPLIANCE

This motion complies with: (1) the type-volume limitation of Federal Rules of Appellate Procedure 27(d)(2)(a) and 29(b)(3) because it contains 488 words, excluding the parts of the motion 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 type-face (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

/s/ Steven P. Lehotsky
STEVEN P. LEHOTSKY

CERTIFICATE OF SERVICE

On February 14, 2021, this motion was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

Steven P. Lehotsky
STEVEN P. LEHOTSKY

Nos. 21-103 & -104

In the United States Court of Appeals for the Sixth Circuit

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

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 REHEARING EN BANC

Jonathan D. Urick
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, D.C. 20062

Steven P. Lehotsky
Scott A. Keller
Jeremy Evan Maltz
LEHOTSKY KELLER LLP
200 Massachusetts Ave. NW
Washington, DC 20001
(512) 693-8350
steve@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/ Steven P. Lehotsky
STEVEN P. LEHOTSKY
Counsel of Record for Amicus Curiae
Chamber of Commerce
of the United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes, and Rules

Other Authorities

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.

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

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Chamber has a vital interest, on behalf of its members and the broader business community, in promoting a predictable, rational, and fair legal environment. The Chamber therefore has a keen interest in ensuring that courts rigorously analyze, consistent with Federal Rule of Civil Procedure 23, whether a plaintiff has satisfied the prerequisites for class certification before certifying a class.

INTRODUCTION

Since *Martin v. Behr Dayton Thermal Products LLC*, the extreme results of the panel's decision have become evident. 896 F.3d 405, 412-13 (6th Cir. 2018). Contrary to Rule 23's carefully crafted safeguards, *Martin* held that so-called "issues classes" "certified" under Federal Rule of Civil Procedure 23(c)(4) may proceed even if the case as a whole does not meet Rule 23(b)(3)'s predominance and superiority requirements. Consequently, as the district court here observed, *Martin* "enshrines . . . the lowest existing threshold for issue-class certification." *In re Flint Water Cases*, 2021 WL 3887687, at *42 (E.D. Mich. Aug. 31, 2021). Because *Martin* contradicts Rule 23 and imposes improper settlement pressure on defendants, *Martin* should be overruled.

Rule 23(c)(4) does not create an independent basis for class certification. Under Rule 23's plain text and structure, Rules 23(a) and 23(b) impose mandatory requirements that all certified classes must meet. Rule 23(c), by contrast, provides tools for managing cases properly certified under Rule 23(b). Because *Martin* sidesteps Rule 23(b)(3), however, it allows "any competently crafted class" to give rise to an "issues class." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (cleaned up). This case exemplifies how district courts in this circuit have extended *Martin*: The district court certified multiple issues classes despite *twice* acknowledging "the overwhelming presence of individual issues." *Flint Water*, 2021 WL 3887687, at *37. *See also* Pet.14-16. Not only is this approach incompatible with Rule 23, it raises constitutional concerns under the Seventh Amendment.

Compounding its legal defects, *Martin*'s practical effects on defendants are severe by making certification of abusive "issues classes" trivially easy and increasing the coercive pressure to settle meritless cases. The cost of such class-action abuse reverberates throughout the economy. 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 grant the Petition for Rehearing En Banc to correct *Martin*'s error and rein in abusive issues classes.

ARGUMENT

I. *Martin* conflicts with Rule 23's text and structure and poses constitutional concerns under the Seventh Amendment.

A. *Martin* misinterpreted Rule 23.

Generally, Rule 23 has three provisions that govern class certification—Rule 23(a) and (b) impose mandatory requirements, while Rule 23(c) governs procedure. As the Fifth Circuit correctly concluded, the "proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). *Martin* erred by using Rule 23(c)(4) to justify certification of classes that do not comply with Rule 23(b)(3). *See* Pet.9-11.

1. Rule 23 establishes a clear process to certify a class. *First*, Rule 23(a) imposes four "[p]rerequisite[]," "threshold requirements applicable to all class actions": numerosity, commonality, typicality, and adequacy of representation. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

Second, once those requirements are met, plaintiffs must "show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Id.* at 614. In other words, Rule 23(b) establishes the three exclusive "[t]ypes" of classes that courts may certify. Fed. R. Civ. P. 23(b). Applicable here, a Rule 23(b)(3) class must meet two further requirements: (1) predominance—*i.e.*, "questions of law or fact common to class members predominate over any questions affecting only individual members"; and (2) superiority—*i.e.*, "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The "mission" of the "demanding" predominance requirement is to "assure the class cohesion that legitimizes representative action in the first place" by precluding classes in which the members' claims have factual and legal idiosyncrasies that defeat class unity.

