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Appellate Division—Second Department Docket No. 2022-00273

New York Supreme Court
Appellate Division—Second Department

JOSEPH DUDLEY, ELIZABETH DUDLEY, ALEX GADD, JENNIFER GADD, DANIEL SULLIVAN, and ALLYSON SULLIVAN, on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

—against—

API INDUSTRIES, INC., d/b/a/ ALUF PLASTICS,

Defendant-Appellant.

MOTION BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE BUSINESS COUNCIL OF NEW YORK STATE, INC., FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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Rockland County Clerk's Index No. 030905/2018

Supreme Court of the State of New York
Appellate Division—Second Department

JOSEPH DUDLEY, ELIZABETH DUDLEY, ALEX GADD, JENNIFER GADD, DANIEL SULLIVAN, and ALLYSON SULLIVAN, on behalf of themselves and all others similarly situated	)	
Plaintiffs-Respondents,	)	Notice of Motion Docket No. 2022-00273
—against—	)	
API INDUSTRIES, INC. d/b/a ALUF PLASTICS	)	
Defendant-Appellant.	)	

NOTICE OF MOTION FOR LEAVE
TO FILE BRIEF AS *AMICI CURIAE*

Please take notice that upon the annexed affirmation of Susie Kim, dated September 21, 2022, and the papers attached thereto, undersigned counsel will move this Court, at the courthouse thereof, located at 45 Monroe Place, Brooklyn, New York, 11201, on October 14, 2022, at 10:00 in the forenoon of that date, or as soon thereafter as counsel may be heard, for an order pursuant to Section 1250.4(f) of the Practice Rules of the Appellate Division granting leave for the Chamber of Commerce of the United States of America and the Business Council of New York

State, Inc., to file a brief as *Amici Curiae* in support of Defendant-Appellant ALUF Plastics, and for any further relief that the Court may deem just and proper.

Dated: September 21, 2022,
New York, New York

Respectfully Yours,

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Supreme Court of the State of New York
Appellate Division—Second Department

JOSEPH DUDLEY, ELIZABETH DUDLEY, ALEX GADD, JENNIFER GADD, DANIEL SULLIVAN, and ALLYSON SULLIVAN, on behalf of themselves and all others similarly situated Plaintiffs-Respondents, —against— API INDUSTRIES, INC. d/b/a ALUF PLASTICS Defendant-Appellant.	)	Docket No. 2022-00273

AFFIRMATION OF SUSIE KIM IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Susie Kim, an attorney admitted to practice in the State of New York, hereby affirms under penalty of perjury as follows:

1. I am an attorney at the law firm Stein Mitchell Beato & Missner LLP, counsel for the Chamber of Commerce of the United States of America and the Business Council of New York State, Inc. I submit this affirmation in support of their motion for leave to file the accompanying brief as *Amici Curiae* in support of Defendant-Appellant ALUF Plastics.

2. 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 more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, including New York. 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 briefs in cases, like this one, that raise issues of concern to the nation's business community, including cases in New York courts.

3. The Business Council of New York State, Inc., is the leading business organization in New York, representing the interests of large and small firms throughout the state. Its membership is made up of roughly 3,500 member companies, local chambers of commerce, and professional and trade associations. Though 72 percent of its members are small businesses, it also represents some of the largest and most important corporations in the world. It serves as an advocate for employers in the state's political and policy-making arenas, as well as in the courts.

4. Attached hereto as Exhibit A is a copy of the brief that proposed *Amici* wish to submit to this Court. The Chamber and Business Council have duly authorized me to submit this brief on their behalf.

5. *Amici* have a strong interest in defending a predictable legal environment in New York, including the limitations on tort liability upon which businesses operating in the State rely. Courts in New York have long recognized that economic losses alone do not constitute a legally cognizable injury for recovery in tort. Likewise, courts in New York have recognized a sharp distinction between private nuisance, which affects one or a small number of people, and public nuisance, which may affect an entire community but requires special injury as a prerequisite to asserting a private claim in court. The decision below strayed from these principles in favor of expansive theories of liability that could give rise to undue uncertainty, excessive costs, and unfairness for businesses operating in the State.

