No. 21-948

In the
Supreme Court of the United States

EDUCATIONAL COMMISSION FOR FOREIGN MEDICAL GRADUATES,
Petitioner,

v.

MONIQUE RUSSELL, JASMINE RIGGINS, ELSA M. POWELL, AND DESIRE EVANS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, when an action involves both common and individual questions, a court may certify common questions for class treatment under Rule 23(b)(3) without finding that common questions predominate over the individual questions.

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INTEREST OF *AMICUS CURIAE*[*]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's members have a strong interest in promoting fair and predictable legal standards. They have been and continue to be defendants in putative class actions. The Chamber's members thus have a strong interest in ensuring that courts undertake the rigorous analysis required by Federal Rule of Civil Procedure 23. The Chamber has filed *amicus curiae* briefs in several recent Rule 23 class action cases including *Tyson Foods, Inc.* v. *Bouaphakeo*, No. 14-

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[*] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties were timely notified more than 10 days prior to the filing of this brief. All parties have consented to the filing of this brief.

1146; *Comcast Corp.* v. *Behrend*, No. 11-864; and *Walmart Stores, Inc.* v. *Dukes*, No. 10-277.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a critical question of class-action procedure: whether a district court can certify an issues class under Federal Rule of Civil Procedure 23(c)(4) even though no cause of action satisfies Rule 23(b)(3)'s predominance and superiority requirements. The Third Circuit's decision below wrongly held that it could, and that Rule 23(b)(3) applied only to the issues identified for class proceedings under Rule 23(c)(4).

The Third Circuit's approach would permit a torrent of abusive class actions. This Court has already recognized that a Rule 23(b)(3) damages class action extends class treatment to circumstances "in which class-action treatment is not as clearly called for," and therefore Rule 23(b)(3) imposes critical procedural safeguards. *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 34 (2013) (internal quotations omitted). The decision below, however, permits certification of a damages class action even when no cause of action can satisfy Rule 23(b)(3)'s requirements. This decision will mean that class certification will be possible in virtually every case. The inevitable result will be an increase in abusive class actions designed to impose massive settlement pressure through class certification regardless of the merits of the underlying claims.

The decision below also deepens a circuit split on the proper reading of Rule 23. The Fifth Circuit

recognizes that Rule 23(c)(4) permits class proceedings on certain issues only when a cause of action as a whole satisfies the predominance and superiority requirements of Rule 23(b)(3). See *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). In contrast, the Second, Sixth, and Ninth Circuits agree with the decision below that Rule 23(c)(4) permits class proceedings on certain issues even if a cause of action cannot satisfy Rule 23(b). See *Martin* v. *Behr Dayton Thermal Prods., LLC*, 896 F.3d 405, 413 (6th Cir. 2018); *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006); *Valentino* v. *Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). The answer to the crucial question whether a damages class action can proceed where no cause of action satisfies Rule 23(b)(3) should not turn on where a case is filed. This Court's review is necessary to establish a uniform answer to that question.

Finally, the decision below misreads the text of Rule 23 and undermines the protections guaranteed by that Rule. Rule 23(c)(4) does not establish an alternative route to class certification. Instead, it creates a tool that can be used to manage a class action that meets the requirements of Rules 23(a) and (b). The structure of Rule 23 confirms this understanding. Rule 23(a) establishes four prerequisites that all class actions must meet. Rule 23(b) identifies the three kinds of class actions and the requirements to bring each of those kinds of class actions. Rule 23(c) then provides a set of procedures and tools to administer a class action that satisfies the requirements for certification in Rule 23(a) and (b). If Rule 23(c)(4) established a new kind of class action instead of a tool to allow a class that has already met the requirements to

proceed only on some issues, it would not have been placed among these management tools.

This Court's review of this important question is needed.

ARGUMENT

This Court has recognized that abuse of class action procedures burdens both defendants and absent class members. See, *e.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 363–64 (2011); *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 33–34 (2013); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 629 (1997). As an "exception to the usual rule" that cases are litigated individually, a case should be permitted to proceed as a class action only after a court has conducted a "rigorous analysis" to ensure that it meets Rule 23's requirements for class certification. *Dukes*, 564 U.S. at 349, 351 (quoting *Califano* v. *Yamaski*, 442 U.S. 682, 700–01 (1979)).

The decision below undermines these essential protections. The Third Circuit found that Rule 23(c)(4) permits the certification of a class action to address certain issues even when no cause of action can satisfy the requirements of Rule 23(a) and (b). This holding permits a party seeking certification in a damages case to avoid the crucial protections of Rule 23(b)(3), which requires that common issues must predominate and that class proceedings must be the superior method to resolve a dispute. The holding will result in an increase in abusive class actions aimed to extract large settlements, even though the underlying claims are meritless. This Court's intervention is needed.

