No. 18-472

IN THE

Supreme Court of the United States

BEHR DAYTON THERMAL PRODUCTS LLC, *ET AL.*,
Petitioners,

v.

TERRY MARTIN, *ET AL.*,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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February 2019

QUESTION PRESENTED

Whether a court may exercise its broad discretion under Federal Rule of Civil Procedure 23 to certify one or more issues for class treatment pursuant to Rules 23(b)(3) and (c)(4), where common issues predominate over individual ones for the certified issues but not for all elements of the cause of action?

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INTRODUCTION

Petitioners Behr Dayton Thermal Products, *et al.*, ("Behr") ask this Court to grant certiorari to consider an issue the lower courts already have resolved for themselves. The courts' consensus is shared by rule-making bodies and the scholarly community.

In its recent review of Federal Rule of Civil Procedure 23, the Advisory Committee on Civil Rules thoroughly studied the issue Behr raises and found that the circuits have fallen in line on the issue and no amendment or clarification is necessary. The rule-makers specifically decided not to pursue the approach Behr advocates. Their considered decision to leave the existing consensus in place contradicts Behr's claims that there is a conflict requiring this Court's attention and that the circuits' consensus view requires correction or clarification.

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." In this case, the U.S. Court of Appeals for the Sixth Circuit found that certification of issues relating to Behr's responsibility for groundwater contamination underlying respondents' properties in Dayton, Ohio, was appropriate. The court held that the class members had carried their burden of demonstrating that—in a class action limited to those issues—common issues predominate over individual ones and a class action provides a superior mechanism to resolve those issues, as required by Rule 23(b)(3).

Behr contends that the Sixth Circuit's approach to issue classes conflicts with the Fifth Circuit's, under which, Behr asserts, an issue class may be certified only if the court first determines that certification of

all elements of respondents' claims would satisfy Rule 23(b)(3). Behr's contention rests principally on a footnote in a nearly quarter-century-old Fifth Circuit decision, *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).

Behr concedes *Castano's* footnote has never been followed by any other circuit. And Behr fails to mention that much more recent Fifth Circuit decisions—including *In re Deepwater Horizon*[1]—have expressly endorsed the approach of the other circuits to Rule 23(c)(4) issue classes without mentioning *Castano*. Behr also overlooks that these developments in the case law led the Advisory Committee and its Rule 23 Subcommittee to conclude that "there is no significant need" to amend Rule 23(c)(4) because the "circuits seem to be in accord" that certifying classes limited to particular issues is appropriate even when certifying an entire action or claim might not satisfy Rule 23(b)(3).[2]

Even before the Fifth Circuit's recent case law solidified the circuits' convergence, this Court had at least three times denied requests to resolve the purported conflict between the view of the other circuits and the *Castano* footnote. Behr's attempts to conjure up a broader conflict by focusing on insubstantial semantic differences among the other circuits' articulations of the consensus approach are unconvincing, especially given that Behr

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[1] 739 F.3d 790 (5th Cir. 2014), *cert. denied sub nom. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Development, Inc.*, 135 S. Ct. 754 (2014).

[2] Rule 23 Subcomm. Report 5, in Advisory Comm. on Civ. Rules, Agenda Book, Nov. 5–6, 2015, at 91, https://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf.

acknowledges none of those circuits concurs with the approach it advocates.

Given the developments in the Fifth Circuit's case law, and the rulemakers' conclusion that the circuits' accord obviates any need to amend, correct, or clarify the rule, the absence of any need for review by this Court is apparent. There is no reason for this Court to grant review to resolve a conflict that does not exist.

STATEMENT

This is a class action on behalf of approximately 540 homeowners in the McCook Field neighborhood, "a low-income area surrounding a Superfund site" in Dayton, Ohio. Pet. App. 1a. As respondents allege, the homeowners' residential properties have been severely contaminated by known and suspected carcinogens emanating from nearby industrial facilities owned or formerly owned by petitioners. Specifically, two groundwater plumes of toxic chemical compounds have migrated into the McCook Field neighborhood from a Behr Dayton Thermal Products facility (the site of a former Chrysler manufacturing plant) and an Aramark dry cleaning facility. Toxic vapors from the plumes rise through the soil into class members' homes, reducing property values and endangering the residents. Petitioners have been aware of the contamination for decades. Remediation efforts have been inadequate to address the ongoing harm suffered by the class members.

In 2008, respondents filed suit in an Ohio state court to seek compensation for contamination-related economic injuries. Behr removed the action to the U.S. District Court for the Southern District of Ohio. Respondents moved to certify a class on the issue of petitioners' liability for certain claims asserted by the

class, or in the alternative for certification of seven specific common issues suitable for classwide determination. All of those common issues focused on aspects of petitioners' conduct and the resulting contamination rather than on matters relating to individual class members. See Pet. App. 6a–7a.[3]

The district court found that both alternatives satisfied the threshold requirements of Rule 23(a). The court nevertheless denied certification of the liability issue class because, it found, determining liability to class members would require individualized inquiries into injury-in-fact and causation that would predominate over common issues. Pet. App. 51a–53a. By contrast, the court concluded that certification of a class action to resolve the seven specific issues identified by respondents was appropriate under Rule 23(c)(4). The court determined that these issues were "common to the claims of all class members, and are capable of classwide resolution." *Id.* at 41a. Behr does not contest that finding before this Court.

The court further found that resolving these common issues on a classwide basis, with individualized determinations as to injury, causation, and damages to follow, "will ensure that property owners in the McCook Field neighborhood have an opportunity to litigate their claims" and that the issue class would "save[] time and scarce judicial resources. *Id.* at 67a.

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[3] Behr's assertion that respondents "failed to demonstrate common issues predominate over individual issues as to their cause of action," Pet. i, inaccurately suggests that respondents sought and failed to obtain certification of their causes of action as a whole. In fact, respondents' operative motion for class certification sought certification only of alternatively defined issue classes.

Both Behr and respondents sought leave to appeal under Rule 23(f). The court of appeals declined respondents' request to review the district court's refusal to certify a liability class but granted Behr's petition to consider its contention, based on the *Castano* footnote, that the district court had erred in certifying an issue class without finding that common questions of law or fact predominated over individual issues as to respondents' entire "cause of action." After briefing and argument, the court affirmed the certification order.