6. Businesses also have a strong interest in ensuring that courts comply with binding precedent governing class actions, including cases that instruct trial courts how to comply with Article 9 of the New York Civil Practice Law and Rules when certifying a class. Allowing the named plaintiffs in this case to proceed as representatives of a broad class, pursuing novel (and unwarranted) tort theories based on novel claims of damage, would be inconsistent with such precedent and would disrupt the reasonable expectations of businesses operating in New York.

7. *Amici* make four points in the proposed brief. First, New York's physical harm requirement imposes important limits on tort liability, which the trial court missed in allowing this case to proceed with

no allegation of physical injury or actual damage to property. New York courts have not recognized "stigma damages" as a stand-alone basis to recover in tort for negligence. Second, plaintiffs have failed to plead a nuisance claim. Neither law nor public policy supports plaintiffs' mix-and-match approach to the requirements of private and public nuisance. Third, plaintiffs failed to carry their burden to certify a class under Article 9 of the New York Civil Practice Law and Rules. Finally, courts should resist any attempt to distort class-action and tort law to superintend environmental policy. Public policy favors dismissal of plaintiffs' inadequately pled claims.

8. Pursuant to Rule 1250.4(f) of the Rules of Practice of this Court, the Chamber and Business Council seek leave to file their brief because this appeal presents questions of law that are of great importance to their members. Businesses have a vital interest in ensuring that courts properly apply longstanding principles of New York law. To provide the goods and services that we access as part of our daily lives, businesses require a reliable legal regime in which to operate. The economic loss doctrine prohibits plaintiffs from alleging purely economic harms to support their negligence claim. And plaintiffs cannot allege private nuisance based on a theory of harm that they share with more than 3,000 other residents. Eviscerating state law's settled limits on negligence and private nuisance claims would greatly hinder businesses' ability to predict costs and thereby reduce investment and the quality of

goods and services. Finally, even if plaintiffs could state legally viable tort claims, they failed to show that this suit should proceed as a class action.

9. Granting leave for *Amici* to file their proposed brief will not delay this proceeding or prejudice the parties. *Amici* have an important perspective to add in this appeal, particularly as they have identified issues that otherwise may have escaped the lower court's attention.

* * *

WHEREFORE, I respectfully request that this Court enter an order: (1) granting the Chamber of Commerce of the United States of America and the Business Council of New York State, Inc., leave to file their brief as *Amici Curiae* in support of Defendant-Appellant ALUF Plastics; (2) accepting the brief that has been filed and served along with this motion; and (3) granting any other and further relief that the Court may deem just and proper.

Dated: September 21, 2022,
New York, New York

Respectfully Yours,

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Attorney for Amici Curiae the Chamber of Commerce of the United States of America and the Business Council of New York State, Inc.

Exhibit A

Appellate Division—Second Department Docket No. 2022-00273

New York Supreme Court
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JOSEPH DUDLEY, ELIZABETH DUDLEY, ALEX GADD, JENNIFER GADD, DANIEL SULLIVAN, and ALLYSON SULLIVAN, on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

—against—

API INDUSTRIES, INC., d/b/a/ ALUF PLASTICS,

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE BUSINESS COUNCIL OF NEW YORK STATE, INC., AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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INTRODUCTION

In this class action, plaintiffs ask the Court to disregard longstanding principles of New York law and their core competencies in favor of expansive and unbounded theories of liability. Specifically, they ask this Court to approve class litigation against Defendant ALUF Plastics, a family-owned company that manufactures plastic products in Orangeburg, New York, for alleged transient odors from its facility. Plaintiffs allege neither physical harm to an individual person nor actual damage to any particular property. They instead seek to recover for alleged "stigma damages" from the perceived diminution of property value based on transient odors. And they seek to do so on behalf of more than 3,000 households.