I. The Question Presented Is Important.

This Court's review is needed to resolve a question of critical importance. The decision below will permit the certification of a class in nearly any case. The resulting shakedown class actions that fail to comply with the protections established in Rule 23(b)(3) will harm businesses, customers, employees, and the judicial system.

Class-action defendants face enormous pressure to settle. The certification of a class often results in a massive increase in the potential liability and costs faced by a defendant. *See Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("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."). This increased potential liability and cost may force the defendant to enter what Judge Friendly called "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); see also *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail"). The risk of a massive loss means 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 the prospect of success at trial." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975); see also *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify

a class . . . places pressure on the defendant to settle even unmeritorious claims.").

It is unsurprising, then, that most class action defendants settle even when a claim is meritless. See 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"). In 2019, for example, companies reported that they settled 60.3% of class actions. See Carlton Fields Class Action Survey, at 26 (2021), available at https://classactionsurvey.com. The previous year they reported settling an even higher 73%. *Id.* The same appears to be true in cases where issues were certified for class treatment even though the case does not satisfy Rule 23(b)(3). Counsel for *amicus curiae* was unable to find any case that proceeded to trial after the certification of this kind of issues class.

This Court has repeatedly emphasized the importance of ensuring that Rule 23's requirements are satisfied. Class action litigation is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast*, 569 U.S. at 33 (quoting *Yamasaki*, 442 U.S. at 700–01). A plaintiff seeking to invoke this exception "must affirmatively demonstrate his compliance" with Rule 23's requirements. *Id.* (quoting *Dukes*, 564 U.S. at 350).

These requirements are especially important in a Rule 23(b)(3) damages class action. Rule 23(b)(3) authorizes a damages class action only where "the

questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This Court has recognized that this kind of class action is an "adventuresome innovation" that "is designed for situations 'in which class-action treatment is not as clearly called for.'" *Comcast*, 569 U.S. at 34 (quoting *Dukes*, 564 U.S. at 362). So "[i]f anything," certification under Rule 23(b)(3) should be "even more demanding" than other provisions of Rule 23. *Id*.

The approach adopted by the Third Circuit below would extend class treatment far beyond even the "adventuresome innovation" of Rule 23(b)(3). Discarding Rule 23(b)(3), the Third Circuit held that a class can be certified based on common issues even when those common issues do not predominate over individual issues for the cause of action as a whole. *See* Pet. App. 24a. In other words, the Third Circuit found that Rule 23(c)(4) creates an "additional pathway[]" that looks only to "particular issues" identified for class treatment. Pet. App. 13a.

The Third Circuit's approach would work a massive expansion of the settlement pressure inherent in class-action litigation. This Court has recognized that "any competently crafted class complaint literally raises common questions." *Dukes*, 564 U.S. at 349 (quotation marks and citation omitted). Looking only to common issues to certify a class under Rule 23(c)(4) would permit a court to "sever issues until the remaining common issue[s] predominate." *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th

Cir. 1996). As a result, defendants could face the immense pressure to settle caused by class certification in nearly every case.

This pressure to settle remains even though an issues class would not result in a single damages award. See Pet. App. 31a–32a (arguing that the incentive to bring abusive class actions depends on a damages award). Class actions place outsized settlement pressure on defendants because of the massive liability that could result from a single adverse decision. An issues class proceeding will result in a ruling that binds the defendant in litigation with class members. Even without a final damages award, this kind of all-or-nothing proceeding could result in a massive increase in the liability faced by the defendant, creating pressure to settle even unmeritorious claims.

The Third Circuit's approach would also undercut the bellwether process that federal courts have developed to promote the resolution of complicated multi-district litigation. This process sends a handful of representative cases to a jury. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25. Rev. Litig. 691, 696 (2006). These bellwether trials promote settlement by providing guidance on how juries are likely to assess the arguments in the remaining cases. *See In re Methyl Tertiary Butyl Ether (MTBE) Prods.*, 2007 WL 1791258, at *2 (S.D.N.Y. June 15, 2007). A key feature of this process is that bellwether trials lack preclusive effect—permitting a defendant to gain information about the likely value of claims without facing the

unfair pressures exacted by a single resolution applying in all cases. But if these key issues can be resolved in a way that binds the defendant in all future cases, the defendant will face enormous pressure to settle without the valuable information that bellwether proceedings provide to both sides.

