No. 19-20723

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

COREY PRANTIL; RONALD WHATLEY; BETTY WHATLEY; BRET SIMMONS; PHYLLIS SIMMONS; GREG NASON; LARRY ANDERSON; TANYA ANDERSON; KEITH LYONS; BEVERLY FLANNEL; ROLAND FLANNEL,

Plaintiffs-Appellees,

v.

ARKEMA INCORPORATED,

Defendant-Appellant.

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

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF DEFENDANT-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Case No. 19-20723, *Corey Prantil, et al., v. Arkema Inc.*

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

Amici 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.

American Fuel & Petrochemical Manufacturers (AFPM)

AFPM has no parent corporation. No publicly held company has any ownership interest in AFPM.

American Chemistry Council (ACC)

ACC has no parent corporation. No publicly held company has any ownership interest in ACC.

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INTEREST OF AMICI CURIAE[1]

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

The American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association representing approximately 300 companies that comprise virtually all U.S. refining and petrochemical manufacturing capacity. AFPM's members supply consumers with a wide variety of products that are used daily in homes and businesses.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to fund this brief's preparation or submission.

The American Chemistry Council (ACC) represents leading companies engaged in the business of chemistry—a $553 billion industry and a key element of the nation's economy. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer.

Amici have a vital interest in promoting a predictable, rational, and fair legal environment for their members and affiliates, many of whom have been or may become defendants in putative class actions. Amici are keenly interested in ensuring that courts rigorously and consistently apply Rule 23's requirements before certifying a class. That did not happen here. The district court certified a class despite a host of individualized issues and without sufficiently vetting the expert testimony supporting class certification. The district court's lax approach, if adopted more broadly, would unjustifiably raise the cost of business in critical industries and would impair due-process rights. This Court's guidance is needed to ensure that the district court's errors are not repeated elsewhere.

SUMMARY OF ARGUMENT

The district court's class-certification order should be reversed. Its predominance inquiry was cursory, flawed, and contrary to this Court's precedent. This amicus brief will focus on two key issues in need of this Court's guidance: (1) a district court cannot evade or water down Rule 23's predominance inquiry by dividing up a case or issues through case-management tools, and (2) a thorough *Daubert* analysis is required when assessing expert opinions at the class-certification phase.

Because class certification "magnifies and strengthens the number of unmeritorious claims," *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996), it can put "'insurmountable pressure' on a defendant to settle" even a meritless suit. *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007). If followed more broadly, the district court's lax approach to Rule 23 will burden the economy and stifle innovation by making it easier for plaintiffs with meritless claims to coerce unwarranted settlements. It also will impair due-process rights and waste judicial resources.

I. This Court has long held that Rule 23(b)(3)'s predominance requirement cannot be satisfied by using procedural tools like multi-

phase trials to pare putative class claims until common issues eventually predominate over the remaining individual ones. *Ibe v. Jones*, 836 F.3d 516, 531 (5th Cir. 2016) (A "'district court cannot manufacture predominance through the nimble use of' management tools." (quoting *Castano*, 84 F.3d at 745 n.21)). In doing just that, the district court overlooked defendant's argument that exposure, injury, causation, and damages will all require individualized inquiries. The court compounded this error by assuming that any problems of individualized inquiries could be alleviated by dividing the trial to resolve purportedly common issues first.

The Supreme Court has rejected the "trial by formula" tactics proposed in plaintiffs' trial plan here. And this Court has rejected the use of case-management tools like multi-phased trials to circumvent Rule 23's requirements that the action be assessed as a whole and that the predominance inquiry be especially demanding and searching.

II. This Court has made clear more than once that a district court's decision to certify a class "must be made based on adequate *admissible evidence* to justify class certification." *Bell v. Ascendant Sols., Inc.*, 422 F.3d 307, 312-13 (5th Cir. 2005) (quoting *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005)) (emphasis added). The district

court relied on expert opinions in deciding to certify the class. But it did so without performing the thorough reliability analysis required by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Conducting a thorough *Daubert* analysis at the class-certification stage accords with this Court's admissibility requirement and the rigor demanded of a district court's class-certification analysis. A majority of other Circuits require a *Daubert* analysis at the class-certification stage. That requirement also follows from several recent statements by the Supreme Court, including its express "doubt" that a *Daubert* analysis was not required at the class-certification stage. *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 354 (2011).