Plaintiffs' novel theories are foreclosed by longstanding principles of New York law, which prohibits recovery in tort for purely economic harms like those alleged by the plaintiffs. And the private nuisance claim does not extend to a theory of harm that plaintiffs share with more than 3,000 households. Moreover, even if plaintiffs *could* state a legally viable claim in tort under New York law, they cannot show that this suit should proceed as a class action. The many individualized issues concerning whether Defendant's facility (as opposed to another source) caused nuisance-level odors to impact any particular household and, if so, the damages that resulted from such odors will predominate over any common issues in this case.

More fundamentally, a class action suit in tort is not the appropriate vehicle for resolving this dispute. Numerous state and local regulations apply to Defendant, from zoning to environmental regulations. To the extent that this class action reflects community-wide concern about transient odors emitted by the facility, such concerns are more properly addressed through agency enforcement and the political process, including legislation and local government action, than through a misuse of the class action mechanism.

STATEMENT OF INTEREST OF *AMICI CURIAE*

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 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 business community in New York.[1]

The Business Council of New York State, Inc., is the leading business organization in New York State, representing the interests of large and small firms throughout the state. Its membership is made up of roughly 3,500 member companies, local chambers of commerce, and professional and trade associations. Though 72 percent of its members are small businesses, it also represents some of the largest and most important corporations in the world. Combined, its members employ more than 1.2 million New Yorkers. It serves as an advocate for employers in the state's political and policy-making arenas, working for a healthier business climate, economic growth, and jobs. It also provides important benefits to its members' employees with group insurance programs and serves as an information resource center for its members.

To provide the goods and services that we access as part of our daily lives, businesses require a reliable legal regime in which to operate.

[1] *See, e.g.*, Br. of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Appellant, *Chavez v. Occidental Chem. Corp.*, No. CTQ-2019-00003 (N.Y.) (cross-jurisdictional tolling); *Amici Curiae* Brief of Coalition for Litigation Justice, Inc. et al., *In re New York City Asbestos Litig.*, No. APL-2017-00114 (N.Y.) (punitive damages); Br. of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Defendant-Appellant, *Davies v. S.A. Dunn & Co., LLC*, Nos. 530994, 531613 (N.Y. App. 3d Dep't) (public nuisance and negligence); Br. of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Defendant-Appellant, *Duncan v. Capital Region Landfills, Inc.*, No. 531616 (N.Y. App. 3d Dep't) (same).

Businesses have a strong interest in ensuring that courts comply with binding precedent governing torts and class actions, including cases that instruct trial courts how to comply with Article 9 of the New York Civil Practice Law and Rules when certifying a class. Allowing the named plaintiffs in this case to proceed as representatives of a broad class, pursuing novel tort theories based on claims of intangible harm, would be inconsistent with such precedent and would disrupt the reasonable expectations of businesses operating in New York. Such disruptions harm businesses' ability to predict costs, and thereby reduce investment and the quality of the goods and services that they can provide to the people of this State.

Amici respectfully request that this Court reverse the trial court's decision because it contravenes well-established legal principles and eviscerates important limits on class actions.

ARGUMENT

I. The trial court erred in allowing plaintiffs to proceed with negligence and private nuisance claims.

This Court should reject plaintiffs' novel legal theories.

A. New York's physical harm requirement imposes important limits on tort liability.

As "a fundamental principle" of New York law, plaintiffs must allege "physical injury or damage to property" to recover in tort for negligence. *Caronia v. Phillip Morris USA, Inc.*, 22 N.Y.3d 439, 446 (2013). This physical harm requirement serves several important

purposes: "it defines the class of persons who actually possess a cause of action, provides a basis for the factfinder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims." *Id.*

The trial court in this case disregarded that fundamental requirement. Although "[d]amages are a necessary element of a negligence claim which must be pleaded and proven," *Siler v. Lutheran Social Services of Metropolitan N.Y.*, 10 A.D.3d 646, 648 (2d Dep't 2004), the trial court allowed this case to proceed with no allegation of physical injury or actual damage to property. The court recognized "the plethora of case law determining that economic losses in and of themselves are not sufficient to plead a legally cognizable injury such that is required to recover on a negligence claim," but held that plaintiffs could continue to litigate their negligence claim based on a theory of "stigma damages" allegedly caused by transient odors. R. 15.

