19-2851

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES D. SULLIVAN, LESLIE ADDISON, WILLIAM S. SUMNER, JR., RONALD S. HAUSTHOR, GORDON GARRISON, LINDA CRAWFORD, TED CRAWFORD, AND BILLY J. KNIGHT, individually, and on behalf of a Class of persons similarly situated,

Plaintiffs-Respondents,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORP.,

Defendant-Petitioner.

On appeal from the United States District Court for the District of Vermont, No. 5:16-cv-00125, Hon. Geoffrey W. Crawford

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF DEFENDANT-PETITIONER

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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 company and has issued no stock.

The National Association of Manufacturers is a nonprofit corporation organized under the laws of the State of New York. It has no parent company and has issued no stock.

The American Tort Reform Association is a nonprofit corporation organized under the laws under the laws of the District of Columbia. It has no parent company and has issued no stock.

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 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. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing the requirements for class certification.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. NAM is the voice of the manufacturing community and

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no party or counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

Many of the *amici*'s members and affiliates are defendants in cases filed as putative class actions. They therefore have a keen interest in ensuring that courts properly analyze, consistent with the text of Federal Rule of Civil Procedure 23, whether a plaintiff has satisfied the rigorous prerequisites for class certification.

The *amici* agree with all of Petitioner's class-certification arguments, but they wish to highlight two particular points. First, the district court incorrectly invoked Rule 23(c)(4) to certify an "issue class" purportedly focused on liability but actually carving out a narrow sub-issue that would not even resolve the question of liability on a classwide basis. The district court's approach to issue classes dramatically expands Rule 23(c)(4)—which serves only a narrow purpose—in a manner that swallows the general rule (Rule 23(b)(3)) governing certification of most class actions. Second, the district court's certification under Rule 23(b)(2) of a medical monitoring class improperly brushes aside individualized issues inherent in assessing whether such monitoring is appropriate.

That decision commits the same error that the Supreme Court identified and corrected in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). *Amici* therefore have a strong interest in this Court's review of the district court's erroneous class certifications.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Supreme Court has repeatedly recognized that failing to apply class-certification requirements properly is deeply unfair to both absent class members and defendants, and, as a result, Rule 23's limitations must be enforced to protect against class-action abuses. *E.g.*, *Dukes*, 564 U.S. at 363; *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997). Because class actions are an "'exception to the usual rule'" that cases are litigated individually, it is essential that courts apply a "rigorous analysis" to the requirements governing class certification before a lawsuit is approved for class treatment. *Dukes*, 564 U.S. at 349, 351 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

Because the district court's certifications violate Rule 23's basic principles, this Court should review and reverse those determinations. A class-certification order warrants appellate review under Rule 23(f) if it "will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable" or if "the certification order implicates a legal question

about which there is a compelling need for immediate resolution." *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001). The district court's class-certification easily satisfies this standard for two reasons.

First, the order conflicts with Supreme Court and Circuit precedent. Second, the issues raised by the petition—including the parameters of a valid Rule 23(c)(4) certification and the propriety of a medical-monitoring class under Rule 23(b)(2)—are important and bound to arise repeatedly in other litigation (especially if the district court's decision is permitted to stand). *See* Rule 23(f) Pet. at 6. This Court should therefore grant the petition and reverse the district court's order.

ARGUMENT

I. Review Is Warranted Because The District Court Improperly Certified A Liability Issue Class Under Rule 23(c)(4).

The district court certified a class based on injuries allegedly suffered by property owners as a result of PFOA contamination by purporting to use Rule 23(c)(4) to "[d]ivid[e] the lawsuit into liability and damages portions." Order at 22. According to the court, the "common element" of each of Plaintiffs' claims "is that Chem-Fab and Saint-Gobain were the source of contamination." *Id*. at 21.