The Sixth Circuit recognized that the *Castano* footnote sets forth the "narrow view" of issue class certification advocated by Behr, but questioned whether the Fifth Circuit continues to adhere to that view. Pet. App. 11a. By contrast, the court pointed out, other circuits have agreed that certification of an issue class does not require a finding that common issues predominate for the cause of action as a whole. The court cited decisions of the Second, Third, Fourth, Seventh, Eighth, and Ninth Circuits that rest the determination whether to certify an issue class on whether the issue class itself satisfies the Rule 23(b)(3) requirements of predominance and superiority, and apply a "functional" analysis to consider whether an issue class is a superior method of adjudicating a case. *Id.* at 10a–11a.

The court declined to adopt the *Castano* footnote's narrow view of Rule 23(c)(4) and instead, following other circuits that had addressed the propriety of issue classes, adopted an approach that "respects each provision's contribution to class determinations by maintaining Rule 23(b)(3)'s rigor without rendering Rule 23(c)(4) superfluous." *Id.* at 12a. That consensus approach, the court explained, "flows naturally from

Rule 23's text, which provides for issue classing '[w]hen appropriate.'" *Id.* At the same time, that approach "ensures that courts will not rely on issue certification where there exist only minor or insignificant common questions, but instead where the common questions render issue certification the superior method of resolution." *Id.* at 13a.

Applying the consensus approach, the court determined that common issues predominate in the issue class certified by the district court. It held that all of the certified issues are "capable of resolution with generalized, class-wide proof," and that the answers generated to these common questions will "apply in the same way to each property owner within the plumes." *Id.* at 15a. Behr, moreover, had not "identified any individualized inquiries that outweigh the common questions prevalent *within each issue*." *Id.* at 16a. Citing this Court's recent ruling in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), the court found certification of these common issues appropriate "even if 'important matters' such as actual injury, causation, and damages will have to be tried separately." Pet. App. 16a.

The court further concluded that the issue class satisfied Rule 23(b)(3)'s requirement of superiority. Acknowledging that the issue class would not resolve the entire case, the court pointed out that "resolving the certified issues will go a long way toward doing so, and this is the most efficient way of resolving the seven issues that the district court has certified." *Id.* at 19a. In addition, the court pointed out that "the record indicates that the [class members'] properties are in a low-income neighborhood, meaning that class members might not otherwise be able to pursue their claims." *Id.* at 20a. "Resolving the issue in one fell

swoop," the court concluded, "would conserve the resources of both the court and the parties" and "materially advance the litigation." *Id*.

The court accordingly held: "Because the issue classes satisfy predominance and superiority, the district court did not abuse its discretion by certifying them under Rule 23(c)(4)." *Id*. The court returned the case to the district court "with the expectation that it be moved expeditiously toward resolution." *Id*. at 22a.

REASONS FOR DENYING THE WRIT

I. The circuits are not currently split on whether "issue classes" can be certified under Rule 23(c)(4) when common issues do not predominate as to an entire cause of action.

Behr's claim of an "entrenched" circuit split, Pet. 2, rests on its assertion that a single court of appeals, the Fifth Circuit, "has consistently adhered … over the last two decades," Pet. 15, to the view stated in a footnote in 1996 that an entire "cause of action must satisfy the requirements of Rule 23(b)(3) before individual issues can be certified under Rule 23(c)(4)." Pet. 14 (citing *Castano*, 84 F.3d at 745 n.21). This Court has repeatedly denied certiorari to resolve the claimed conflict with the *Castano* footnote. Developments since the Court's most recent denial, in 2012—including the Advisory Committee's thorough examination of the issue—confirm that any conflict has abated.

This case marks at least the fourth time in the last fifteen years that class-action defendants have asked the Court to grant certiorari to resolve the claimed circuit conflict over Rule 23(c)(4). *See Healthplan Servs., Inc. v. Gunnells*, No. 03-1282 (filed March 11, 2004);

Pella Corp. v. Saltzman, No. 10-355 (filed Sept. 13, 2010); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McReynolds*, No. 12-113 (filed July 25, 2012).

As here, the petitioners in each previous case asserted that the circuits were irreconcilably split over whether Rule 23(c)(4) allows a court to certify an issue class without finding that the action would satisfy Rule 23(b)(3) if the entire claim were certified.[4] The questions presented in both the *McReynolds* and *Gunnells* petitions, like the question Behr poses here, explicitly asked the Court to determine whether certification of an issue class under Rule 23(c)(4) required a finding that the claims as a whole satisfy Rule 23(b)(3)'s predominance requirement.[5] This Court denied certiorari in each case.[6]

The Court's 2004 denial of certiorari in *Gunnells* came in the face of the Fourth Circuit's express acknowledgment that a circuit conflict then existed. *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 444

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[4] *See McReynolds*, Pet. 22 ("The Seventh Circuit's Use Of Rule 23(c)(4) To Manufacture A Rule 23(b) Issue Class Exacerbates A Circuit Split On A Recurring Question"); *id.* ("An Acknowledged Three-Way Circuit Conflict Exists On The Question Whether Rule 23(c)(4) Authorizes Certification Of Isolated Issues Extracted From Claims That Do Not Satisfy Rule 23(b)"); *Pella*, Pet. 17 ("By endorsing such non-dispositive 'issue' classes under Rule 23(b)(3), the Seventh Circuit gutted the 'predominance' requirement and deepened a circuit conflict.") (citing *Castano*, 84 F.3d at 745 n.); *Gunnells* Pet., 2004 WL 530983, at *17 ("The Fourth Circuit's decision vividly illustrates the irreconcilable approaches utilized by the Fourth, Fifth and Ninth Circuits with regard to this issue. The Fourth Circuit's analysis creates a direct conflict with the Fifth Circuit.").

[5] *McReynolds*, Pet. i; *Gunnells*, Pet. i.

[6] *McReynolds*, 568 U.S. 887 (2012); *Pella*, 562 U.S. 1178 (2011); *Gunnells*, 542 U.S. 915 (2004).

(4th Cir. 2003). By the time of the *McReynolds* petition in 2012, courts and commentators had raised significant doubts that any conflict continued to exist. As the *McReynolds* respondents pointed out, a then-recent Fifth Circuit decision had recognized that Rule 23(c)(4) gives district courts flexibility to permit issue classes even where a class's entire cause of action may not satisfy Rule 23(b)(3). *McReynolds*, Resp. Supp. Br. 1–3 (citing *In re Rodriguez*, 695 F.3d 360 (5th Cir. 2012)).

As explained in detail below, events since 2012 confirm the absence of a circuit conflict. *First*, the Fifth Circuit's current case law shows that it does not "adhere" to the *Castano* footnote, let alone "consistently." Instead, it applies a practical approach to Rule 23(c)(4) in line with that of other circuits.