In assessing the expert testimony's reliability, the district court analyzed only those "issues relevant to class certification." RE40.[2] That limited approach contravenes this Court's precedent. This Court should clarify that a thorough *Daubert* analysis is required before certifying a class based on expert testimony.

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[2] Record Excerpts filed by Arkema with its Appellant's Brief.

ARGUMENT

The district court's lax approach to class certification, if not corrected, could have widespread negative effects for American businesses. Whether using a multi-phased trial plan to evade a searching predominance analysis or certifying a class on expert testimony without a *Daubert* analysis, the district court's lax approach to class certification was inadequate. That approach drastically lowers the threshold for class certification set by Rule 23 and increases the potential for coercive settlements in meritless class actions. It raises business costs in important industries, undermines due process, and wastes judicial resources.

I. Rule 23(c)(4) does not allow the use of case-management tools to evade Rule 23(b)(3) by paring issues in a putative class action until common issues eventually predominate.

This Court has long recognized that a "'district court cannot manufacture predominance through the nimble use of' management tools." *Ibe*, 836 F.3d at 531 (quoting *Castano*, 84 F.3d at 745 n.21); App.Br.55. Yet that is precisely what the district court did. Although individual issues predominate throughout this case, the district court certified the class based on a trial plan that merely assumed that all issues but damages were common and predominated.

A. The district court's lax approach to class certification would increase the potential for coercive settlements, raise the cost of business in critical industries, and undermine due process rights.

This Court should clarify that the district court's approach to certifying a class by substituting a multi-phased trial plan for a demanding predominance analysis has no place in a proper Rule 23 analysis. "Where the plaintiff seeks to certify a class under Rule 23(b)(3), the Rules demand 'a close look at the case before it is accepted as a class action.'" *Madison v. Chalmette Ref., L.L.C.*, 637 F.3d 551, 554 (5th Cir. 2011).

This Court has long recognized that "[c]lass certification magnifies and strengthens the number of unmeritorious claims." *Castano*, 84 F.3d at 746. Because this aggregation of claims and plaintiffs increases a defendant's likelihood of getting an adverse judgment and increases the size of a potential judgment, it is unsurprising that "class certification may be the backbreaking decision that places insurmountable pressure on a defendant to settle, even where the defendant has a good chance of succeeding on the merits." *Regents*, 482 F.3d at 379 (internal quotation marks omitted).

Using case-management tools to lower the threshold for class certi-

fication and evade a careful predominance analysis, if adopted more broadly, will inevitably facilitate coercive settlements of meritless class actions. It will thus raise the cost of doing business in vitally important industries as companies are forced to spend vast sums of money trying to manage their risk of class action suits, but never knowing whether the rules governing class-action litigation will be applied consistently and reliably. Such increased risk and resource reallocation can stifle innovation and curtail product development, potentially denying Americans beneficial products and services that could otherwise be brought to market where class-action treatment is more predictable, rational, and fair.

The district court's lax approach will not just make it easier for plaintiffs with meritless claims to cross the class-certification threshold and coerce unwarranted settlements. Failing to scrupulously apply Rule 23's requirements before certifying a class also wastes judicial resources and undermines due process. In those instances where defendants press on after a class is certified, rather than streamlining the issues for trial, an improvident class-certification order based on a multi-phased trial plan will likely wind up less fair and less efficient than if certification were denied at the outset. By the time individualized issues are found

to predominate over common issues and such classes are de-certified, copious resources of the parties and the court have been consumed for little to no benefit.

Allowing this case to proceed as a class action would illustrate the inefficiency and unfairness just described. Because "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not," the "Judiciary's role is limited 'to provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (citation omitted). A court cannot, therefore, order relief to any class member whose person or property was not exposed to the chemicals of concern, who was exposed but suffered no injury, or whose injury was not caused by the exposure. Because the class here includes everyone living or owning property within a seven-mile radius of the plant, RE38, each of those issues—and more—will require individualized determinations for each class member before the district court can have authority to order relief to that class member. *See id.*; *Castano*, 84 F.3d at 745; *Madison*, 637 F.3d at 556. Any anticipated efficiencies gained by proceeding class-

wide (even in the multi-phased trial approved here) will be nullified by those individualized determinations.[3]