But the district court also recognized the possibility that "[o]ther sources such as local businesses or the Bennington landfill are the more likely sources of contamination." *Id*. at 23. The broad question of whether Petitioner's plants were *one* potential source of contamination might be common, but answering that

question does nothing to resolve the defendant's liability and advance the litigation because—as the district court's acknowledgment of the possibility of other, "more likely[,] sources of contamination" makes clear—the actual or dominant source of contamination on each piece of property, if any, may vary. *See* Rule 23(f) Pet. at 13. The question of Petitioner's potential responsibility therefore must itself be resolved individually.

To be sure, whether petitioner is a potential source of contamination is relevant to determining liability. But answering that one question does not come close to resolving the liability issue. Instead, other important individualized issues remain, such as:

- whether there is PFOA on any particular property and how much; and
- whether the presence of PFOA was significant enough to cause injury.

These issues go to liability—satisfying Plaintiffs' burden of proof on their causes of action—and not just to the amount of damages.

For that reason, the district court's Rule 23(c)(4) certification conflicts with this Court's precedent. In *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), this Court held that an issue class may be certified if it would "'reduce the range of issues in dispute and promote judicial economy.'" *Id*. at 234 (quoting *Robinson v. Metro-N. Commuter R.R.*, 267 F.3d 147, 168 (2d Cir. 2001)). If,

however, a "number of questions . . . remain for individual adjudication," issue certification is not proper. *Id*.

McLaughlin was a civil RICO action in which the plaintiffs asserted that they were deceived by the defendant's marketing and branding of "light" cigarettes. *Id*. at 220. In holding issue certification improper, the Court explained that certifying "the issue of defendants' scheme to defraud" would not "materially advance the litigation because it would not dispose of larger issues such as reliance, injury, and damages." *Id*. at 234.

The same goes here. The district court's issue certification on "liability" encompasses only whether Petitioner bore some potential responsibility for the contamination, and leaves unresolved larger issues such as injury and damages. Nor does the issue class promote judicial economy because, as the district court acknowledged, individualized damages trials will still be required for the approximately 2,200 properties at issue. Order at 7, 9-10.

This Court's review is essential to correct the district court's error and clarify the limitations that *McLaughlin* imposes on the certification of issue classes under Rule 23(c)(4). Unless district courts rigorously follow *McLaughlin*, issue certification will nullify Rule 23(b)'s essential protections. A loose approach would invite a flood of nuisance lawsuits and *in terrorem* settlements.

Review is also warranted to ensure that issue classes under Rule 23(c)(4) do not swallow Rule 23(b)(3)'s predominance requirement. Ordinarily, a putative class representative must demonstrate that common issues predominate to obtain certification of a damages class action. The "mission" of the predominance requirement is to "assure the class cohesion that legitimizes representative action in the first place." *Amchem*, 521 U.S. at 623. The requirement accomplishes that mission by winnowing out proposed class actions in which the members' claims are riddled with factual and legal differences.

The predominance requirement is for that reason a "demanding" one. *Id*. Yet that requirement loses all force when, as here, liability-only issue classes are certified that could not satisfy Rule 23(b)(3)—and even though they would not meaningfully advance the litigation. That would transform issue certification under Rule 23(c)(4) into a standardless end-run around Rule 23(b)(3)'s predominance requirement. After all, a creative lawyer almost invariably will be able to identify at least one common legal issue and/or some factual issue that may be subject to common proof.

Even proponents of issue class actions acknowledge that such an 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). And not for the better.

Absent strict adherence to the limitations setting forth the narrow category of cases "appropriate" for issue-class certification, certified issue classes will become routine, and abusive class actions will increase.

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). 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* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (Dec. 2010) ("virtually all cases certified as class actions and not dismissed before trial end in settlement"). Opening the door to large numbers of "issue classes" would multiply significantly these adverse consequences—and in circumstances where the important requirements of Rule 23(b)(3) are absent.

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 could 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 (or to taxpayers) in the form of higher prices and lower wages and benefits; and much of the remainder of the burden would fall on innocent investors.

II. Review Is Also Warranted Because The District Court Improperly Certified A Medical-Monitoring Class Under Rule 23(b)(2).

