No. 17-3663

In the

United States Court of Appeals

for the

Sixth Circuit

TERRY MARTIN; LINDA RUSSEL, aka Linda Russell; NANCY SMITH; DEBORAH NEEDHAM,

Plaintiffs-Appellees,

– v. –

BEHR DAYTON THERMAL PRODUCTS LLC; BEHR AMERICA, INC.; CHRYSLER MOTORS LLC, nka Old Carco LLC; ARAMARK UNIFORM & CAREER APPAREL INC.,

Defendants-Appellants.

On appeal from the United States District Court for the Southern District of Ohio, Case No. 4:16-cv-439, Hon. Walter H. Rice

---

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* SUPPORTING THE PETITION FOR REHEARING *EN BANC*

STEVEN P. LEHOTSKY
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062
(202) 463-5337

ANDREW J. PINCUS
ARCHIS A. PARASHARAMI
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

The American Tort Reform Association has no parent corporation and has issued no stock.

The National Association of Manufacturers has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

Corporate Disclosure Statement i
Table of Authorities iii
Interest of the *Amici Curiae* 1
Introduction 2
Argument 3
I. The Panel Adopted An Extreme Position Regarding An Issue That Divides The Circuits. 3
II. The Panel Decision Is Inconsistent With Both Rule 23 And Binding Precedent. 5
A. The panel's decision violates Rule 23's structure and text. 5
B. The panel's interpretation of Rule 23(c)(4) would render Rule 23(b)(3)'s standards meaningless and allow certification of virtually any putative class action. 9
C. The panel's decision raises serious Seventh Amendment concerns. 11
III. The Question Presented Is Exceptionally Important Because Of The Substantial Adverse Practical Consequences Of The Panel's Decision. 12
Conclusion 13

TABLE OF AUTHORITIES

Page(s)

CASES

Allison v. Citgo Petroleum Corp,
151 F.3d 402 (5th Cir. 1998).....3

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997)..... 6, 9

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975)..... 12

Castano v. Am. Tobacco Co.,
84 F.3d 734 (5th Cir. 1996)..... 3, 9

Gates v. Rohn & Haas Co.,
655 F.3d 255 (3d Cir. 2011) 4

In re Am. Med. Sys., Inc.,
75 F.3d 1069 (6th Cir. 1996).....6

In re Nassau Cty. Strip Search Cases,
461 F.3d 219 (2d Cir. 2006) 3

In re St. Jude Med., Inc.,
522 F.3d 836 (8th Cir. 2008).....4

Kartman v. State Farm Mut. Auto. Ins. Co.,
634 F.3d 883 (7th Cir. 2011).....4

Matter of Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995)..... 11

McLaughlin v. Am. Tobacco Co.,
522 F.3d 215 (2d Cir. 2008) 3, 4

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,
559 U.S. 393 (2010)..... 12

Smillie v. Park Chem. Co.,
710 F.2d 271 (6th Cir. 1983).....5

TABLE OF AUTHORITIES
(continued)

Page(s)

Valentino v. Carter-Wallace, Inc.,
97 F.3d 1227 (9th Cir. 1996) 4

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 11

Yousuf v. Samantar,
451 F.3d 248 (D.C. Cir. 2006) 5

CONSTITUTIONAL PROVISIONS AND RULES

U.S. Const. amend. VII 11, 12

Fed. R. App. P. 29(a)(4)(E) 1

Fed. R. Civ. P.
23 ..... *passim*
23(a) 5, 6, 7
23(b) 5, 12
23(b)(1) 6, 7, 8
23(b)(2) 6, 7, 8
23(b)(3) ..... *passim*
23(c) 5, 6, 8
23(c)(1) 7
23(c)(2) 7, 8
23(c)(3) 7
23(c)(4) ..... *passim*
23(c)(5) 7
52(b) 5
59(e) 5

OTHER AUTHORITIES

Henry J. Friendly, *Federal Jurisdiction: A General View* (1973) 12

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 10

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America 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 its members' interests in matters before the courts, Congress, and the Executive Branch.