Proceeding in a single class-wide trial on "virtually every issue prior to damages," RE71, also risks impermissibly excusing class members from having to prove each element of their claims. This, in turn, would violate the Rules Enabling Act, which mandates that rules of procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see, e.g.*, *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013). Excusing unexposed or uninjured plaintiffs from proving elements of their claims necessarily enlarges their substantive rights and abridges defendant's. *See In re Asacol Antitrust Litig.*, 907 F.3d 42, 53–54 (1st Cir. 2018) (holding

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[3] This Court's extended discussion of Article III standing in *In re Deepwater Horizon* accords with amici's argument here. 739 F.3d 790, 802-04 (5th Cir. 2014). The Court found that the settlement class there, by definition, excluded anyone not injured as a result of the Deepwater Horizon incident. *Id.* at 804. No such definitional limitation exists for the class certified here, raising genuine standing issues. *Cf. Flecha v. Medicredit, Inc.*, --- F.3d ---, 2020 WL 91267, at *7 (5th Cir. Jan. 8, 2020) (Oldham, J., concurring) ("Article III is just as important in class actions as it is in individual ones [and in this] era of frequent litigation, class actions' [etc.], courts must be more careful to insist on the formal rules of standing, not less so.") (internal citations omitted).

that class certification violated the Rules Enabling Act in a case like this one, where "any class member may be uninjured, and there are apparently thousands who in fact suffered no injury"). As many of their members and affiliates have found themselves targets of meritless class actions, amici find any approach that would excuse uninjured plaintiffs from proving the elements of their case extremely troubling.

These broad concerns are just some of the wide-ranging negative effects on the legal system and the economy that the district court's lax approach to class certification could have. This Court should clarify that nothing in Rule 23 allows a court to lower the class-certification threshold through multi-phased trial plans and case-management tools.

B. The district court evaded Supreme Court precedent and misapplied this Court's precedent when it held that a bifurcated trial can replace a rigorous predominance analysis.

The district court's use of case-management tools to certify a class without a scrupulous predominance analysis is not just alarming as a practical matter. It also evades Supreme Court precedent. And the district court's rationale for that evasion misapplies this Court's precedent.

The district court justified its approval of plaintiffs' multi-phased

trial plan under Rule 23(c)(4) by relying on *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992), in which this Court affirmed a multi-phased trial plan for a certified class action. RE69. But intervening Supreme Court precedent—and additional guidance from this Court—fatally undermine the district court's approach.

Citing this Court's observation in *Madison*, the district court conceded that intervening Supreme Court precedent cast doubt on *Watson*'s ongoing viability. RE70 (quoting *Madison*, 637 F.3d at 556). While mentioning *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013),[4] the court failed to mention that *Dukes* even more directly undermines *Watson*. RE70. *Dukes* expressly "disapprove[d the] novel project" of using "sample set[s] of the class members" to establish percentages and ratios of liability and dam-

[4] *Amchem* noted that the predominance "inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy" and thus "that 'mass accident' cases" require an especially searching predominance analysis because they "are likely to present 'significant questions, not only of damages but of liability and defenses of liability, . . . affecting the individuals in different ways.'" 521 U.S. at 623, 625. *Comcast* held that the predominance requirement is not satisfied by a damages model that does not provide class-wide calculations of damages that match the class-wide liability theories. 569 U.S. at 36-38.

ages that would be applied to the whole class. 564 U.S. at 367. To "replace [individualized] proceedings with Trial by Formula" in this way violates the Rules Enabling Act's prohibition on interpreting the Rules to "abridge, enlarge or modify any substantive right." *Id.* This novel—and now-rejected—project of analyzing only a subset of the class members is essentially the same type of maneuver employed in *Watson*.

Inexplicably, the district court certified this class anyway, relying on a multi-phased trial plan that called for the very "sample plaintiff cases" method *Dukes* rejected. RE69. Rather than recognize that *Dukes* rejected that *Watson*-based approach, or heed *Amchem*'s "call for caution when individual stakes are high and disparities among class members great," 521 U.S. at 625, the district court focused only on distinguishing *Comcast*. RE70-71.