This Court's review is also necessary because the district court failed to account for the individualized assessments necessary to determine what, if any, medical monitoring would be necessary for each class member. "[C]laims for *individualized* relief" do not fall within Rule 23(b)(2). *Dukes*, 564 U.S. at 360 (emphasis in original). "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted," so the rule "applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Id*. (internal quotation marks omitted). Put simply, the rule "does not authorize class certification when each individual class member would be entitled to a *different* injunction against the defendant." *Id*. (emphasis in original).

The courts of appeals agree that medical-monitoring claims are a "highly individualized remedy" not suitable for resolution on a class basis. *In re St. Jude Med. Inc.*, 522 F.3d 836, 840 (8th Cir. 2008). Because would-be "class members' regimes of medical screenings and corresponding cost will vary individual by individual," a "'single injunction or declaratory judgment' cannot 'provide relief to each member of the class.'" *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 263 (6th

Cir. 2011). As the Tenth Circuit explained in upholding the denial of Rule 23(b)(2) certification of a class of individuals claiming exposure to uranium-mill emissions who sought medical monitoring, the class would be comprised of "individuals who might have been exposed to hazardous substances released into the environment in varying ways and degrees at different times." *Boughton v. Cotter Corp.*, 65 F.3d 823, 827 (10th Cir. 1995).

The same rationale applies here, where the proposed class includes individuals allegedly exposed to PFOA in different degrees and at different times, and that differential exposure necessarily affects whether medical monitoring is warranted at all—let alone the extent of the monitoring.

As with the Rule 23(c)(4) certification, the district court glossed over the individualized nature of Plaintiffs' claims, instead relying on the "alleged release of PFOA by the defendant over many years" as conduct that applies generally to the whole class. Order at 26. But resort to such a common course of conduct does not establish Petitioner's liability for medical monitoring, which depends on individualized questions of exposure, source of exposure, medical history, age, gender, and weight, among others.

The district court justified its Rule 23(b)(2) certification because "the plaintiffs in this case have already undergone blood serum testing for PFOA" and their test results were "above background levels." *Id.* at 27. But whether those

"above background levels" of PFOA create an additional risk of developing a disease linked to PFOA exposure depends on individualized medical profiles and health characteristics.

In addition, the district court admitted that some class members may already be undergoing monitoring, stating that the class remedy is for screening "that does not duplicate their current primary care," *id*. at 31, and Petitioner is "free to prove that the remedy [of medical monitoring] is unnecessary or positively harmful," *id*. at 32. Determination of whether monitoring duplicates any individual's primary care and whether monitoring is unnecessary or harmful are all individualized assessments that cannot be resolved on a class basis. Further, an elevated PFOA level does not establish Petitioner's liability for medical monitoring because the individualized question of the source of each class members' exposure remains.

Indeed, as Petitioner explains (at 18-19), courts have repeatedly rejected requests to certify medical monitoring classes in cases alleging environmental exposure, including two other cases alleging PFOA contamination: *Rhodes v. E.I. du Pont de Nemours & Co.*, 253 F.R.D. 365, 376-79 (S.D. W.Va. 2008), and *Rowe v. E.I. du Pont de Nemours & Co.*, 2008 WL 5412912 (D.N.J. Dec. 23, 2008).

The district court's decision ignores that medical monitoring is a quintessentially individualized claim that depends not just on environmental exposure, which in the case of alleged releases over decades varies substantially

from person to person, but also on an individual's unique health and physical profile. The decision therefore opens the door to a proliferation of improper class actions seeking medical monitoring. For the reasons described above, such a proliferation, untethered from Rule 23, will have dire consequences for businesses, consumers, and the entire economy.

CONCLUSION

The petition should be granted and the District Court's order reversed.

Dated: September 13, 2019

Respectfully submitted,

/s/ *Andrew J. Pincus*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I hereby certify that this brief:

(i) complies with the type-volume limitation of Rules 5(c)(1) and 29(a)(5) because it contains 2,574 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); 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 Times New Roman font in a size equivalent to 14 points or larger.

/s/ *Andrew J. Pincus*
Andrew J. Pincus

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Andrew J. Pincus*
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