No. 22-119

In the United States Court of Appeals for the Fourth Circuit

ELEGANT MASSAGE, LLC D/B/A LIGHT STREAM SPA, on behalf of itself and all others similarly situated,
Plaintiff-Respondent,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND STATE FARM FIRE AND CASUALTY COMPANY,
Defendants-Petitioners.

On Petition for Permission to Appeal from the
United States District Court for the Eastern District of Virginia
No. 2:20-cv-00265 (Hon. Raymond A. Jackson)

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE THE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF THE PETITION FOR PERMISSION TO APPEAL

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Pursuant to Federal Rule of Appellate Procedure 29, the American Tort Reform Association (ATRA) respectfully requests leave to file the accompanying amicus brief.[1] Counsel for amicus has conferred with counsel for Petitioners and Respondent. Petitioners consent to the filing of this amicus brief. Respondent takes no position.

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. For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues, including class actions. Improperly certified class actions significantly harm American businesses by pressuring them to settle even meritless claims. ATRA thus has a keen interest in ensuring that the courts rigorously and consistently analyze whether plaintiffs have properly satisfied all the requirements of Rule 23 before certifying a class.

[1] No counsel for a party authored this brief in whole or in part, and no such counsel nor any party here contributed money to fund this brief or its submission.

Amicus is in a unique position to aid this Court's consideration of the issues raised in Petitioner's Rule 23(f) petition—especially the profound economic consequences of class-certification decisions. As further explained in the attached amicus brief, the district court's order here would permit class certification in nearly any case involving a form contract. Such a conclusion is both inconsistent with Federal Rule of Civil Procedure 23, and would have negative economic consequences across the country.

Dated: March 2, 2022

Respectfully submitted,

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Fourth Circuit Rules 26.1(a)(2)(A) and (a)(2)(C), the American Tort Reform Association (ATRA) certifies that it is a non-profit corporation organized under the laws of the District of Columbia. ATRA has no parent entity, and no publicly held corporation or similarly situated legal entity has 10% or greater ownership of ATRA.

Under Fourth Circuit Rule 26.1(a)(2)(B), ATRA further certifies that it is unaware of any publicly held corporation or similarly situated legal entity, other than those listed in Petitioners' corporate disclosure statement, that has a direct financial interest in the outcome of this litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rule

Other Authorities

INTEREST OF AMICUS CURIAE

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.[1] For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues, including class actions. Improperly certified class actions significantly harm American businesses by pressuring them to settle even meritless claims. ATRA thus has a keen interest in ensuring that the courts rigorously and consistently analyze whether plaintiffs have properly satisfied all the requirements of Rule 23 before certifying a class.

[1] No counsel for a party authored this brief in whole or in part, and no such counsel nor any party here contributed money to fund this brief or its submission.

INTRODUCTION

For the second time in this case, the district court's class-certification order is sufficiently important to warrant review under Rule 23(f). In effect, the district court's order concluded that the existence of a standard contract was enough to give rise to a Federal Rule of Civil Procedure 23(b)(3) class—regardless of the myriad complicated and individualized facts that affect the businesses' rights and obligations under the contract. Such standardized form contracts and policies are ubiquitous in American life, so the district court's error was not merely a fact-bound error limited to this case. Rather, it reflects a fundamental misunderstanding of Rule 23 that, if adopted by other courts, would insert significant mischief into class-action jurisprudence.

The claims in this case concern Defendants-Petitioners State Farm's denial of insurance coverage for some Virginia businesses. Plaintiff asserts that a series of Virginia orders related to COVID-19 caused Plaintiff (and other businesses) covered losses under a standard State Farm business insurance policy. But Virginia's orders imposed different requirements on different

businesses at different times—and consequently State Farm's individual claim denials considered the individual circumstances of those businesses (including whether they were even covered by the Virginia orders). *See* Petition at 15. Nevertheless, the district court certified a Rule 23(b)(3) class of (1) all Virginia business (2) holding a standard State Farm insurance policy; (3) "that were subject to partial or full business suspension" under the more than 10 executive orders issued by the Virginia state government; and (4) were denied insurance claims for "business income losses and/or extra expenses." *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 2022 WL 433006, at *20 (E.D. Va. Feb. 11, 2022). Because Plaintiff asserted a class under Federal Rule of Civil Procedure 23(b)(3), the district court concluded that the purportedly common issue—the "uniform[]" denial of claims under the policy—predominated over individualized issues. *Id.* at *18. But, as the Petition highlights, even an allegation of "uniform conduct is not, by itself, sufficient to satisfy Rule 23(b)(3)'s more demanding predominance requirement." Petition at 3 (quoting *EQT Prod. Co. v. Adair*, 764 F.3d 347, 366 (4th Cir. 2014)); *see also id.* at 16-17 (collecting similar cases).

What the court's sweeping class-certification order ignores, therefore, are the myriad ways in which the various executive orders affected different businesses differently—both on the face of the orders and in businesses' (and their customers') response to those orders. The interaction between the orders, the terms of the insurance policy, the policy-holding business's responses, and the public's responses produce individualized issues of coverage and damages that outweigh any common questions about the interpretation of the standard policy. *See* Petition at 2.