Invoking *In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir. 2014), the district court concluded that *Comcast* is "largely irrelevant '[w]here determinations on liability and damages have been bifurcated' in accordance with Rule 23(c)(4)." RE71. "[T]he predominance inquiry can still be satisfied," it held, by structuring the case to "establish liability on a class-wide basis, with separate hearings to determine" individual

damages issues. *Id.* The district court found that a multi-phased trial obviated the need for a more searching predominance analysis because "virtually every issue prior to damages is a common issue." RE71. But defendant identified a host of individual issues prior to damages, *see* App.Br.22-34, making it impossible to "establish liability on a class-wide basis." RE71. The district court's reliance on *Watson* to substitute a multi-phased trial plan for a demanding predominance inquiry thus not only ran afoul of *Dukes* and *Amchem*, but also belied its conclusion that "*Comcast* is largely irrelevant." RE71.

Deepwater Horizon is thus of little value here because, even if *Comcast* is "inapplicable" where common liability issues predominate over individualized damages issues, 739 F.3d at 826, *Deepwater Horizon* never purported to dilute the rigorous predominance analysis required before certifying a class. Like *Amchem*, this case "present[s] 'significant questions, not only of damages but of liability and defenses of liability, . . . affecting the individuals in different ways.'" 521 U.S. at 625. Nor can *Deepwater Horizon* inoculate the district court's replacement of a rigorous predominance inquiry with a multi-phased trial plan using *Watson*-derived "sample plaintiff cases," RE69, against *Dukes*, which rejected

such tactics as impermissible "Trial by Formula." 564 U.S. at 367.

In addition to the Supreme Court's intervening guidance in *Dukes*, *Comcast*, and *Amchem*, this Court since *Watson* has repeatedly rejected attempts to "'manufacture predominance through the nimble use of' management tools." *Ibe*, 836 F.3d at 531 (quoting *Castano*, 84 F.3d at 745 n.21). As this Court in *Castano* observed, "[r]eading Rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of Rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended." 84 F.3d at 745 n.21. *Ibe* reiterated *Castano*'s holding, recognizing that case-management tools may only be used for "housekeeping"—that is, simplifying trials to improve "'manageability' of the potential class action"—but not to evade a demanding predominance inquiry. 836 F.3d at 531 (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001)).

Both Supreme Court precedent and this Court's recent guidance thus reject class certification based on multi-phased trial plans that simply assume cases can be managed to save individualized issues for

later. District courts must closely analyze whether and how the purportedly common issues will actually be proven class-wide at trial and whether individual issues would predominate. *Castano*, 84 F.3d at 745.

C. Several individualized issues here preclude a predominance finding and highlight the error of using case management to avoid a predominance inquiry.

The district court's lax approach to Rule 23 here illustrates how it lowers the class-certification threshold, as the class was certified despite predominating individualized issues on both liability and damages.

1. A searching predominance analysis would have belied the district court's repeated presumption that "virtually every issue prior to damages is a common issue." RE68, 71 (quoting *Bertulli v. Ind. Ass'n of Continental Pilots*, 242 F.3d 290, 298 (5th Cir. 2001)). As this Court recently reiterated, "courts must certify class actions based on proof, not presumptions." *Flecha v. Medicredit, Inc.*, --- F.3d ---, 2020 WL 91267, at *4 (5th Cir. Jan. 8, 2020). "[T]he predominance criterion is far more demanding" than the inquiry the district court performed, and it cannot be met when the number and significance of individual issues—like exposure, injury, and causation—outweigh common ones. *Amchem*, 521 U.S.

at 624.[5] As defendant showed, the claims here contain too many highly individualized facts and too many plaintiff-specific issues to be resolved through a class action. *See Madison*, 637 F.3d at 556.