Second, case law of other circuits remains consistent notwithstanding Behr's attempt to characterize different ways of articulating the same principles as a "conflict."

Third, the bodies responsible for proposing amendments to the Federal Rules of Civil Procedure—the Judicial Conference Committee on Rules of Practice and Procedure (the "Standing Committee") and its Advisory Committee on Civil Rules—concluded, without dissent, that Rule 23(c)(4) does not require clarification, correction, or amendment. The committees tasked with recommending revisions to the rules to ensure their consistent application saw no disagreement among the courts warranting any changes. They declined a specific suggestion to amend the rule to incorporate the cause-of-action-wide predominance requirement Behr advocates. This Court should not intervene to revisit a conclusion the federal judiciary

reached only a few years ago through an exhaustive rulemaking process

Fourth, there is wide agreement among scholars with the rulemakers' determination that any circuit conflict has dissipated.

In sum, the decision below does not "deepen[] an entrenched conflict among the courts of appeals." Pet. 2. Instead, it further cements a solid consensus among the circuits. This Court's intervention is not warranted.

A. The Fifth Circuit does not "consistently adhere" to a construction of Rule 23(c)(4) at odds with that of other circuits.

Behr's assertions that the Fifth Circuit has "consistently adhered" to the *Castano* footnote "over the last two decades," Pet. 15, and that the resulting "conflict among the courts of appeals has been recognized both by courts that have taken sides in the conflict and by those that have not yet done so," Pet. 10, rely on case law frozen in time at least a decade ago. Behr cites only three appellate decisions to support its assertion that the Fifth Circuit has "consistently" followed the *Castano* footnote: an nonprecedential, unpublished opinion from 2005, an opinion from 2001 that was withdrawn the next year, and a decision from 1998.[7]

Likewise, the four decisions Behr cites as recognizing the existence of a conflict do not reflect the present

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[7] *See Corley v. Orangefield Indep. School Dist.*, 152 F. Appx. 350, 355 (5th Cir. 2005); *Smith v. Texaco, Inc.*, 263 F.3d 394, 409 (5th Cir. 2001), *withdrawn & app. dism'd*, 281 F.3d 477 (5th Cir. 2002); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417 (5th Cir. 1998).

state of the law in the Fifth Circuit: They date back a decade or more, to 2009, 2008, 2006, and 2003.[8] As the Sixth Circuit noted below, "subsequent caselaw from within the Fifth Circuit itself indicates that any potency the narrow view once held there has dwindled." Pet. 11a. That assessment was correct, even understated.

The *Castano* footnote itself was dicta, as the court's holding in *Castano* rested on the ground that the district court had not properly determined that common issues predominated or that class treatment would be superior even as to the matters certified by the district court. *See* 84 F.3d at 740–51. The 1998 opinion in *Allison* (the only other still-precedential Fifth Circuit decision Behr cites), cited the *Castano* footnote in rejecting a rule of "automatic certification in every case where there is a common issue." 151 F.3d at 422. The court did not address the approach later adopted by other circuits, including the court below, which by no means provides for "automatic certification" and often results in denial of issue class certification.

More recently, the Fifth Circuit has cited *Castano* for other propositions but has not relied on it to reject an issue class for well over a decade. And Behr does not even mention, let alone try to distinguish, the Fifth Circuit's current case law—in particular, its 2012 decision in *Rodriguez* (which was highlighted in the supplemental briefing preceding this Court's denial of certiorari in *McReynolds*), and that court's 2014

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[8] *See Hohider v. UPS, Inc.*, 574 F.3d 169, 200 n.25 (3d Cir. 2009); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008); *In re Nassau County Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006); *Gunnells*, 348 F.3d at 444.

decision in *Deepwater Horizon*, which explicitly endorsed decisions of circuits on the other side of the supposed conflict.

In *Rodriguez*, the Fifth Circuit affirmed the "narrow class certification" of a Rule 23(b)(2) class on the issue of a class's entitlement to injunctive relief even though the class's damages claims arising from the same causes of action did not satisfy Rule 23(b)(3)'s predominance requirement. 695 F.3d at 363. The court pointed out that "Rule 23(c)(4) explicitly recognizes the flexibility that courts need in class certification by allowing certification 'with respect to particular issues' and division of the class into subclasses." *Id*. at 369 n.13 (quoting *Bolin v. Sears, Roebuck & Co*., 231 F.3d 970, 976 (5th Cir. 2000)). The court's focus on whether the certified issue satisfied the requirements of Rule 23(b)—as opposed to whether the cause of action as a whole satisfied Rule 23(b)—is incompatible with Behr's account of the law of the Fifth Circuit.

Deepwater Horizon shows even more clearly that the Fifth Circuit does not adhere to the position Behr ascribes to it. *Deepwater Horizon* affirmed certification of a class as consistent with Rule 23(c)(4) where the case presented common issues that could be resolved on a classwide basis even though the class members' entire causes of action could not be certified under Rule 23(b)(3). *See* 739 F.3d at 806, 815–16.

Deepwater Horizon involved claims of property damage and economic loss by tens of thousands of businesses and private citizens against British Petroleum ("BP") related to the massive explosion and oil spill in the Gulf of Mexico that began on April 20, 2010. Within five weeks, "at least 70 cases ha[d] been filed in various state and federal courts; and at least

59 of these [we]re styled as class actions." *Cajun Offshore Charters, LLC v. BP Prods. N. Am., Inc.*, 2010 WL 2160292, at *1, n.1 (E.D. La. May 25, 2010). The Judicial Panel on Multidistrict Litigation transferred the federal actions to the District Court for the Eastern District of Louisiana. *See Deepwater Horizon*, 739 F.3d at 796.

"[I]t became obvious" to the transferee court "that nearly all the different types of claims arising out of the Deepwater Horizon casualty share common fact issues requiring essentially the same discovery with respect to the liability phase of the litigation." *In re Oil Spill by the Oil Rig "Deepwater Horizon"*, 2011 WL 1464908, at *1 (E.D. La. Apr. 15, 2011). The district court therefore "anticipated that 'issues relating to damages' could and would be 'severed and tried separately' from other issues relating to liability." *Deepwater Horizon*, 739 F.3d at 806. Ultimately, the parties reached a class settlement that resolved certain liability issues and established a damages claims mechanism, and the district court certified a settlement class. *Id*. at 796.