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.

The National Association of Manufacturers (NAM), the largest manufacturing association in the United States, represents small and large manufacturers in every industrial sector and in all 50 states.

---

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no 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.

Amici have a keen interest in ensuring that courts rigorously analyze, consistent with Federal Rule of Civil Procedure 23 and the requirements of due process, whether a plaintiff has satisfied the prerequisites for class certification before certifying a class.

INTRODUCTION

The panel adopted an extreme interpretation of Rule 23 that broadens the division among the courts of appeals and will precipitate a flood of class action litigation in this Circuit involving claims that could not otherwise have been certified under Rule 23. The *en banc* Court should grant rehearing, vacate the panel's opinion, and reverse the district court's class certification order.

The panel held that a district court may certify issue classes under Rule 23(c)(4) when Rule 23(b)(3)'s requirements prohibit certification of a class for the relevant cause of action. That holding cannot be squared with the text, structure, or purpose of Rule 23.

Moreover, the panel's decision would result in certification of classes that would nullify the essential due process protections that the Rule is meant to secure, create tremendous settlement pressure without regard to a claim's underlying merits, and transform this Circuit into a magnet for cases ineligible for certification elsewhere.

This Court's review *en banc* is therefore essential.

ARGUMENT

I. THE PANEL ADOPTED AN EXTREME POSITION REGARDING AN ISSUE THAT DIVIDES THE CIRCUITS.

The panel's decision to affirm the certification of seven "issue classes"—which do not resolve liability either individually or taken together—will make this Court an outlier among the Circuits. As the panel acknowledged (Op. 8-9), its decision conflicts with the rule in the Fifth Circuit, which holds that Rule 23(c)(4) authorizes class trials in damages class actions only when the case as a whole satisfies Rule 23(b)(3). *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996); *Allison v. Citgo Petroleum Corp*, 151 F.3d 402, 421-22 (5th Cir. 1998).

The panel claimed to embrace the Second Circuit's approach in *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006). But that decision allowed district courts to use "subsection (c)(4) to certify a class *as to liability*." *Id.* at 227 (emphasis added). The Second Circuit later prohibited issue certification in a mass tort case because "larger issues such as reliance, injury, and damages" could not be tried classwide. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (reversing certification order). The district court in this case similarly acknowledged that individualized issues concerning "fact-of-injury and causation overwhelm[ed] the

few questions that are common to the class." Thus, contrary to the panel's assertion, the Second Circuit, under *McLaughlin*, likely would have prohibited issue certification here.

The panel embraced dictum in *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996), but that decision *vacated* certification of issue classes because the district court did not consider predominance. *Id.* Likewise, in this case, the district court's only discussion of predominance concluded that predominance was *not* satisfied. Under the Ninth Circuit approach, therefore, the district court's certification likely would not stand.

Moreover, the Third, Seventh, and Eighth Circuits also likely would have reversed the district court's certification order. See, e.g., *Gates v. Rohn & Haas Co.*, 655 F.3d 255, 272-74 (3d Cir. 2011) (affirming denial of issue certification in environmental tort case because questions of "causation and extent of contamination would need to be determined at follow-up proceedings"); *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 886-87 (7th Cir. 2011) (reversing certification and holding that issue classes were not "appropriate" because Rule 23(b)(3)'s requirements were not "satisfied"); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841-42 (8th Cir. 2008) (decertifying class and prohibiting use of issue certification because of "the

individual issues necessarily involved in determining liability" and damages).

In short, the panel's decision not only deepens a circuit split, but adopts an extreme position among the Circuits.