For example, the district court found that the harm element of plaintiffs' negligence claim would "be proven on a class-wide basis, as described" in the cursory discussion of cohesiveness under Rule 23(b)(2). RE65. But the district court never supported its bare pronouncement that putative class members "all face exposure and the concomitant health risks." RE62. Nor did the court explain why the notion that "remediation is better suited to class-wide resolution" somehow establishes the harm element as to all the property within the class boundary. *Id.*

To the extent the district court concluded that harm (to person or property) could be established class-wide based on the sampling performed by plaintiffs' experts, that conclusion contradicts *Tyson Foods,*

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[5] A multi-phased trial "[s]evering the defendant's conduct" from the individual issues cannot "save the class action." *Castano,* 84 F.3d at 745 n.21. As in *Castano*, the "problem with the district court's approach" is that a trial on supposedly common issues will show that some of them "must be proven in individual trials." *Id.* at 745. "The court then would [be] faced with the difficult choice of decertifying the class after phase 1 and wasting judicial resources, or continuing with a class action that would have failed the predominance requirement of Rule 23(b)(3)." *Id.*

136 S. Ct. at 1046. *Tyson Foods* endorsed such sampling for "proving classwide liability" only insofar as "each class member could have relied on that sample to establish liability if he or she had brought an individual action." *Id.* The experts' sampling here cannot establish class-wide liability because each class member could not have relied on those samples to establish liability in an individual action. App.Br.8-13.

This is not merely a matter of "individual differences in the concentration and types of chemicals found on the[putative class members'] properties" that would implicate damages calculations. RE62. Rather, *liability itself* is not subject to class-wide proof because exposure to the chemicals in the first place cannot be shown on a class-wide basis. *See Gates v. Rohm & Haas Co.*, 655 F.3d 255, 270 (3d Cir. 2011) (noting that issues of exposure, harm, and causation in mass tort cases often "require considering individual proof of class members' specific characteristics").

Nor is exposure the only liability issue requiring individualized determinations. Individualized causation issues cannot be ignored simply because "there are *fewer* hyper-localized alternative sources" of plaintiffs' chemicals of concern, or because "alternative causes would *likely* apply to large chunks or all of the class area," RE65 (emphasis added)—especially

when exposure itself requires individual inquiries.

Defendant detailed many other individualized issues of exposure, causation, and injury. App.Br.25-34. Just these *known* individualized issues create an impermissible risk that any class action will "degenerate . . . into multiple lawsuits separately tried," even setting aside individualized issues yet to be discovered. *Madison*, 637 F.3d at 556.

2. The district court also failed to analyze whether, even with a multi-phased trial, individualized *damages* issues would nevertheless predominate. The need for individualized damages determinations may not always preclude a predominance finding, *see Deepwater Horizon*, 739 F.3d at 816-17. But it *can* and often it *does*.

This Court has not hesitated to hold that plaintiffs fail the predominance inquiry when individualized damages issues predominate over common issues shared by the class. *See, e.g.*, *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 100 F. App'x 296, 297 (5th Cir. 2004) (per curiam); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 301 (5th Cir. 2003); *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 745 (5th Cir. 2003). This is especially so in mass-tort cases involving other plaintiff-specific issues like exposure, injury, and causation. *See, e.g.*, *Steer-*

ing Comm. v. Exxon Mobil Corp., 461 F.3d 598, 602-03 (5th Cir. 2006).

In assessing whether individualized damages issues will predominate, district courts must carefully consider how a trial would be conducted and which issues actually will predominate at trial. *See Madison*, 637 F.3d at 557; *In re Wilborn*, 609 F.3d 748, 755 (5th Cir. 2010) (vacating certification because "individual issues for each class member, particularly with respect to damages, override class concerns when we consider how the case must be tried"). The district court did not do that here. It even *conceded* that plaintiffs' expert report—which plaintiffs posited could determine property-diminution damages "on a class-wide basis through mass appraisal techniques"—"has been excluded for failing to provide enough information to assess reliability." RE69.

Rather than carefully consider how damages would be proven at trial or whether individualized damages issues would predominate, the district court found it "enough for plaintiffs to say that some kind of regression analysis could determine damages *en masse*," and conceded only that "damages will be somewhat individualized." RE69, 72. The court was untroubled that individual damages issues might predominate (1) because of the multi-phased trial plan and (2) because plaintiffs' claims stem from

a single episode of allegedly tortious conduct. RE71-72. But neither point justifies disregarding a predominance of individualized damages issues.

First, as the Third Circuit observed, the whole "concept of a trial plan" being offered to achieve class certification presupposes "a *rigorous evaluation* of the likely shape of a trial on the issues." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 319 (3d Cir. 2008) (internal quotation marks omitted) (emphasis added). Allowing plaintiffs to simply assert that "some kind of regression analysis" will suffice to establish damages at trial is far from a "rigorous evaluation."