Amchem, 521 U.S. at 623. *See also* Pet.12 (explaining Rule 23(b)(3)'s importance).

Finally—after Rule 23(a) and 23(b)(3) are satisfied—Rule 23(c) establishes the procedures and mechanisms for proceeding with class actions. Rule 23(c)(1) requires that the certification decision take place as soon as practicable and that the certification order define the class and appoint class counsel. Rule 23(c)(2) specifies the notice requirements for (b)(3) classes and authorizes the district courts to require notice to (b)(1) and (b)(2) classes when appropriate. Rule 23(c)(3) provides that any judgment in a certified class action applies to all class members, clarifying the preclusive effect of the certification order. And Rule 23(c)(5) permits the division of a class into subclasses.

Like these provisions, Rule 23(c)(4) provides a tool for the management of a class action, not a new pathway to establish a class action. The Rules Committee would not have placed Rule 23(c)(4) in the middle of a series of procedures and management tools if it had meant to create a whole new type of class action. This placement confirms that Rule 23(c)(4) is a case

management tool that allows a district court to limit class treatment to particular issues when a case has already satisfied Rule 23(a) and (b).

2. None of Rule 23(c)'s procedural provisions supplant Rule 23(a)'s and 23(b)'s substantive requirements or provide a stand-alone basis for class certification. Rather, they are tools that courts may employ in managing class actions that otherwise satisfy all of Rule 23(a)'s prerequisites and the additional requirements for at least one of the three types of class actions defined in Rule 23(b)(1)-(3). There are at least three textual and structural reasons supporting this interpretation.

First, Rule 23(c)(4) explicitly provides that "an action may be brought or maintained as a class action with respect to particular issues" only "[*w*]*hen appropriate*." Fed. R. Civ. P. 23(c)(4) (emphasis added). And it is "appropriate" for district courts to use this management tool only when a class satisfies Rule 23(b)(3). Interpreting Rule 23(c)(4) this way is consistent with other parts of Rule 23(c), which address procedures for handling class actions that are eligible for certification under Rule 23(b). Accordingly, this interpretation of the interaction between Rules 23(b)(3) and Rule 23(c)(4) does not

render Rule 23(c)(4) superfluous. The 1996 amendment to Rule 23 illustrates one potentially valid use of Rule 23(c)(4): When a class trial allows for "the adjudication of liability to the class," but class members must then "come in individually and prove the amounts of their respective claims." *See also* Pet.10-11. So, for instance, Rule 23(c)(4) would permit courts to create separate issues classes within Rule 23(b)(3)-compliant classes for different categories of damages.

Second, by its own terms, Rule 23(c)(4) does not create standalone "issues class actions." Unlike Rule 23(b)—which expressly sets forth "[t]ypes" of class actions, *see* Fed. R. Civ. P. 23(b)—Rule 23(c)(4) does not impose any requirements for maintaining an issues class action or identify any limitations on issues classes. The contrast in the language of Rule 23(c)(4) and Rule 23(b) indicates that Rule 23(b) establishes the only paths to class certification. The Rules Committee would have placed the provision in Rule 23(b) or, at the very least, used language similar to Rule 23(b) if it had meant to create a new kind of class action.

Third, confirming that Rule 23(c)(4) is not a standalone type of class action, Rule 23(c)(2) establishes notice requirements and notice options for 23(b)(1)-(3) classes. But it does not address notice for a "23(c)(4) class." And Rule 23(c)(3) imposes rules for the judgment for 23(b)(1)-(3) classes. This absence of any rules for the management of a Rule 23(c)(4) class action confirms that it does not establish a separate type of class action.

In sum, had the Rules Committee intended to create an "issues class" independent of Rule 23(b)'s "[t]ypes" of classes, it would have done so clearly as it did with Rule 23(b). It would not have hidden such a significant expansion of the class-action device in a part of Rule 23 dedicated to case management.

3. The Supreme Court has recognized that Rule 23(b)(3) was "the most adventuresome innovation" of the 1966 amendments to Rule 23, *Amchem*, 521 U.S. at 614 (quotation omitted), and has been understood as the outermost limit for class proceedings. Nevertheless, *Martin*'s reliance on Rule 23(c)(4) for a new category of class actions further extends the limits of class

certification beyond the already-"adventuresome" boundaries carefully limited by Rule 23(b)(3).