Over objections that the certification did not comport with Rule 23(b)(3) because common issues did not predominate, the Fifth Circuit held that certification under such circumstances was "in accordance with … Rule 23(c)(4)." *Id.* at 806; *see also id.* at 815–16. Endorsing the approach used by other circuits, the Fifth Circuit stated that limiting a class action to "'determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed.'" *Id*. at 806 n.66 (quoting *Butler v. Sears, Roebuck &*

Co., 727 F.3d 796, 800 (7th Cir. 2013) (Posner, J.), *cert. denied*, 571 U.S. 1196 (2014)).

Deepwater Horizon also approvingly cited decisions of "many circuits" that had "divided and tried" "common and individual issues" "by means of … Rule 23(c)(4), which permits district courts to limit class treatment to 'particular issues' and reserve other issues for individual determination." *Id.* at 816 (citing *Butler*, 727 F.3d at 800; *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013), *cert. denied*, 571 U.S. 1196 (2014); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013)).

Deepwater Horizon never mentioned the *Castano* footnote. However, the Fifth Circuit's approach in *Deepwater Horizon*, under which the predominance analysis turned on the courts' Rule 23(c)(4) authority to limit certification to particular issues, is incompatible with the *Castano* footnote's inflexible reading of the rule. In addition, as *Deepwater Horizon* noted, its application of Rule 23(c)(4) was consistent with several of the Fifth Circuit's other decisions both before and after *Castano*: "This court has previously 'approved mass tort or mass accident class actions when the district court was able to rely on a manageable trial plan—including bifurcation' of 'class-wide liability issues' and issues of individual damages." *Id.* at 807 n.65 (citations omitted). For example, the court cited *Madison v. Chalmette Refining, L.L.C.*, 637 F.3d 551, 556 (5th Cir. 2011), for the proposition that "predominance may be ensured in a mass accident case when a district court performs a sufficiently 'rigorous analysis' of the means by which common and individual issues will be divided and tried," including

through use of Rule 23(c)(4). *Deepwater Horizon*, 739 F.3d at 816.[9]

Tellingly, *Deepwater Horizon* repeatedly stated that its ruling comported with other circuits' use of Rule 23(c)(4) issue classes to divide common issues from ones requiring individual treatment. *See id.* at 806 & n.66, 815–16 & nn.104 & 109. The court especially relied on the Seventh Circuit's opinion in *Butler*, which exemplifies that court's approach to issue classes—contradicting Behr's insistence that the Seventh Circuit's approach conflicts with the Fifth Circuit's. Pet. 9–10. *Deepwater Horizon* also approvingly cited the Sixth Circuit's decision in *Whirlpool*, which presaged and was relied on by the decision below, see Pet. App. 19a, as well as the Ninth Circuit's decision in *Leyva*.

The Fifth Circuit's endorsement of other circuits' decisions refutes Behr's claim of an ongoing circuit split. Circuits that approvingly cite each other's decisions on a point are not "deep[ly]" divided. Pet. 2.[10]

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[9] Other Fifth Circuit decisions taking a similar approach include *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 848 (5th Cir. 2012); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 626–29 (5th Cir. 1999), *cert. denied*, 528 U.S. 1159 (2000); *Robertson v. Monsanto Co.*, 287 F. Appx. 354, 362 (5th Cir. 2008).

[10] District courts in the Fifth Circuit have followed *Deepwater Horizon*'s lead: "It is well-established in this Circuit that [district courts] may divide hearings regarding damages into phases, particularly in complex cases where, as here, such a division would serve judicial efficiency by separating common issues from individual ones. *See*, *e.g.*, *In re Deepwater Horizon … .*" *In re Chinese-Manufactured Drywall Products Liab. Litig.*, 2017 WL 1421627, at *15 (E.D. La. Apr. 21, 2017); s*ee also Burns v. Chesapeake Energy, Inc.*, 2018 WL 4691616, at *6 (W.D. Tex. Sept. 28, 2018).

B. Semantic variations in the standards the circuits apply to issue classes do not constitute a circuit split.

Beyond its outdated depiction of Fifth Circuit case law, Behr seeks to bolster its claim of conflict by asserting that the circuits that allow issue classes without requiring a claim-wide showing of predominance are irreconcilably divided over the appropriate standards for determining whether an issue class should be certified on the facts of a particular case. This supposed secondary conflict (also claimed in the *McReynolds* petition seven years ago) is illusory.

Behr posits that the Second and Ninth Circuits permit certification of an issue class when doing so would "materially advance" resolution of an action, while the Third and Seventh Circuits take a "functional approach" that considers a "wide range of factors," Pet. 13, to determine whether an issue class will contribute to the fair and efficient resolution of the case.

On its face, Behr's assertion does not describe a conflict, but merely a variation in the way courts have expressed the same inquiry into whether an issue class is a superior means of resolving a case. Indeed, Behr acknowledges the "functional approach" it ascribes to the Third Circuit is derived from the American Law Institute's *Principles of the Law of Aggregate Litigation*. Pet. 12. And *Principles* § 2.02 recommends that a court should authorize an issue class if doing so would "materially advance" the litigation—the very standard that Behr contends *conflicts* with the Third and Seventh Circuits' "functional approach." As Behr also acknowledges, courts that have adopted what it labels the "broad" and more permissive variant have,

under the rubric of "material advancement," rigorously considered multiple factors and declined issue class treatment where those considerations suggest it would not contribute to the fair and efficient resolution of a case. *See*, *e.g.*, *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008). In short, the "functional approach" and the "material advancement approach" mirror each other.

Behr's failure to cite any cases that would have come out differently under the two supposedly different tests confirms that the semantic differences it describes do not reflect a conflict. This case is no exception: Behr concedes that the Sixth Circuit's "'functional, superiority-like analysis'" is consistent with the analysis of the Third and Seventh Circuits. Pet. 13–14. Behr also acknowledges that the Sixth Circuit found that certification would "materially advance the litigation," consistent with what Behr calls the Second and Ninth Circuit test. Pet. 14. Behr complains that the Sixth Circuit did not do a rigorous enough analysis of material advancement on the facts here, but such a fact-bound criticism falls far short of establishing that this case actually turns on a choice between conflicting legal standards.[11]

C. The Advisory Committee and its Rule 23 Subcommittee determined there is no circuit conflict over Rule 23(c)(4).

In 2011—before the Fifth Circuit issued its decisions in *Rodriguez* (2012) and *Deepwater Horizon*

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[11] Behr is also flatly wrong in saying the Sixth Circuit erred in finding material advancement because it "nowhere considered the individual issues regarding causation and damages that would require individual adjudication." Pet. 14. The court expressly addressed those issues. *See* Pet. App. 15a–19a.