The costs of this new category of class action will reverberate through the entire economy. Class actions already impose huge costs. In 2019, these costs totaled more than $2.64 billion. See Carlton Fields Class Action Survey 4. Defense costs in a single class action can run into nine figures. See Adele, *Dukes* v. *Wal-Mart*: Implications for Employment Practices Liability Insurance 1 (July 2011) (noting defense costs of $100 million). Under the Third Circuit's decision, businesses will have to expend substantial resources to defend against a new category of class action. But they will not bear those expenses alone. Instead, the costs would ultimately be passed to consumers through higher prices.

The increased costs resulting from the Third Circuit's approach will not be accompanied by any improvement in the resolution of cases. By definition, the Third Circuit's holding that Rule 23(b)(3) does not need to be satisfied for a cause of action means that class proceedings can go forward even when common issues do not predominate and class treatment is not a superior method of resolving the dispute. So the substantial costs resulting from class treatment will be imposed with no countervailing benefit through efficient resolution of a multitude of disputes.

II. This Court's Intervention Is Needed to Resolve a Split on this Important Question.

This Court's intervention is needed to resolve the proper application of Rule 23(c)(4). The circuit courts have reached contradictory holdings on whether Rule 23(c)(4) authorizes the certification of an issues class when no cause of action satisfies Rule 23(b)(3). Only this court can provide the certainty class-action defendants need on whether Rule 23(c)(4) can be used to evade the protections of Rule 23(b)(3).

In the Fifth Circuit, Rule 23(c)(4) cannot be used to certify an issues class that fails predominance under Rule 23(b)(3). That Court explained that "[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. An alternative reading that looked only to the issues singled out under Rule 23(c)(4) would "allow[] a court to sever issues until the remaining common issue predominates over the remaining individual issues," thus "eviscerat[ing] the predominance requirement of rule 23(b)(3)." *Id.* That model would result in "automatic certification in every case where there is a common issue." *Id.*

In contrast, the Second, Sixth, and Ninth Circuits allow a court to certify a class under Rule 23(c)(4) even when a cause of action as a whole does not satisfy Rule 23(b)(3)'s predominance requirement. The Second Circuit found that "a court may employ

subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement." *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006). Similarly, the Ninth Circuit announced that Rule 23(c)(4) permits a court to certify a class action on some issues "[e]ven if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted." *Valentino* v. *Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). And the Sixth Circuit rejected "[a] requirement that predominance must first be satisfied for the entire cause of action." *Martin* v. *Behr Dayton Thermal Prods., LLC*, 896 F.3d 405, 413 (6th Cir. 2018).

In this case, the Third Circuit joined the Second, Sixth, and Ninth circuits in holding that Rule 23(c)(4) can be used to certify a class even when no cause of action satisfies Rule 23(b)(3). It announced that Rule 23(c)(4) provides an "additional pathway[]" to class certification. Pet. App. 13a. According to the Third Circuit, that pathway permits a party to single out "'particular issues' for class treatment." Pet. App. 14a. The party seeking class certification need not show that the case or any cause of action satisfies the requirements of Rule 23(b)(3). Instead, that party may show that particular "*issues* 'satisfy Rule 23(a)'s prerequisites' and that those issues are 'maintainable under Rule 23(b)(1), (2), or (3).'" Pet. App. 14a (quoting *Amchem*, 521 U.S. at 614).

This Court's intervention is needed to resolve this dispute between the circuits. The circuits that have read Rule 23(c)(4) to create a new kind of issues

class action have expanded the number of cases where a class can be certified. As a result, they have expanded the reach of the enormous pressure to settle that accompanies class certification. Whether a defendant faces that pressure should not turn on where a case was filed. Class-action defendants need the certainty about the reach of those pressures that only this Court can provide.

III. The Decision Below Is Inconsistent With Rule 23.

A district court's duty to rigorously analyze the class-certification criteria "is not some pointless exercise . . . [i]t matters." *Chavez* v. *Plan Benefit Servs., Inc.*, 957 F.3d 542, 547 (5th Cir. 2020). Contrary to the decision below, Rule 23(c)(4) does not create a new "pathway" to certify an issues class that falls short of Rule 23(b)(3)'s requirements. It merely creates a discretionary case-management tool that a district court can employ when a case otherwise satisfies the class-certification requirements.

Rule 23 establishes two sets of requirements that every case must satisfy to proceed as a class action. Rule 23(a) first establishes four "prerequisites" to bringing a class action—numerosity, commonality, typicality, and adequacy. These requirements are "applicable to all class actions." *Amchem*, 521 U.S. at 613.

A party seeking class certification who has satisfied the Rule 23(a) prerequisites "must" then "show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Id.* at 614. These three provisions

establish the three "types of class actions" that a party can bring. Fed R. Civ. P. 23(b).