Specifically, *Martin* held that district courts may certify an "issues class" when "common questions *predominate within certain issues* and where class treatment of those issues is the superior method of resolution." *Martin*, 896 F.3d at 405 (emphasis added). In other words, rather than asking whether common questions predominate across the entire "controversy"—as Rule 23(b)(3) requires—district courts may "sever issues until the remaining common issue predominates over the remaining individual issues," which would "eviscerate the predominance requirement." *Castano*, 84 F.3d at 745 n.21. "[T]he result would be automatic certification in every case where there is a common issue, a result that could not have been intended." *Id.*

Consequently, *Martin* allows routine certification of "issues classes" because "any competently crafted class complaint literally raises common questions." *Dukes*, 564 U.S. at 349 (cleaned up). This is why *Martin*'s statement that issues classes will "not risk undermining the predominance

requirement" has rung hollow. 896 F.3d at 413. It is easy to satisfy predominance as to one or more discrete issues of a court's choosing—as compared to the entire case. Because that will always be possible, *Martin* effectively nullifies Rule 23(b)(3). *See* Pet.11-13. Even proponents of "issues class actions" recognize that this approach "fundamentally revamp[s] the nature of class actions." Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 Utah L. Rev. 249, 263 (2002).

B. *Martin* raises substantial Seventh Amendment concerns.

The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. Under *Martin*, however, such reexamination is likely. Specifically, any facts found by a jury deciding certified "common issues" may be reexamined by later juries that must decide individualized questions (like proximate causation) that overlap with the common issues. That reexamination would raise serious

constitutional concerns. *E.g.*, *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995).

Martin dismissed this concern as premature, 896 F.3d at 417, and the district court here concluded that "Seventh Amendment concerns are speculative at the class certification stage of the proceedings." *Flint Water*, 2021 WL 3887687, at *46. However, under Rule 23 it is "critical . . . to determine how the case will be tried," including as to individualized issues, *before* class certification. *See* Advisory Committee Note to 2003 Amendment Fed. R. Civ. P. 23. Even if Seventh Amendment concerns can be avoided in the future, failure to make any effort to mitigate those concerns falls far short of the rigorous analysis required by Rule 23 at the class-certification stage.

II. This Court should reconsider *Martin* because of the undue and burdensome settlement pressure it places on defendants.

Martin was not only wrong on the merits, it has enormous practical consequences. Class certification is subject to strict standards because the "class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Dukes*, 564 U.S. at 348

(citation omitted). But under *Martin*, district courts can effectively certify "issues classes" at will, without regard for Rule 23(b)'s essential due process protections. This can only invite abuse of the class-action device—with consequences for businesses; their customers and employees; and the entire judicial system.

As the Supreme Court has recognized for decades, class certification exerts enormous pressure on defendants 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"); *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."). It is unsurprising, then,

that "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (Dec. 2010). In 2019, for example, companies reported settling 60.3% of class actions. *See* Carlton Fields Class Action Survey 26 (2021), https://bit.ly/2WDSTEP. The previous year they reported settling an even higher 73%. *Id.*

To mitigate these risks, Rule 23 imposes stringent requirements. Relevant here, Rule 23(b)(3)'s "predominance" and "superiority" requirements ensure prompt and speedy resolution of claims. When common issues are not predominant, however, those complexities can only increase litigation and settlement costs without meaningfully promoting final resolution of the claims on the merits.

Purported Rule 23(c)(4) "issues classes" pose especially acute problems: "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) (emphasis added). And under the Court's decision in *Martin*, the variety and number of cases that district courts can certify is limited only by the cases that attorneys can bring.

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

CONCLUSION

The Court should grant the Petition for Rehearing En Banc.

Respectfully submitted,

/s/ Steven P. Lehotsky

Jonathan D. Urick
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, D.C. 20062

Steven P. Lehotsky
Scott A. Keller
Jeremy Evan Maltz
LEHOTSKY KELLER LLP
200 Massachusetts Ave. NW
Washington, DC 20001
(512) 693-8350
steve@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 29(b)(4) because it contains 2598 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/ Steven P. Lehotsky
STEVEN P. LEHOTSKY

CERTIFICATE OF SERVICE

On February 14, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

/s/ Steven P. Lehotsky
STEVEN P. LEHOTSKY