(2014)—the Advisory Committee on Civil Rules created a special subcommittee to consider whether Rule 23 required updating in light of "the development of a body of case law on class action practice."[12] Together, the Committee and its Rule 23 Subcommittee devoted "more than five years of study and consideration" to Rule 23, leading to amendments adopted by this Court in 2018.[13] By the end of that study—after the decisions in *Rodriguez* and *Deepwater Horizon*—the rulemakers had considered and rejected suggestions that Rule 23(c)(4) required amendment or that the Advisory Committee Notes required correction or clarification. The Committee ultimately concluded that "[d]issonance in the courts has subsided" regarding issue classes and "[t]here seems little need to undertake work to clarify the law."[14] Furthermore, the Committee cautioned that amending Rule 23(c)(4) "might well create new complications."[15]

The Rule 23 Subcommittee began considering whether to amend Rule 23(c)(4) in 2014. That August, a group of corporate counsel and defense bar practitioners submitted a paper to the rulemakers asserting that there was a "split among the circuits" over Rule 23(c)(4) that should be resolved by amending the rule to incorporate the *Castano* footnote's approach.[16] At

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[12] Comm. on Rules of Practice and Procedure, Minutes, June 12–13, 2017, at 27, https://www.uscourts.gov/file/24103/download.

[13] *Id.*

[14] Advisory Comm. on Civ. Rules, Minutes, Nov. 5, 2015, at 23, https://www.uscourts.gov/sites/default/files/2015-11-05-minutes_civil_rules_meeting_final_0.pdf.

[15] *Id.*

[16] Lawyers for Civil Justice, Repairing the Disconnect Between Class Actions and Class Members: Why Rules Governing

the Advisory Committee's meeting in October 2014, the Subcommittee reported that the "point deserves further investigation," but noted that "disagreements among the circuits on the interpretation of Rule 23(c)(4) may be on the way to a resolution that will forestall any role for rule amendments."[17]

Thereafter, in February 2015, the Subcommittee discussed possible approaches to amending Rule 23(c)(4), including one incorporating the approach of the *Castano* footnote. At the same time, however, the Subcommittee questioned the need for any rulemaking on the subject because panels of the Fifth Circuit had recently "seemed more receptive to issues class treatment in some cases," so that "if one reason for adopting this approach is to reconcile or resolve a circuit split, that reason may be disappearing."[18]

The Subcommittee's April 2015 report to the Advisory Committee elaborated on this point, noting that although "there has seemed to be a split in the circuits," "recent reports suggest that all the circuits are coming into relative agreement that in appropriate cases Rule 23(c)(4) can be used even though full Rule

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"No-Injury" Cases, Certification Standards for Issue Classes, and Notice Need Reform (Aug. 13, 2014), http://www.uscourts.gov/file/17648/download.

[17] Hon. David G. Campbell, Memorandum to Hon. Jeffrey S. Sutton, Dec. 2, 2014, at 10, https://www.uscourts.gov/sites/default/files/fr_import/CV12-2014.pdf.

[18] Rule 23 Subcomm., Notes of Conference Call, Feb. 23, 2015, at 10, in Advisory Comm. on Civ. Rules, Agenda Book, April 9–10, 2015, at 310, https://www.uscourts.gov/sites/default/files/fr_import/CV2015-04.pdf.

23(b)(3) certification is not possible due to the predominance requirement."[19]

At the Advisory Committee's April 2015 meeting, the Committee noted that there were competing "views" as to whether "an issue class can be certified only if common issues predominate in the claims considered as a whole" or whether "predominance is required only as to the issues certified for class treatment."[20] Pointedly, however, the Committee observed that there are "signs that the courts may be converging on the view that predominance is required only as to the issues."[21]

Thereafter, the Subcommittee gave no further consideration to amendments that would embody the approach of the *Castano* footnote but still continued to consider whether Rule 23 should be amended to clarify that a finding of predominance as to an entire claim is not a prerequisite to issue class certification under Rule 23(c)(4). By July 2015, however, the Subcommittee doubted whether such an amendment was necessary because "[i]t was acknowledged that the seeming split in the courts of appeals on the availability of (c)(4) certification without satisfying (b)(3) had *largely*

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[19] Rule 23 Subcomm. Report 39, in Advisory Comm. on Civ. Rules, Agenda Book, April 9–10, 2015, at 281 (emphasis added), https://www.uscourts.gov/sites/default/files/fr_import/CV2015-04.pdf.

[20] Advisory Comm. on Civ. Rules, Minutes, April 9, 2015, at 40, https://www.uscourts.gov/sites/default/files/cv04-2015-min_0.pdf.

[21] *Id.* at 41.

disappeared," and "the Fifth Circuit has largely *fallen in line* with the other circuits."[22]

In September 2015, having already received extensive written submissions from a wide range of individuals and groups concerning the scope of possible changes to Rule 23,[23] the Subcommittee convened a "mini-conference" on Rule 23 attended by members of the Subcommittee, the judges chairing the Advisory and Standing Committees, other judges, academics, and representatives of diverse interest groups. The Subcommittee's introductory memorandum for the mini-conference contained sketches of possible changes intended to "confirm" that "[s]ince its amendment in 1966, Rule 23(c)(4) has recognized [the] possibility" that "in actions brought under Rule 23(b)(3), there are cases in which certification to achieve resolution of common issues would be appropriate even if certification with regard to all issues involved in the action would not."[24]

Significantly, however, the Subcommittee's memorandum also noted that "[a]n overarching issue … is whether any of these possible rule changes is really needed; if the courts are finding sufficient flexibility in the rule as presently written to make effective use

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[22] Rule 23 Subcomm., Notes of Conference Call, July 15, 2015, at 8, in Advisory Comm. on Civ. Rules, Agenda Book, Nov. 5–6, 2015 (emphasis added), at 248, https://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf.

[23] *See* https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/rules-suggestions.