"Stigma damages" are not recognized under New York tort law. The trial court (at R. 15) derived the notion of stigma damages from *Criscuola v. Power Authority of the State of New York*, 81 N.Y.2d 649 (1993), a takings case that has no bearing on this matter. There, the Power Authority of the State of New York had acquired an easement for a high voltage power line that crossed the claimants' property, and the Court of Appeals merely addressed a discrete "evidentiary issue." *Id.* at 651. Specifically, the court had to decide "whether proof of

reasonableness is required before a claimant can recover consequential damages for an eminent domain taking of property, whose value may be affected by a perceived public fear of danger or of health risks." *Id.* The court concluded that such proof was not required because the market value of property may be adversely affected "even if the public's fear is *unreasonable*." *Id.* (emphasis added).

Context matters. *Criscuola* plainly did not address the availability of "stigma damages" in the context of a *negligence claim* or any other tort claim. Nor did the court purport to address any other legal issue "of first impression." *Id.*

The trial court should have looked to the recent on-point decision in *Davies v. S.A. Dunn & Co., LLC*, 200 A.D.3d 8 (3d Dep't 2021), for guidance. There, the Third Department persuasively explained why plaintiffs could not proceed with a putative class action alleging that a defendant landfill owed the "surrounding property owners a duty of care to avoid injuring them" with transient odors. *Davies*, 200 A.D.3d at 16. Like plaintiffs here, the plaintiffs in *Davies* failed to plead a "legally cognizable injury recognized in tort law" because "[t]o recover in negligence," "a plaintiff must sustain either physical injury or property damage resulting from the defendant's alleged negligent conduct." *Id.* (citing *Caronia*, 22 N.Y.3d at 446–47, and *532 Madison Ave. Gourmet Foods v. Finlandia Ctr.*, 96 N.Y.2d 280, 290, 291–92 (2001)). "[S]tigma damages," standing alone, could not support a negligence claim. *Davies*,

200 A.D.3d at 10; *accord Duncan v. Capital Region Landfills, Inc.*, 198 A.D.3d 1150, 1151 (3d Dep't 2021) (citing *Davies* to dismiss a negligence claim based on transient odors and economic damages). This bedrock principle is enough to preclude plaintiffs' suit.[2]

B. Private nuisance claims are not a substitute for failed public nuisance claims.

In addition to a failure to identify a legally cognizable harm in negligence, plaintiffs have failed adequately to plead a nuisance claim. Their mix-and-match approach to the requirements of private and public nuisance is supported by neither law nor public policy.

Under longstanding precedent, a private nuisance claim "threatens one person or a relatively few" amount of people. *Copart Indus., Inc. v. Consol. Edison Co. of N.Y., Inc.*, 41 N.Y.2d 564, 568 (1977) (citing *McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 344 (1928)). An individual plaintiff or a small group of plaintiffs typically may bring a private nuisance claim when a defendant has interfered with the use or enjoyment of their property. New York courts have accepted private nuisance claims in a variety of circumstances involving no more than a few people. Homeowners, for example, have been permitted to bring a private nuisance claim against their neighbors for the damages caused

[2] If the Court concludes that plaintiffs' negligence and private nuisance claims are essentially the same wrong grounded in allegations of negligence, *see, e.g.*, *Chenango Inc. v. County of Chenango*, 256 A.D.2d 793, 794 (3d Dep't 1998), it may dispose of both claims based on the impermissible assertion of stand-alone stigma damages.

by the spread of invasive bamboo from one yard to another. *Sultan v. King*, 73 Misc. 3d 338 (Sup. Ct. Suffolk County 2021). And homeowners have brought a private nuisance action against a vendor who parked tractor-trailer trucks in front of their house, blocking their ability to exit their own driveway. *Aristedes v. Foster*, 73 A.D.3d 1105 (2d Dep't 2010).