Once all of the individualized issues are stripped away, the remaining "common issue" is an alleged state-wide breach of a standard insurance policy—which is not capable of "generat[ing] common *answers* apt to drive the resolution of the litigation," as Rule 23 requires. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). *See* Petition at 7-18. And, even if it were a truly common issue, it would not predominate over the individualized issues. Fed. R. Civ. P. 23(b)(3). *See* Petition at 18-20. Consequently, if adopted by other courts, the district court's order would permit class certification any

time a single plaintiff identifies a standard contract and *alleges* a scheme to deny benefits to policy-holders.

The prevalence of standardized contracts means that the district court's interpretation would permit courts to certify countless cases. Given the immense settlement pressure that class certification imposes on class-action defendants, the effect of such widespread class certification would affect the entire economy. *E.g.*, ATRA, Economic Impact Report Analyzes Excessive Tort Costs on State Economies (Oct. 15, 2018), https://bit.ly/3K1Ndrq (ATRA Report).

Accordingly, this Court should grant the Rule 23(f) Petition and reverse the district court.

ARGUMENT

I. The district court's manifestly erroneous application of Rule 23's stringent requirements deserves this Court's review because it would allow class certification in countless cases involving nothing more than standardized contracts.

Because class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," strict adherence to Rule 23's safeguards is necessary to avoid the stresses that class

certification imposes. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quotation marks omitted). Those safeguards are especially important in the context of Rule 23(b)(3) class actions, at issue here. The district court's class certification violates key class-certification principles, and would provide for class certification arising from any standardized contractual language. Rule 23 does not permit such an outcome.

A. As the Supreme Court has recognized, damages classes permitted under Rule 23(b)(3) are an especially "'adventuresome innovation,' . . . designed for situations 'in which class-action treatment is not as clearly called for.'" *Id.* at 34 (quoting *Dukes*, 564 U.S. at 362); *accord Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997). The provision's drafters "were aware that they were breaking new ground and that [the resulting] effects might be substantial." Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1487 (2008). So they included important safeguards to prevent "their new experiment" from "open[ing] the floodgates to an unanticipated volume of litigation in class form." John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice,*

and Loyalty in Representative Litigation, 100 Colum. L. Rev. 370, 401-02 (2000). As a result, Rule 23(b)(3) "imposes stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013).

Specifically, Rule 23(b)(3) requires a plaintiff to "*affirmatively demonstrate*" that "class issues predominate" and a "class action is a superior method of adjudicating the dispute." *Dukes*, 564 U.S. at 350, 362-63. Named plaintiffs therefore must "*prove*—not simply plead—that their proposed class satisfies" Rule 23's criteria. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014). District courts, in turn, "must conduct a 'rigorous analysis' to determine whether" the plaintiffs have carried that burden. *Comcast*, 569 U.S. at 35; *see General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).

B. The district court here, however, did not rigorously apply Rule 23's safeguards—and if left uncorrected, the district court's approach would allow for class certification in any case that includes form contracts or standardized contractual language. While the order identified some purportedly common issues, the order dismisses or outright ignores the many

individualized differences among the class members' businesses and alleged injuries that will inevitably predominate over common questions.

Specifically, Plaintiff purports to represent a class unified by an "identical [insurance] Policy" and a "common injury": denial of insurance claims arising from a set of Virginia orders governing how businesses could operate in the face of the COVID-19 crisis. *Elegant Massage*, 2022 WL 433006, at *14, *16. In other words, the "common issue" in this case is whether members of the purported class were entitled to recover benefits under an identical insurance policy.

But whether any policy-holding business has suffered an "injury" from an improperly denied claim—and how much it was entitled to under the policy—depends on whether its claim was, in fact, improperly denied. *See* Petition at 15-16 (collecting examples of diverse reasons claims were denied for diverse businesses). As the Petition recounts in detail, resolution of that issue depends on the business-by-business interaction of at least four factors: (1) at the threshold, whether Virginia's orders even applied to the business and, if so, what requirements the orders imposed on the business

and when; (2) interpretation of interrelated provisions of the State Farm policies as applied to the orders and the particular businesses; (3) how individual businesses responded to the orders and implemented any restrictions; and (4) customers' and other's response to both COVID-19 generally and individual business's response specifically.[2]

All of these considerations are relevant to whether any business was entitled to recover under the policy—and *how much*. And they present fundamental differences among the purported class that cannot be cast aside as irrelevant to the purported "common injury" of uniformly denied insurance claims. *Elegant Massage*, 2022 WL 433006, at *14 (noting allegation that "Defendants uniformly denied every claim filed for loss of income and/or extra expenses that class members submitted").[3] Furthermore, they are certainly

[2] Regarding this fourth consideration, any given business's lost revenue may be attributable, for example, to a change in consumer preferences in light of COVID-19—and *not* the imposition of any of the orders. *See* Petition at 21-22.