II. THE PANEL DECISION IS INCONSISTENT WITH BOTH RULE 23 AND BINDING PRECEDENT.

The panel's decision is wrong. Rule 23(c)(4) does not provide a free-standing basis for certifying classes—which is the role of the various subsections of Rule 23(b). Rather, Rule 23(c)(4) is a subpart of Rule 23(c), which sets forth procedures for managing a case in which a class has been certified under Rule 23(b).

The subparts of a single Federal Rule of Civil Procedure addressing one subject must be construed *in pari materia*. *See Yousuf v. Samantar*, 451 F.3d 248, 257 (D.C. Cir. 2006); *cf. Smillie v. Park Chem. Co.*, 710 F.2d 271, 274 (6th Cir. 1983) (construing Rules 52(b) and 59(e) *in pari materia*). Paragraph 23(c)(4) cannot plausibly be construed to authorize a so-called issue class action when Rule 23(b)(3) bars class certification as to the underlying cause of action. The panel erred by concluding otherwise.

A. The panel's decision violates Rule 23's structure and text.

1. Rule 23(a) defines four prerequisites to bringing a class action—numerosity, commonality, typicality, and adequacy. Fed. R. Civ. P.

23(a). These "threshold requirements [are] applicable to all class actions." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

If the party seeking class certification satisfies the Rule 23(a) prerequisites, it must then also "show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem*, 521 U.S. at 614. These provisions of Rule 23 define the three "[t]ypes" of permissible class actions and the special additional requirements that must be satisfied to maintain each of them.

Rule 23(b)(3) authorizes class actions that are not covered by (b)(1) or (b)(2), including damages class actions, but only if the court finds that common issues predominate and that treatment of the "controversy"—*i.e.*, the case as a whole—on a class-wide basis would be superior to individual actions.

Damages actions are thus eligible for class treatment only if the district court undertakes a rigorous analysis and finds that the plaintiff satisfies not only the four threshold requirements of Rule 23(a) but *also* Rule 23(b)(3)'s two additional elements of predominance and superiority. See, e.g., *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996).

Rule 23(c) then sets forth the procedures and mechanisms for moving forward with a class action:

- 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.

- Rules 23(c)(4) and (5) provide management tools, authorizing the district courts to permit class actions to be maintained "with respect to particular issues" or to divide a class into subclasses.

2. Rule 23(c)(4)'s placement in Rule 23 confirms that it is not a stand-alone basis for class certification. Rather, it is a tool that the district 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).

First, Rule 23(c)(4) provides that, "*[w]hen appropriate*, an action may be brought or maintained as a class action with respect to particular issues." (emphasis added). That text gives district courts authority to manage an action that satisfies Rule 23(b)(3)'s predominance requirement (as connoted by the language "when appropriate"), but encompasses one or more issues that cannot be resolved on a class-wide basis. The advisory

committee note to the 1966 Amendment suggests that Rule 23(c)(4) can be used appropriately 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." The district court in that situation may issue an order providing that the action may be maintained as a class action with respect to the common issue of liability.

Second, Rule 23(c)(4) does not describe an "issue class action" as a separate type of class action; it does not state the requirements for maintaining an issue class action and does not set forth any limitations on issue class actions. It therefore differs starkly from Rules 23(b)(1), (2), and (3), each of which contains specific, detailed requirements for certification.

And Rule 23(c)(2), which specifies the notice requirements for class actions, addresses (b)(3) damages classes and the option of notice for (b)(1) and (b)(2) classes. But it does not address notice for a "(c)(4)" class—again undermining the panel's interpretation.

If the Rules Committee had intended to establish a fourth type of class action, it would not have buried this fourth type of class action in Rule 23(c)'s list of procedures and case-management tools. Instead, "[t]he 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*, 84 F.3d at 745 n.21.

B. The panel's interpretation of Rule 23(c)(4) would render Rule 23(b)(3)'s standards meaningless and allow certification of virtually any putative class action.