[24] Rule 23 Subcomm., Introductory Memorandum for Mini-Conference on Rule 23 Issues, Sept. 11, 2015, at 40, in Advisory Comm. on Civ. Rules, Agenda Book, Nov. 5–6, 2015, at 226, https://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf.

of issues classes, it may be that a rule change is not indicated."[25] The proceedings at the mini-conference confirmed the latter view: "No voices were raised to support moving forward on the possible revisions to (b)(3) or (c)(4)."[26]

Accordingly, when the Subcommittee met after the mini-conference it decided not to recommend amendments addressing issue classes:

> The consensus was that the question of amending either Rule 23(b)(3) or 23(c)(4) to clarify treatment of issue classes is not ripe for action, and this issue should be dropped from the Subcommittee's agenda for the present. … Moreover, recent decisions and statements by the Fifth Circuit indicate that there is no longer a serious circuit conflict problem on this subject. Under these circumstances, it does not seem that adopting rule changes like the ones in the sketches would actually make a difference.[27]

Based on this conclusion, the Subcommittee recommended to the Advisory Committee that the subject of issue classes "should be taken off the agenda for the

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[25] *Id*. at 39.

[26] Minutes of Mini-Conference on Class Actions, Sept. 11, 2015, at 21, in Advisory Comm. on Civ. Rules, Agenda Book, Nov. 5–6, 2015, at 183, https://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf.

[27] Rule 23 Subcomm., Meeting Minutes, Sept. 11, 2015, at 1, in Advisory Comm. on Civ. Rules, Agenda Book, Nov. 5–6, 2015, at 151, https://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf.

present Rule 23 reform effort."[28] As the Subcommittee explained:

> For a time it appeared that there was a significant conflict among the circuits about whether [Rules 23(b)(3) and 23(c)(4)] could both be effectively employed under the current rule. But it is increasingly clear that the dissonance in the courts has subsided.[29]

Because "[t]he various circuits seem to be in accord about the propriety of such treatment '[w]hen appropriate,' as Rule 23(c)(4) now says,"[30] "[t]he Subcommittee eventually concluded there was no significant need for rule amendments to deal with issue class issues, and that there were notable risks of adverse consequences" to further elaboration of the rule.[31]

At the Advisory Committee's November 2015 meeting, the Rule 23 Subcommittee's chair, Judge Robert M. Dow, Jr., explained that the Rule 23 Subcommittee had taken up the subject of issue classes because of a "perceived split between the Fifth Circuit and other Circuits," but had concluded that "[m]ore recent Fifth Circuit decisions … seem to belie the initial impression"; thus, "[t]here seems little need to undertake work to clarify the law," "[a]nd any attempt

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[28] Rule 23 Subcomm. Report 4, in Advisory Comm. on Civ. Rules, Agenda Book, Nov. 5–6, 2015, at 90, https://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf.

[29] *Id.* at 47.

[30] *Id.* at 5.

[31] *Id.* at 48.

might well create new complications."[32] The full Advisory Committee "agreed with the Subcommittee recommendation that further work on these questions be suspended."[33]

The Advisory Committee, in turn, reported to the Standing Committee its conclusion that, although "[f]or a time it appeared that there was a conflict among the circuits" about issue classes, "it is increasingly clear that the *dissonance in the courts has subsided*."[34] Thus, "there was *no significant need for rule amendments* to deal with issue class issues, and … there were notable risks of adverse consequences" in any changes to the existing rules.[35] The Advisory Committee's Chair, Judge John D. Bates, presented these conclusions at the Standing Committee's January 2016 meeting, where he explained that consideration of rules changes regarding issue classes had been placed "on hold" because "whatever disagreement among the circuits there may have been on this issue at one time, it has since subsided."[36]

Thereafter, the Advisory Committee's deliberations on Rule 23 were limited to other issues and eventually resulted in a set of amendments that were re-

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[32] Advisory Comm. on Civ. Rules, Minutes, Nov. 5, 2015, at 23, https://www.uscourts.gov/sites/default/files/2015-11-05-minutes_civil_rules_meeting_final_0.pdf.

[33] *Id.*

[34] Advisory Comm. on Civ. Rules, Report to the Standing Committee, Dec. 11, 2015, at 27 (emphasis added), https://www.uscourts.gov/sites/default/files/2015-12-11-cv_rules_committee_report_0.pdf.

[35] *Id.* (emphasis added).

[36] Comm. on Rules of Practice and Procedure, Minutes, Jan 7, 2016, at 11–12, https://www.uscourts.gov/file/20044/download.

leased for public comment in August 2016, approvingly reported by the Advisory Committee, and unanimously recommended for adoption by the Standing Committee in June 2017. In endorsing the proposed amendments, the Standing Committee expressly noted that "[a]fter extensive consideration and study, the [Rule 23] Subcommittee narrowed the list of issues to be addressed" and "declined to address … issue classes."[37]

The Judicial Conference approved the Rule 23 amendments in September 2017 and this Court adopted them without dissent in April 2018.[38] Congress did not act to alter the Rule 23 amendments, and they went into effect on December 1, 2018.

All told, the deliberations of the Advisory Committee and Rule 23 Subcommittee involved "nearly two dozen meetings and bar conferences and … a mini-conference in September 2015 to gather additional feedback from a variety of stakeholders,"[39] as well as extensive written submissions from groups and individuals representing a wide range of interests. That

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[37] Comm. on Rules of Practice and Procedure, Minutes, June 12–13, 2017, at 27–28, https://www.uscourts.gov/file/24103/download.

[38] Judicial Conf. of the United States, Report of the Proceedings of the Judicial Conference of the United States, September 12, 2017, at 23, https://www.uscourts.gov/sites/default/files/17-sep_final_0.pdf; Supreme Court of the United States, Order Amending the Federal Rules of Civil Procedure, Rules 5, 23, 62, and 65.1, at 6–12, Apr. 26, 2018, https://www.supremecourt.gov/orders/courtorders/frcv18_5924.pdf.

[39] Comm. on Rules of Practice and Procedure, Minutes, June 12–13, 2017, at 27, https://www.uscourts.gov/file/24103/download.

the rulemaking bodies, after years of study and deliberation, made the considered judgment that there was no split requiring amendment of Rule 23(c)(4)—or even confusion requiring its clarification—and declined to pursue an amendment that would move the rule in the direction advocated by Behr here is strong reason for this Court not to take up the issue of interpreting the rule.

Should the courts, in the face of the rulemakers' recognition of the current convergence of views, unexpectedly issue decisions indicating a clear and outcome-determinative disagreement, there will be ample opportunity for the rulemakers to consider some clarification or, failing that, for this Court to intervene. Until then, proper regard for the deliberative process established to determine whether the rules require clarification or alteration counsels against review of the issue by this Court.