Second, *Ibe* greatly undercuts the notion that individualized damages are unimportant because plaintiffs' claims "stem from a single episode[] of tortious conduct." RE64, 71-72. The claims in *Ibe* all stemmed from a single football game. 836 F.3d at 521. Yet this Court held that "[w]hether a class member actually received a lesser-quality seat and how the relocated seat affected damages raised complex and individualized issues that could not be resolved by common evidence" and agreed with the district court that computer modeling "does not eliminate the need to evaluate the extent of obstruction actually experienced by individual class members." *Id.* at 530-32.

District courts are obliged "to consider rigorously how they plan to 'adjudicate common class issues in the first phase and then later adjudicate individualized issues in other phases' of the multi-phase trial before the final decision is made to certify a class." *Deepwater Horizon*, 739 F.3d at 816. The district court's assumption here that a multi-phased trial obviated the need for that careful and deliberate analysis was error. This Court's "precedent demands a far more rigorous analysis than the district court conducted." *Madison*, 637 F.3d at 557.

II. A thorough *Daubert* analysis of expert testimony reliability at the class-certification stage is required by the Federal Rules of Evidence, this Court's precedent, and repeated guidance from the Supreme Court.

Performing something less than a *Daubert* analysis at the class-certification stage undermines the very purpose of the district court's gatekeeping functions of ensuring expert testimony is admissible and ensuring class-certification prerequisites are met. This Court's precedent requires class-certification evidence to be admissible, which accords with the majority view among other Circuits, explicitly requiring a thorough *Daubert* inquiry at the class-certification stage. It also accords with the Supreme Court's signals that it would require a *Daubert* inquiry here

and protects parties from the unpredictability and unfairness of ignoring the Federal Rules of Evidence at the class-certification stage.

A. Only a thorough *Daubert* inquiry at the class-certification stage ensures that cases are not improperly decided on inadmissible evidence.

Admission of expert testimony is a departure from the usual requirement that a witness testify only from firsthand knowledge and from the general principle that opinion testimony is unreliable and often not relevant. 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.

The class action is also a departure from usual procedural requirements—specifically the requirement "that litigation is conducted by and on behalf of the individual named parties only." *Flecha*, 2020 WL 91267, at *1 (citing *Dukes*, 564 U.S. at 348). Rule 23 ensures that such a departure can happen only after a preliminary assessment establishes that the class is limited to "those fairly encompassed by the named plaintiffs' claims." *Dukes*, 564 U.S. at 349 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457

U.S. 147 (1982)). *Daubert* and Rule 23 thus both constitute critical and complementary gatekeeping responsibilities placed on a district court. When parties support their arguments for class certification with expert testimony, both gatekeeping functions are implicated.

Applying *Daubert* at the class-certification stage is the only approach that fulfills the district court's gatekeeping duties. The intense settlement pressure class certification places on defendants means that class certification can be, in many instances, the entire ballgame. *See, e.g.*, *Regents*, 482 F.3d at 379. Consequently, it is often the *only* opportunity the district court will have to evaluate expert testimony proffered by plaintiffs and defendants. If the district court does not ensure that expert testimony satisfies *Daubert* at the class-certification stage, it will often *never* make that determination. The case will thus be decided on the basis of expert testimony that was never thoroughly vetted.

Rule 23(b)(3)'s predominance requirement expressly "requires district courts to consider how a trial on the merits would be conducted if a class were certified." *Madison*, 637 F.3d at 555 (internal quotation marks omitted). A trial on the merits would necessarily entail a thorough *Daubert* analysis, requiring exclusion of all expert testimony not

satisfying *Daubert*. Because Rule 23(b)(3) requires the court find—and plaintiffs show—predominance "through evidentiary proof," *Comcast*, 569 U.S. at 33-34, expert testimony that fails the relevant-and-reliable standard cannot support class certification any more than it could support any element of a claim.