[3] Plaintiff's mere allegation of uniform conduct is insufficient under this Court's precedent, as the Petition recounts. *See* Petition at 9 (citing *EQT*, 764 F.3d at 366). More fundamentally, if an allegation of uniform conduct were enough to paper over profound commonality and predominance problems, then every purported class will be able to engage in artful pleading to

not issues that can "be resolved in a single hearing," as the district court concluded. *Id.*

The lead Plaintiff here demonstrates some of the complications that these factors present—and the individualized issues that arise, particularly when assessing damages (if any).[4] For instance, Plaintiff closed its business *before* the orders took effect. *See* Petition at 5. Moreover, Plaintiff's business highlights that Virginia's orders applied differently to different businesses over time. Plaintiff is a massage parlor—a class of businesses that was originally required to close in a March 24, 2020, order, and later allowed to reopen with certain COVID-19 precautions in place on May 8, 2020. *Id.* at 6.[5] Retail

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circumvent Rule 23's safeguards. *Dukes*, 564 U.S. at 349 ("[A]ny competently crafted class complaint literally raises common 'questions.'" (cleaned up)).

[4] The factors outlined in this paragraph demonstrate that this class fails to clear Rule 23(a)'s typicality requirement. *See* Petition at 22-23. Fundamentally, there is no "typical" injury in this case because there is no common injury. *See General Tel. Co.*, 457 U.S. at 157 n.13 ("The commonality and typicality requirements of Rule 23(a) tend to merge.").

[5] The district court itself (in a prior order) noted that massage parlors were treated differently from other kinds of businesses under the orders. *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 506 F. Supp. 3d 360, 379 (E.D. Va. 2020) ("the Executive Orders specifically classified" businesses like

businesses, by contrast, were allowed to remain open. *Id.* at 10. And restaurants could offer delivery and takeout. *Id.* Finally, Plaintiff's unique reaction to the orders illustrates that businesses vary in how they—and their customers—responded to the policies, which affects their coverage under the policy and any resulting damages. Plaintiff, *unlike* many Virginia businesses, did not attempt to reopen after it was allowed to do so. *See id.* at 6.

In light of these individualized issues, the only truly "common issue" in this case is that State Farm had a standard insurance policy and, allegedly, denied claims under the policy. That will be true for any number of insurance policies across the country. Moreover, American businesses use form contracts in every aspect of their business—and with sufficiently artful pleading, the district court's order would allow for class certification of claims involving those contracts as well. *See Am. Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 88 (4th Cir. 2005) (noting that "the bulk of contracts signed

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massage parlors "as a hotspot for COVID-19 and, thus selectively ordered that [they] be closed as a preventative health measure").

in this country, if not every major Western nation," are standardized contracts).

II. This case deserves the Court's attention because improperly certified class actions pose enormous consequences for American businesses, their employees, and their customers.

A district court's duty to rigorously analyze the named plaintiffs' evidence supporting class certification "is not some pointless exercise . . . It matters." *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 547 (5th Cir. 2020). If allowed to stand, the district court's interpretation is not only legally incorrect—it has profound practical consequences.

The decision to certify a class has aptly been described as not only "a game-changer," but "often the whole ballgame." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012). Class certification exerts enormous pressure on defendants to capitulate to abusive "blackmail settlements." Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973). Upon certification, a class action's stakes immediately become so great that defendants often have little choice but 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 Associates., P.A. v. Allstate Ins.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (noting that class certification "places pressure on the defendant to settle even unmeritorious claims" because of "'potentially ruinous liability'").

Accordingly, virtually all certified class actions "end in settlement" before trial. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (Dec. 2010). Indeed, in 2019, companies reported settling 60.3 percent of class actions, and they settled an even higher 73 percent the year before. *See* 2020 Carlton Fields Class Action Survey 29, https://bit.ly/2WDSTEP.

Class-action litigation costs in the United States are huge and growing. In 2019, they totaled a staggering $2.64 billion, continuing a rising trend that

started in 2015. *Id.* at 4. Class actions thus force defendants to divert resources away from socially productive activities. *See Blue Chip Stamps*, 421 U.S. at 740 (the "very pendency" of class action "may frustrate or delay normal business activity").

Indeed, abusive lawsuits result in over $284.847 billion in excessive tort costs each year—amounting to an annual "tort tax" of $1,303.10 for every American. *See* The Perryman Group, *Economic Benefits of Tort Reform* 1, 10 (Dec. 2021), https://bit.ly/3htpkNe (Perryman Report). Defendants ultimately pass along these costs to consumers and employees through higher prices, lower wages, and even lost jobs. *See* ATRA Report (noting job losses across six studied States). So in truth, the economy-wide cost is much higher—wiping out as much as $429.35 billion in overall economic activity in the United States. *See* Perryman Report at 13. In particular, this lost output affects over 2.2 million jobs. *Id.*; *accord* ATRA Report.

CONCLUSION

This Court should grant the Petition and correct the district court's fundamental misapplication of class-action law.

Dated: March 2, 2022

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