Rule 23 makes clear that a damages class action may be certified only if the plaintiff demonstrates, among other things, compliance with Rule 23(b)(3)'s predominance requirement. The "mission" of this "demanding" predominance requirement—which winnows out classes in which the members' claims have factual and legal idiosyncrasies that defeat class unity—is to "assure the class cohesion that legitimizes representative action in the first place." *Amchem*, 521 U.S. at 623-24.

The panel's interpretation of Rule 23(c)(4) undermines this "mission" because it renders Rule 23(b)(3)'s limitations meaningless. A creative lawyer almost invariably will be able to identify at least one common legal or factual issue subject to common proof when related claims are asserted by multiple plaintiffs. The panel's approach permits a district court to "sever issues until the remaining common issue predominates over the remaining individual issues," thus "eviscerat[ing] the predominance requirement." *Castano*, 84 F.3d at 745 n.21. In other words, the district court can peel

away individual issues until the common issue or issues are left, and then certify an issue class with respect to them—even if the common issues represent a small share of all of the issues that must be decided to resolve the case.

That is why the panel's assurance that its decision will "not risk undermining the predominance requirement" (Panel Op. at 9) is entirely hollow. If the predominance lens is not focused on the case as a whole but instead on one or more discrete issues of a court's choosing, it will be easy to satisfy predominance *as to that issue or issues*. That watered-down approach to predominance makes *some* question in virtually every case classable—nullifying Rule 23(b)(3).

Even proponents of issue class actions acknowledge 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. And not for the better. If the panel's decision stands, issue classes will become routine in this Circuit—and the number of cases filed here to utilize the panel's issue class rule to force settlement of non-meritorious claims will increase dramatically.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citation omitted). The panel's standard violates that basic principle, allowing certification of some class in virtually every case.

C. The panel's decision raises serious Seventh Amendment concerns.

The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. But that forbidden approach is exactly what the panel's decision contemplates: the facts found by the jury deciding the certified issues may be reexamined by subsequent juries deciding individualized questions (such as proximate causation) that overlap with the common issues. That reexamination would raise serious constitutional concerns. *See, e.g.*, *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995).

The panel dismissed this concern as premature because the district court had not yet announced a procedure for addressing Seventh Amendment issues (Panel Op. 15). But Rule 23 does not permit this "wait-and-see" approach: instead, it is "critical . . . to determine how the case will be tried," including as to individualized issues, *prior* to class certification. *See*

Fed. R. Civ. P. 23 advisory committee note on 2003 amendment. Assuming that obvious Seventh Amendment issues can somehow be avoided later in the case, without identifying any plan for doing so, falls far short of the "rigorous analysis" required by Rule 23.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT BECAUSE OF THE SUBSTANTIAL ADVERSE PRACTICAL CONSEQUENCES OF THE PANEL'S DECISION.

Construing Rule 23(c)(4) to allow certification of issue classes virtually at will, and without regard for the essential due-process protections of Rule 23(b), inevitably will result in a flood of shakedown class actions.

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, 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, e.g.*, *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 therefore is unsurprising that businesses often settle even meritless claims. The ripple effects of such lawsuits will be felt throughout the economy. And the costs would not be borne by business and governmental defendants alone, but rather would largely be passed along to innocent customers and employees (or to taxpayers) in the form of higher prices and lower wages and benefits.

CONCLUSION

The petition for rehearing *en banc* should be granted.

Respectfully submitted,

Dated: August 6, 2018

/s/ *Andrew J. Pincus*

ANDREW J. PINCUS
ARCHIS A. PARASHARAMI
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

STEVEN P. LEHOTSKY
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062
(202) 463-5337

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g), the undersigned counsel for *amici curiae* certifies that this brief:

(i) complies with the word limitation of Rule 29(b)(4) because it contains 2,598 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 Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: August 6, 2018 /s/ *Andrew J. Pincus*

CERTIFICATE OF SERVICE

I hereby certify that that on August 6, 2018, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: August 6, 2018 /s/ *Andrew J. Pincus*