A *Daubert* analysis at the class-certification stage is in fact *codified*. Federal Rule of Evidence 702 is the basis of the *Daubert* standard, and this Rule applies to *all stages* of a case, not just post-certification. Federal Rule of Evidence 1101 states that the Federal Rules of Evidence apply to "proceedings before[] United States district courts" and in "civil cases and proceedings." Fed. R. Evid. 1101(a), (b). Tellingly, although Rule 1101 states that the Federal Rules of Evidence do not apply to "a preliminary examination in a *criminal* case," it contains no such limitation for preliminary examinations in *civil* cases. Fed. R. Evid. 1101(d)(3) (emphasis added). The only other Rule 1101 provision limiting Rule 702's application in a civil proceeding is when a "federal statute or a rule prescribed by the Supreme Court" so provides. Fed. R. Evid. 1101(e). But Rule 23 nowhere suggests that the Federal Rules of Evidence do not apply to the "rigorous analysis" required at the class-

certification stage. In fact, the Supreme Court has reiterated that this rigorous analysis "will frequently entail overlap with the merits of the plaintiff's underlying claim" and "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Comcast*, 569 U.S. at 33-34.

B. The Supreme Court has repeatedly signaled support for a *Daubert* inquiry at class certification.

As defendant observes, the Supreme Court has strongly signaled that a *Daubert* analysis is required at the class-certification stage. App.Br.67-70. *Dukes* expressed "doubt" at the proposition "that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings." 564 U.S. at 354. *Comcast* reiterated that the "rigorous analysis" requirement applies with special force to Rule 23(b)(3)'s predominance requirement, which "is even more demanding than Rule 23(a)." *Comcast* then reversed the district court's class certification where plaintiffs' expert-prepared damages model was deficient. 569 U.S. at 34, 38. And *Tyson Foods* cited Rule 702 in its discussion of whether an expert's statistical approach could "be used to establish classwide liability," observing that inferences from expert studies have "been permitted

by the Court so long as the study is *otherwise admissible*." 136 S. Ct. at 1049 (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).

C. This Court's precedent compels a *Daubert* analysis at the class-certification stage—an approach reflecting the majority view among Circuits.

This Court has not yet squarely held that a thorough *Daubert* analysis is required at the class-certification stage. But its precedent compels that conclusion, and that conclusion comports with the majority view among the Circuits.

1. In *Amedisys*, this Court held that "a careful certification inquiry is required and findings must be made based on adequate *admissible evidence* to justify class certification." 401 F.3d at 319 (emphasis added). This Court reiterated that rule in *Ascendant Solutions,* 422 F.3d at 312–13. Later, in *Fener v. Operating Engineers Construction Industry & Miscellaneous Pension Fund (LOCAL 66)*, this Court affirmed a district court's refusal to certify a class, finding the plaintiffs' expert testimony "fatally flawed" and amounting to only "well-informed specula-

tion." 579 F.3d 401, 410 (5th Cir. 2009). While not mentioning *Daubert*, this Court's focus on the expert's methodology in affirming the denial of certification strongly suggests it would have reversed a certification order issued without a *Daubert* analysis.

2. The majority view among other Circuits also requires a complete *Daubert* analysis at class certification. The Third, Seventh, and Eleventh Circuits expressly require a *Daubert* analysis and the Second Circuit (like this Court and the Supreme Court) has only refrained from endorsing that rule because it has yet to be necessary for a holding.[6]

The Second Circuit, in *Teamsters Local 445 Freight Division Pension Fund v. Bombardier Inc.*, took pains to "dispel any remaining confusion and hold that the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements." 546 F.3d 196, 202–03 (2d Cir. 2008). Then, in *In re U.S. Foodservice Inc. Pricing Litigation*, the Second Circuit reiterated its disavowal of the approach that

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[6] District court cases in the Fourth and D.C. Circuits suggest a full *Daubert* analysis at the class-certification stage is being applied there as well. *See, e.g.*, *Rhodes v. E.I. du Pont de Nemours & Co.*, No. 6:06-CV-00530, 2008 WL 2400944, at *10-11 (S.D. W. Va. 2008); *Campbell v. Nat'l R.R. Passenger Corp.*, 311 F. Supp. 3d 281, 295–96 (D.D.C. 2018).

"an expert's testimony may establish a component of a Rule 23 requirement simply by not being fatally flawed." 729 F.3d 108, 129 (2d Cir. 2013) (quoting *In re IPO Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006)). Explicitly deciding whether "a *Daubert* analysis forms a necessary component of a district court's rigorous analysis" at the class-certification stage was unnecessary because the district court had properly "considered the admissibility of the expert testimony" and "did make the requisite [*Daubert*] findings." *Id.* at 129-30.