In contrast to a private nuisance claim, a public nuisance claim generally consists of conduct that offends, interferes with, or causes "damage to the public in the exercise of rights common to all." *Copart*, 41 N.Y.2d at 568 (citing *New York Trap Rock Corp. v. Town of Clarkston*, 299 N.Y. 77, 80 (1949)). Public nuisance claims involve more than just a few people, because the harm is "general and widespread as to affect a whole community." *532 Madison Ave.*, 96 N.Y.2d at 293 (quoting William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. Rev. 997, 1015 (1966)). Private parties may bring a public nuisance claim only if they demonstrate a "special injury beyond that suffered by the community at large." *Id.* at 292.

Plaintiffs attempt to blur the line between these claims, but they cannot satisfy the requirements of either. As the trial court correctly recognized, plaintiffs cannot pursue a private action for public nuisance because their alleged harm "is the same for all the residents in the nearby vicinity." R. 13. Plaintiffs also should not have been permitted to pursue a *private* nuisance claim because "the alleged nuisance affects a wide area and adjacent properties." *Cedar & Wash. Assocs., LLC v. Bovis Lend*

Lease LMB, Inc., 95 A.D.3d 448, 449 (1st Dep't 2012). Their expansive theory of liability, which would sweep in more than 3,000 residences in a vast area, bears no relation to the private nuisance claim on behalf of "one person or a relatively few" amount of people that New York law recognizes. *Copart*, 41 N.Y.2d at 568.

The trial court nevertheless allowed plaintiffs to pursue a private nuisance theory, relying largely on a decision from the Third Circuit applying Pennsylvania law. R.12. But even assuming that the decision correctly applied Pennsylvania law to authorize a mishmash of public and private nuisance on behalf of a class of 8,400 households within a 2.5-mile radius of a landfill, *Baptiste v. Bethlehem Landfill Co.*, 965 F.3d 214, 223 (3d Cir. 2020), the New York Court of Appeals "has taken a different, more limited approach," *Davies*, 200 A.D.3d at 13 (citing *532 Madison Ave.*). In New York, plaintiffs cannot sustain a private nuisance claim based on odors allegedly affecting the community at large. *See, e.g.*, *Copart*, 41 N.Y.2d at 568.[3]

That narrower approach is not only more historically grounded, it serves salutary purposes. "Redress of . . . wrong to the entire community is left to its duly appointed representatives." Restatement (Second) of

[3] Unlike the Third Circuit, the Second Circuit has concluded: "Public and private nuisance bear little relationship to each other." *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050 (2d Cir. 1985). "Under New York law, [a defendant] is subject to liability for *either* a public *or* private nuisance on its property upon learning of the nuisance and having a reasonable opportunity to abate it." *Id.* (emphasis added).

Torts § 821C cmt. a (Am. Law Inst. 1975). That is because large-scale issues "are better dealt with by the legislative and executive branches, which, unlike courts, are uniquely capable of balancing all of the competing needs and interests in play." U.S. Chamber Institute for Legal Reform, *Waking the Litigation Monster: The Misuse of Public Nuisance* 32 (2018), https://instituteforlegalreform.com/research/waking-the-litigation-monster-the-misuse-of-public-nusiance.

That division of labor not only respects the separation of powers, but it also recognizes the inherent limitations of courts. Courts are well suited to resolve allegations of a private nuisance involving a small number of persons and property. But where, as here, plaintiffs seek redress of alleged harms on behalf of a diffuse group of individuals who experience the alleged odors in different ways—at different times, in different amounts—across a wide area, the claims necessarily give rise to questions of "policy," where the "informed assessment of competing interests is required." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427 (2011). Courts are ill suited for such assessments, and the traditional limits on public and private nuisance respect that reality.

II. This Court should rigorously enforce class action requirements.

The Court should not allow this litigation to proceed as a class action even if it concludes that some individual claims may survive. A class action lawsuit represents "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) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). Class certification has significant consequences for the rights of both plaintiffs and defendants alike. Thus, even if courts construe Article 9 of the New York Civil Practice Law and Rules "liberally" in favor of granting class certification, *Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, 135 (2d Dep't 2008), they must be mindful not to rubberstamp a proposed class. Particularly in light of the rising number of class actions being filed in New York, this Court should reinforce the appropriate analysis for class certification, as is required by New York law.