D. Recent scholarship confirms that the Fifth Circuit's decisions have abated any conflict.

Recent scholarship by academic authorities on class action litigation underscores the rulemakers' conclusion that there is congruence among the circuits on the interpretation of Rule 23(c)(4). Perhaps most notably, Lewis & Clark Law School Professor (and former Dean) Robert H. Klonoff—who was twice appointed as the academic member of the Advisory Committee on Civil Rules by Chief Justice Roberts, served as associate reporter for the ALI's *Principles of the Law of Aggregate Litigation*, and is the author of a leading casebook, *Class Actions and Other Multi-Party Litigation: Cases and Materials* (4th ed. 2017)—recently observed that "[a]lthough the circuits were at

one time in conflict, there now appears to be *universal agreement* that the predominance requirement of Rule 23(b)(3) does not apply when certification is only for an issues class." Alon Klement & Robert Klonoff, *Class Actions in the United States and Israel*, 19 Theoretical Inquiries L. 151, 161 (2018) (emphasis added).

University of Georgia Law Professor Elizabeth Chamblee Burch, co-author of *The Law of Class Actions and Other Aggregate Litigation* (2d ed. 2013), agrees that the Fifth Circuit has fallen into line with the other circuits. In a 2015 article, she pointed out that the Fifth Circuit "recently changed course [from the *Castano* footnote] in *In re Deepwater Horizon*," thus contributing to an "emerging consensus." Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 Va. L. Rev. 1855, 1892 (2015).

Similarly, University of South Carolina Law School Professor Joseph A. Seiner observed that "[t]he Fifth Circuit ha[d] [once] been more restrictive" than the other circuits on issue class certification but that the circuit's "more recent decisions have relaxed this approach." Joseph A. Seiner, *The Issue Class*, 56 B.C. L. Rev. 121, 134 (2015) (citing *Deepwater Horizon* and *In re Rodriguez*).

NYU School of Law Professor Samuel Issacharoff, Reporter of the ALI's *Principles of the Law of Aggregate Litigation*, and former Advisory Committee member Elizabeth Cabraser have also recognized that "[t]he world has moved since" *Castano*. Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. Rev. 846, 871 (2017). As they wrote,

> by now all federal circuits, including the Fifth Circuit, have endorsed the class treatment of specific issues (either by explicitly invoking Rule 23(c)(4), or approving the classwide adjudication of an identified liability issue as a case management technique) in a variety of contexts.

Id.

II. The courts of appeals have correctly construed Rule 23(c)(4).

Behr contends that certiorari "is also needed because the court of appeals' approach to the relationship between Rule 23(b)(3) and (c)(4) is incorrect." Pet. 16. This Court rarely grants certiorari based on such claims of error. *See* S. Ct. R. 10. Given that the circuits are not split, Behr really is arguing that the approach of *all* of the courts of appeals is erroneous. Granting certiorari in such circumstances is rarer still.

Behr's argument is without merit in any event because the courts of appeals' approach to issue classes is firmly grounded in Rule 23. This Court has repeatedly stated that the starting point for construing a statute, or a rule, is the meaning of its language. *Marx v. Gen'l Revenue Corp.*, 568 U.S. 371, 376 (2013). A court's interpretation must begin with the text, viewed in context of a law's "structure, history, and purpose." *Abramski v. United States*, 573 U.S. 169, 179 (2014). All these factors support the decision below.

Leading decisions upholding the use of issue classes—the Fourth Circuit's decision in *Gunnells* and the Second Circuit's in *Nassau County*—carefully discussed Rule 23(c)(4)'s text, structure, history, and purpose. By contrast, the *Castano* footnote, which limned its view of Rule 23(c)(4) in a skeletal 201 words, did

not reference the text, structure, history or purpose of Rule 23. Tellingly, Behr neither addresses the thorough analysis of *Gunnells* and *Nassau County* nor defends the Castano footnote's sparse reasoning.

The starting point in construing Rule 23(c)(4) is to discern "the ordinary meaning of [its] language," *Marx*, 568 U.S. at 376, and "enforce[]" the language's meaning if it is "plain," *U.S. Nat'l Bank of Ore. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993). As *Gunnells* explained, Rule 23(c)(4)

> specifically dictates that "[w]hen appropriate" a class action may be "maintained" as to "particular issues" and, after that is done, "the provisions of this rule," such as the predominance requirement of (b)(3), "shall then ... be construed and applied."

348 F.3d at 439 (citations omitted). *Accord Nassau County*, 461 F.3d at 226 (citing *Gunnells*, 348 F.3d at 439).

This Court admonishes lower courts to "seek guidance from legislative history and from the Rules' overall structure" if a rule's "text is ambiguous." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508–09 (1989). Although *Gunnells* and *Nassau County* determined that Rule 23(c)(4)'s text is unambiguous, both courts took the extra step of examining Rule 23(c)(4)'s role in Rule 23's overall structure and assessing Rules 23(b)(3) and 23(c)(4) in light of their structural relationship and legislative history. Both courts concluded that the rules' structure and history not only comport with Rule 23(c)(4)'s plain text but also independently and adequately support the conclusion that issue class certifications like the one approved below advance the rules' purposes.

According to the Second Circuit, Rule 23(c)(4)'s "plain language and structure establish" that "a court must first identify the issues potentially appropriate for certification 'and ... then' apply the other provisions of the rule, *i.e.*, subsection (b)(3) and its predominance analysis," and that "the Advisory Committee Notes confirm this understanding." *Nassau County*, 461 F.3d at 226 (citing Fed. R. Civ. P. 23(c)(4) Advisory Committee note to 1966 amendment). The Fourth Circuit agreed. *Gunnells*, 348 F.3d at 439 & n.14.

Moreover, "one of the most basic interpretive canons" stresses that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *Corley v. United States*, 556 U.S. 303, 314 (2009) (citations and quotation marks omitted); *see also Marx*, 568 U.S. at 386. The canon against surplusage reinforces the conclusion that Rule 23(c)(4) cannot be restricted to circumstances where an action would satisfy Rule 23(b)(3)'s criteria without regard to the limitation of certification to particular issues. As *Gunnells* explained, such a restriction would effectively "require a court considering the manageability of a class action—a requirement for predominance under Rule 23(b)(3)(D)—to pretend that subsection (c)(4)—a provision specifically included to make a class action more manageable—does not exist until after the manageability determination is made." *Id*. at 439. Thus, under the reading of the rule advocated by Behr, "a court could only use subsection (c)(4) to manage cases that the court had already determined would be manageable without consideration of subsection (c)(4)." *Id*. This reading, *Gunnells* concluded, would leave Rule 23(c)(4) "without any practical application, thereby rendering it superfluous." *Id*.