The Third Circuit, in *In re Blood Reagents Antitrust Litigation*, expressly held "that a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*." 783 F.3d 183, 187 (3d Cir. 2015). This rule was compelled by the Supreme Court's statements in *Dukes* and *Comcast* that the "rigorous analysis" required at the class-certification stage "applies to expert testimony critical to proving class certification requirements." *Id.* "Expert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot 'prove' that the Rule 23(a) prerequisites have been met 'in fact,' nor can it establish

'through evidentiary proof' that Rule 23(b) is satisfied." *Id.*

The Seventh Circuit, in *Messner v. Northshore University HealthSystem*, likewise left no doubt that "[w]hen an expert's report or testimony is 'critical to class certification,' . . . 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." 669 F.3d 802, 812 (7th Cir. 2012) (quoting *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815 (7th Cir. 2010) (*per curiam*)).

Finally, the Eleventh Circuit, in *Sher v. Raytheon Co.*, a putative toxic tort class action very similar to this case, held "that 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." 419 F. App'x 887, 890–91 (11th Cir. 2011). It "agree[d]" with the Seventh Circuit that, at the class-certification stage, the "district court is the gatekeeper [and] must determine the reliability of the expert's experience and training as well as the methodology used." *Id.* at 890 (quoting *Am. Honda*, 600 F.3d at 816).

As in *Sher*, the district court's decision here to certify the class re-

lied on expert opinions submitted by plaintiffs. *See, e.g.,* RE55, 62, 63; *Sher*, 419 F. App'x at 888-89. Like plaintiffs' experts here, Sher's expert "identified the impacted area" as radiating out some distance from the Raytheon facility and "stated that he could develop a . . . model to determine diminution-in-value damages without resorting to an individualized consideration of each of the various properties." *Id.* As in *Sher*, defendant challenged plaintiffs' experts under Rule 702 and *Daubert* and offered rebuttal expert testimony. *See id.* at 889-90 (discussing, *inter alia*, rebuttal expert testimony that the purportedly affected area, like the area in this case, "encompassed many properties on which no contamination had been detected at all"); App.Br.10-14.

Positing that "[w]hether a full *Daubert* analysis at the class certification stage is required is unclear," the district court below accepted plaintiffs' expert testimony, finding it reliable "on the issues relevant to class certification." RE40. This approach resembles the district court's approach in *Sher*, which found it "inappropriate" to "weigh the evidence presented and engage in a *Daubert* style critique of the proffered experts' qualifications" at the class-certification stage. 419 F. App'x at 889. The Eleventh Circuit's reversal in *Sher* is consistent with this Court's prece-

dent requiring "a careful certification inquiry [in which] findings must be made based on adequate *admissible evidence* to justify class certification." *Amedisys*, 401 F.3d at 319.

3. The minority approach, followed by the Eighth and Ninth Circuits, is more limited. The Ninth Circuit holds that expert testimony's admissibility is merely *a non-dispositive factor* in determining the weight to be accorded at the class-certification stage. *See Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018). And the Eighth Circuit only *tentatively* considers the reliability of experts' opinions and 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 *Zurn* dissent correctly observed that "[r]equiring a full *Daubert* analysis is a natural extension of the concept that class certification should not be conditional." 644 F.3d at 628 (Gruender, J. dissenting). That concept was codified in 2003, when Rule 23(c)(1)(C)'s provision allowing conditional class certification was deleted because a "court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." Fed. R. Civ. P. 23(c)(1) advisory committee note to 2003 amendment.

The Eighth and Ninth Circuits' approach thus conflicts with the majority view and with this Court's precedent, as the Ninth Circuit recognized. *See Sali*, 909 F.3d at 1005 ("Only the Fifth Circuit has directly held that admissible evidence is required to support class certification."). This Court should squarely adopt the majority view and hold that a complete *Daubert* inquiry is required at the class-certification stage. This will prevent further confusion in future cases and ensure predictability and fairness in the class-certification process.

CONCLUSION

This Court should reverse the district court's order granting class certification and remand.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document was filed and served on January 16, 2020, via ECF upon counsel of record for the parties.

/s/ Scott A. Keller
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1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,448 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: January 16, 2020

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