A. Close attention to the class certification factors often requires inquiry into "the merits."

Perhaps the most obvious error in the trial court's analysis was its refusal to consider legal and factual issues relevant to class certification because the court deemed them to be "merits" issues that could be resolved later. But such issues, even when they overlap with the "merits" of a claim, must be analyzed when deciding whether to certify a class.

New York's class action statute "was patterned after rule 23 of the Federal Rules of Civil Procedure," *Rosenfeld v. Robins Co.*, 63 A.D.2d 11, 14 (2d Dep't 1978), and like Rule 23, it requires courts to analyze the class certification factors "even when that requires inquiry into the merits" of plaintiffs' claims, *Comcast Corp. v. Behrend*, 569 U.S. 27, 35

(2013) (citing *Wal-Mart*, 564 U.S. at 351); *accord Sternberg v. N.Y. Water Serv. Corp.*, 155 A.D.2d 658, 660 (2d Dep't 1989). Indeed, there is "widespread acceptance" in courts across the country that the factual and legal review of class certification often requires courts to evaluate "merits" questions "that overlap with consideration of the requirements for class certification." *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 381 & n.8 (5th Cir. 2007) (collecting cases). This case shows why such inquiry is necessary: if the lower court had properly applied the class certification factors, it would have had to conclude that "particularized consideration of liability and damages preclude a finding of predominance of common questions of law or fact." *Sternberg*, 155 A.D.2d at 660 (internal quotation marks omitted).

B. The particularized consideration of liability and damages precludes a finding of predominance.

Plaintiffs did not—and indeed cannot—meet their burden to show that common issues will predominate in this case. Plaintiffs put forth a model that, according to the trial court, "demonstrated that residents in the proposed class area of 1.5 miles from the facility are in the path of odor transport" from Defendant's facility. R. 50. But merely being in the path of alleged odor transport, at an undefined concentration, is not enough to demonstrate class-wide proof of nuisance-level odor, causation, or damages. And because each of the residents will experience odors (if any) from Defendant's facility (as well as any competing odors) in a

different fashion, plaintiffs cannot show that common issues will "*predominate* over unique circumstances that may well characterize each aggrieved" class member's claim. *Alix v. Wal-Mart Stores, Inc.*, 57 A.D.3d 1044, 1047 (3d Dep't 2008) (emphasis added).

Indeed, the trial court itself acknowledged that it was not an "easy determination" to conclude that common questions of law and fact predominated over individual questions. R. 49. Defendant did "an excellent job of pointing to other odor sources in the community," explaining that "there have been numerous odor complaints made by residents that cannot be attributed to its facility." R. 49; *see also* R. 50 (noting that "there are other odor sources in the vicinity of the facility").

Thus, notwithstanding the existence of *some* common issues in the case, "the main issues of whether a *specific injury* to property or person was *caused*" by Defendant (and the extent of any alleged damages) will still "require *individualized* investigation, proof and determination." *Evans v. City of Johnstown*, 97 A.D.2d 1, 3 (3d Dep't 1983) (emphasis added); *see also Wojciechowski v. Republic Steel Corp.*, 67 A.D.2d 830, 830–31 (4th Dep't 1979) (affirming the dismissal of a class action alleging depreciation in the value of local homes from airborne dust because the claims required individual investigation and proof). For this reason alone, denial of class certification was required.

Predominance is a particularly important requirement in preserving the due process rights of defendants. "Due process requires

that" courts provide defendants with the "opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted). When a court glosses over individual variations in the class at the certification stage—as the trial court did here—it can lead to a trial plan that will afford the defendant no meaningful opportunity to present individualized defenses to liability for each class member. *See Wal-Mart*, 564 U.S. at 367. Class certification is not appropriate in such circumstances. *See Aprea v. Hazeltine Corp.*, 247 A.D.2d 564, 565 (2d Dep't 1998) (rejecting class certification where "issues exist as to whether and to what extent the emission caused any damage to any individual's property or their use and enjoyment thereof, and whether and to what extent the proximity of the [defendant's facility] affected the market value of individual properties").