Importantly, Rule 23(b)(3) provides the only avenue for a damages claim to proceed as a class action. To satisfy that provision, the district court must find that common questions "predominate over" individualized ones and that "a class action is superior to other available methods" of "adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). These predominance and superiority requirements help limit class certification to cases where class litigation is the best route to resolve the case.

Rule 23(c) then provides district courts with tools to manage a class action that has satisfied Rule 23(a) and (b). Consistent with that structure, Rule 23(c)(4) permits a district court to permit a class action that has satisfied Rule 23(a) and (b) to proceed as a class action "with respect to particular issues." Fed. R. Civ. P. 23(c)(4).

The Third Circuit's alternative view that Rule 23(c)(4) permits the authorization of a class action on certain issues and that Rule 23(b)(3)'s requirements for a damages class action apply to those issues only—rather than to the cause of action as a whole—contradicts the text of Rule 23. To begin, this creation of an issues class action under Rule 23(c)(4) cannot be reconciled with its placement among the other case-management tools in Rule 23(c). *See Murphy* v. *Smith*, 138 S. Ct. 784, 789 (2018) (looking to the "surrounding statutory structure" and "other provisions" to interpret statutory text). Each of the provisions of Rule 23(c) provides a tool or procedure for a district

court to manage an existing or proposed class action. Rule 23(c)(1) requires a court to decide whether to certify a class "[a]t an early practicable time," and announces that a certification order must "define the class and the class claims, issues, or defenses, and must appoint class counsel." Fed. R. Civ. P. 23(c)(1). Rule 23(c)(2) establishes notice requirements for class actions, including individual notice to members of a Rule 23(b)(3) class. Rule 23(c)(3) requires findings about class membership in the judgments for each of the three types of class action permitted by Rule 23(b). And Rule 23(c)(5) permits the division of a class into subclasses.

Like these provisions, Rule 23(c)(4) provides a tool for the management of a class action, not a new "pathway" to establish a class action. The Rules Committee would not have placed Rule 23(c)(4) in the middle of a series of procedures and management tools if it had meant to create a whole new type of class action. This placement confirms that Rule 23(c)(4) is a case management tool that allows a district court to limit class treatment to particular issues when a case has already satisfied Rule 23(a) and (b).

This understanding is confirmed by the absence of the kind of language Rule 23 uses to create a new kind of class action in Rule 23(c)(4). Rule 23(b) is explicit about the creation of three different types of class actions and the requirements for each type. Rule 23(b) is entitled "types of class actions." See *INS* v. *Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) (explaining that the title of a statute or section can help clarify meaning). It begins by explaining that a class action can be brought "if Rule

23(a) is satisfied and if" the conditions for one of the three types of class action have been met. Fed. R. Civ. P. 23(b). It then lays out detailed requirements for each of these three kinds of class action.

Rule 23(c)(4), on the other hand, makes no reference to a "type[] of class action." Nor does it lay out the requirements to bring a class action under Rule 23(b)(4), where it ought to be under the Third Circuit's reading of the rule. It merely announces that "when appropriate" a court may permit class proceedings "with respect to particular issues." Fed. R. Civ. P. 23(c)(4). This contrast in the language of Rule 23(c)(4) and Rule 23(b) indicates that Rule 23(b) establishes the only paths to class certification. See *POM Wonderful LLC* v. *Coca-Cola Co.*, 573 U.S. 102, 114 (2014) (explaining that the provision of rules for some cases implies the exclusion of other cases). The Rules Committee would have placed the provision in Rule 23(b) or, at the very least, used language similar to Rule 23(b) if it had meant to create a new kind of class action.

What's more, the other provisions of Rule 23(c) assume that Rule 23(b) establishes the only three types of class action. For example, Rule 23(c)(2) provides notice requirements "[f]or any class certified under Rule 23(b)(1) or (b)(2)" and a different set of notice requirements "[f]or any class certified under Rule 23(b)(3)." Fed. R. Civ. P. 23(c)(2). And Rule 23(c)(3) imposes rules for the judgment in "any class action certified under Rule 23(b)(1) or (b)(2)" and different requirements for "any class action certified under Rule 23(b)(3)." Fed. R. Civ. P. 23(c)(3). But Rule 23(c) does not include any similar rules for the

administration of an issues class under Rule 23(c)(4). This absence of any rules for the management of a Rule 23(c)(4) class action confirms that it does not establish a separate type of class action.

The Third Circuit's approach is irreconcilable with the text and structure of Rule 23. It allows class action plaintiffs to evade the limitations of Rule 23(b)(3) simply by labelling a proceeding as an issues class action. This is not a superior way of resolving any cause of action, and this Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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