The careful analysis of Rule 23(c)(4)'s text, structure, and history underlying the reading of the rule applied below explains why pre-eminent treatises on class actions, federal practice, and complex litigation "champion [Rule 23(c)(4)] as a class action device of particular benefit for class claims that cannot survive the rigors of Rule 23(b)(3)'s" standards for certifying the entire case. Laura J. Hines, *The Unruly Class Action*, 82 Geo. Wash. L. Rev. 718, 721 & n.15 (2014).[40] As summarized by Professor Hines, these treatises state:

- 6 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 18:7 (4th ed. 2002) (asserting Rule 23(c)(4) as authority for certifying issue class actions "[e]ven [in] cases which might not satisfy the predominance test when the case is viewed as a whole");
- Federal Judicial Center, Manual for Complex Litigation, Fourth § 21.24 (2004) ("Certification of an issues class is appropriate only if it permits fair presentation of the claims and defenses and materially advances the disposition of the litigation as a whole.");
- 5 James Wm. Moore, Moore's Federal Practice § 23.86 (3d ed. 2011) ("[A] court may certify a class action as to particular issues even if the cause of action as a whole would not meet the predominance requirement.");
- Jay Tidmarsh & Roger H. Trangsrud, Modern Complex Litigation 490 (2d ed. 2010) ("By definition, these common issues would predominate,

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[40] Behr relies heavily on Professor Hines' law review articles. *See* Pet. 10, 11, 12, 19, 21, 26.

because only the common issues are litigated on a class-wide basis.");

- 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1790 n.17 (3d ed. Supp. 2013) (adopting the "materially advance" standard for (c)(4) issue class actions).

Hines, *Unruly Class*, at 721 n.15.

The reading of Rule 23(c)(4) adopted below has also been adopted by jurists as different in outlook as former Judge Richard A. Posner and Judge Jack B. Weinstein. Judge Posner, "who authored the most … influential issue class action defeat of the 1990s," *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), subsequently wrote "a series of opinions championing" issue classes and recognizing that a Rule 23(c)(4) issue class certified only as to common questions satisfies Rule 23(b)(3)'s predominance requirement. Hines, *Unruly Class*, at 726.

Judge Weinstein, in a widely cited 2001 opinion, likewise agreed that Rule 23(c)(4)'s framers "considered class actions brought under Rule 23(b)(3) ... particularly well suited for certification of fewer than all issues" because limiting certification to particular issues under Rule 23(c)(4) "assists in satisfying Rule 23(b)(3)'s additional class certification requirements of predominance and superiority." *Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 28–30 (E.D.N.Y. 2001) (citations omitted).

Against these authorities, Behr offers only its own textual exegesis focusing on the use of the term "action" throughout Rule 23, including in Rule 23(b)(3) and Rule 23(c)(4). *See* Pet. 16–19. But Behr does not contend that an issue class can be certified only if the entire *action* satisfies Rule 23(b)(3). It acknowledges

that, under the rule's clear terms, less than the entire action can be certified. It insists, however, that there must be "a finding of predominance for an entire *cause of action*." Pet. 9 (emphasis added); *see also* Pet. 16–18. In pivoting from "action" to "cause of action," however, Behr betrays the emptiness of its textual argument, as the term "cause of action" is nowhere used in Rule 23.

Engrafting that term onto Rules 23(b)(3) and 23(c)(4) is particularly unwarranted because its use is unnecessary to reconcile those provisions. Rule 23(c)(4)'s language makes clear that certification limited to particular issues is nonetheless certification of the "action." It is perfectly consistent and logical to read Rule 23(b)(3)'s requirements that the "class action" certified must satisfy the requirements of predominance and superiority in the same way, limiting their application to the scope of the proposed certification.

Behr's assertion that this reading is "out of step" with this Court's decisions in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997), *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011), and *Comcast Corp.* v. *Behrend*, 569 U.S. 27 (2013), is groundless. None of those decisions addressed issue classes, and their reasoning does not support Behr's restrictive reading of Rule 23(c)(4).

As to *Amchem*, Behr's citation of its requirement that a party seeking certification must "show that the action is maintainable under Rule 23(b)(1), (2), or (3)," 521 U.S. at 614, begs the question of how those requirements apply when the action is to be certified only as to particular issues under Rule 23(c)(4).

Wal-Mart, for its part, holds that a class action must involve at least one "question[] of law or fact common to the class"—a question whose "determination … will resolve an issue that is central to the validity of each one of the claims in one stroke." 564 U.S. at 350. Certification of an issue class is fully consistent with *Wal-Mart* because the very premise of such certification is the finding that there is at least one such issue and that a "classwide proceeding" as to that issue will have "the capacity … to generate common *answers* apt to drive the resolution of the litigation." *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

Behr's reliance on *Comcast* is equally unavailing. *Comcast* held that where an action is certified *without limitation* to particular issues on the theory that common issues predominate because damages as well as liability can be shown on a classwide basis, the proposed methodology for determining classwide damages must align with the class's theory of liability. 569 U.S. at 35. As the Seventh Circuit explained in *Butler*, *Comcast*'s holding does not apply where an issue-specific certification avoids the need for a classwide damages determination. 727 F.3d at 800.

This Court's most recent relevant precedent, *Tyson Foods*, expressly recognized the utility of class actions to resolve "important questions common to all class members," even where "other important matters will have to be tried separately." 136 S. Ct. at 1045–46 (citation omitted). The issue class authorized by Rule 23(c)(4) provides a practical mechanism for such adjudication that assists district judges in managing complex litigation, consistent with all of the requirements of Rule 23.

III. The Court should allow this case to proceed.

This Court "generally awaits final judgment in the lower courts before exercising … certiorari jurisdiction." *Va. Mil. Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari). This case exemplifies the good reasons supporting that policy. Further developments could obviate the need to decide the Rule 23(c)(4) issue in this case. If they do not, consideration of the appropriate standards to govern issue classes (if the Court believed such consideration justified) would benefit from the experience of actually litigating the case to judgment. This is not a case, moreover, where the "in terrorem" effect of a class action is likely to cow the defendants into submission and prevent later review. The class is relatively small, and the defendants have significant resources. As the lower courts found, the real danger here is that the respondents will be denied their day in court absent certification of the issue class. Particularly in view of the substantial delays that have already occurred in this decade-old case, the Court should allow the action to proceed. If Behr is ultimately dissatisfied with the outcome, all of its objections can be addressed together, if need be, on appeal from a final judgment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 2019