If this Court were to affirm the certification decision made here, it would only invite class actions involving transient odors allegedly impacting the community at large. Clever plaintiffs almost always can find someone willing to manufacture a model that approximates *subjective* odor observations over such a large area without demonstrating causation. And if causation and liability issues are simply labeled "merits" determinations to be resolved later, *see*, *e.g.*, R. 27–28, 37–38, 40–41, class certification may follow almost as a matter of course.

But, as the Supreme Court of the United States has recognized, class certifications "can unfairly plac[e] pressure on the defendant to

settle even unmeritorious claims." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (internal quotation marks omitted). Such settlements in turn impose unwarranted costs on business defendants, which are then passed on to consumers in the form of higher prices. Only faithful adherence to the requirements for class certification can avoid these unintended consequences.[4]

III. Allowing plaintiffs' claims to proceed would distort the careful public-policy balance struck by permitting and zoning law.

Nearly one hundred years ago, the Supreme Court of the United States held that local governments may rely on their police power not only to abate a specific use of property but also to create and to implement comprehensive zoning plans for the general use of property. *Euclid v. Ambler Co.*, 272 U.S. 365, 395 (1926). Although subject to some limits, local communities may generally decide for themselves where to locate residential, business, and industrial areas. Each "town is free to set up various types of use zones" that are designed "to provide for the development of a balanced, cohesive community which will make efficient use of the town's available land." *Berenson v. Town of New Castle*, 38 N.Y. 102, 109 (1975). That makes sense, as "what may be appropriate

[4] *Amici* also support Defendant's position regarding numerosity and typicality, Opening Br. at 48–49, but do not duplicate those arguments here, *see* 22 NYCRR § 1250.4(f).

for one community may differ substantially from what is appropriate for another." *Id.* at 110.

Relevant here, the Town of Orangetown has enacted a comprehensive zoning plan "for the protection and promotion of the public health, safety, morals, comfort, convenience, prosperity and other aspects of general welfare." Article 1, § 1. Defendant's facility is located in a "mixed commercial-industrial corridor" zoned by the town that includes "wastewater treatment plants, composting and mulching facilities, and other manufacturing and odor-producing facilities—including Innovative Plastics, another plastics manufacturing plant." R. 979–80. Defendant must comply with the local zoning code and town ordinances governing odors.

The New York State Department of Environmental Conservation also has issued a permit that allows Defendant to operate its facility. R. 981. Defendant complies with the permit by relying on a variety of technologies—including carbon adsorption and multistage air filtration—to minimize the potential release of odors. R. 981–82. And it monitors the release of potential odors every day. R. 983.

Dissatisfied with this regulatory framework, plaintiffs ask the Court to impose its judgment as to the proper operation of the Defendant's facility. Specifically, plaintiffs ask the Court to expand the settled legal rules governing negligence and private nuisance liability, as

well as appropriate uses of the class action device, to quell their frustration with local and state regulation.

But courts should resist any attempt to distort class-action and tort law to superintend environmental policy. *Cf. Am. Elec. Power Co.*, 564 U.S. at 427. As with any policy question, an "informed assessment of competing interests is required," and courts are not well suited to strike the proper balance. *Id.* A class action suit in tort, particularly where (as explained in Part I) plaintiffs' allegations do not satisfy the fundamental requirements of negligence and private nuisance claims, is not the proper vehicle for resolving this dispute.

Agencies like the New York State Department of Environmental Conservation are "better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to make policy judgments designed to address plaintiffs' concerns about transient odors. *Far East Conference v. United States*, 342 U.S. 570, 574–75 (1952). New York law already respects those comparative competencies by limiting the role of the courts in cases involving only economic loss or alleged "private" nuisances that are in fact widespread. Straying beyond those limits, and doing so through an improperly certified class action, is contrary to public policy.

CONCLUSION

For the foregoing reasons, the Court should vacate class certification and dismiss this lawsuit.

Respectfully Submitted,

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