No. 10-355

In the Supreme Court of the United States

PELLA CORPORATION AND PELLA WINDOWS AND DOORS, INC.,

Petitioners,

v.

LEONARD E. SALTZMAN, KENT EUBANK, THOMAS RIVA, AND WILLIAM AND NANCY EHORN,

Respondents.

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

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae DRI—The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation.[1] DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, their clients, and the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system fairer, more efficient and—when national issues are involved—more consistent. To promote these objectives, DRI participates as *amicus curiae* in cases, such as this one, that raise issues of import to its membership, the clients they represent, and to the judicial system as a whole.

This case is of critical importance to DRI and its clientele—businesses that are frequently targeted by class-action lawyers seeking a deep-pocket defendant. The courts below approved the use of "imaginative solutions" to the "problems" of class claims for damages that flunk the requirements imposed by

[1] Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation and submission. The parties were notified of the intention to file this brief at least ten days prior to its due date, and written consents of the parties to the filing of this brief have been or are being filed with the clerk along with this brief.

Federal Rule of Civil Procedure 23(b)(3). Pet. App. 10a. Specifically, the district court overlooked the plaintiffs' inability to show that common issues in the case as a whole predominate over individual ones, as Rule 23(b)(3) mandates, instead certifying certain common issues and severing the multitude of individual issues—including causation, the applicability of the statute of limitations, and damages—for subsequent individual proceedings on the claims for monetary damages. Although not citing the rule, the district court certified an "issue class" under Rule 23(c)(4). In addition, invoking Rule 23(b)(2), the court certified class claims seeking declarations as to the set of common issues. Thus, the plaintiffs obtained class certification even though deciding the class claims will not achieve a final resolution of even a single class member's case.

The "imaginative" approach to class certification endorsed by the courts below, however, is not only contrary to Rule 23, but also effectively permits class certification on demand for the plaintiffs' bar. That in turn allows opportunistic plaintiffs to obtain blackmail settlements from businesses, inspiring new rounds of unfair and wasteful class-action litigation. The escalating demands by—and increasing success of—the plaintiffs' bar in obtaining certification of "issue classes" under Rules 23(b)(2), (b)(3), and (c)(4) have led to vexatious litigation. DRI accordingly has a strong interest in encouraging this Court to review and reverse the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Just over a decade ago, this Court twice reminded the bar and lower courts that the stringent

standard that Rule 23(b)(3) imposes on class certification for damages claims are necessary to protect the due process rights of defendants and absent class members. *See Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845–848 (1999); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 622–623 (1997). This Court emphasized that Rule 23(b)(3)'s protections cannot be bypassed, whether through the device of a "settlement-only class" or by attempting to repackage the class action as one under Rule 23(b)(1)(B) for distribution of a limited fund. See *Ortiz*, 527 U.S. at 845 (warning "against adventurous application of Rule 23(b)(1)(B)" to skirt Rule 23(b)(3)'s requirements); *Amchem*, 521 U.S. at 622–625 (same in settlement class context).

Shortly thereafter, a different tactic to evade Rule 23(b)(3)'s requirement surfaced—the use of "issue classes." See, *e.g.*, Elizabeth J. Cabraser *et al.*, *New Issues and Key Rulings in the Certification, Trial, Settlement, and Appeal of Class Actions* 16 (ABA CCLE Nat'l Inst. Oct. 19, 2001) (arguing that the issue class action "seems poised for a renaissance"). Plaintiffs typically invoke Rule 23(c)(4), which provides for the certification of a "class action with respect to particular issues," or Rule 23(b)(2), which authorizes the certification of a class action seeking "final * * * declaratory relief." The proper relationship between Rule 23(b)(3) on the one hand and Rules 23(c)(4) and 23(b)(2) on the other is among the most significant and disputed questions pertaining to class actions today, with the fate of huge lawsuits hanging in the balance. Now is the time for this Court to resolve these pressing issues, and this is the case in which to do it.

The first question is whether discrete common elements of a class claim for money damages may be certified as an "issue class" under Rules 23(b)(3) and (c)(4) in order to avoid having to satisfy the predominance requirement of Rule 23(b)(3) as to the entire claim. As petitioners have demonstrated, the Third, Fifth, and Eleventh Circuits have rejected this end-run around Rule 23(b)(3). *See* Pet. 17–18 (citing, *e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008); *Andrews* v. *AT&T Co.*, 95 F.3d 1014, 1023–1024 (11th Cir. 1996); *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996)). By contrast, although in this case the Seventh Circuit did not expressly cite Rule 23(c)(4), that court has now joined the Second and Ninth Circuits in allowing the certification of "issue classes." See Pet. App. 6a–8a; *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006); *Valentino* v. *Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Commentators are divided as well.[2]

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[2] Compare Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 712 (2003) (arguing that "neither [Rule 23](c)(4)(A)'s text, its structural placement, nor its rule-making history provide support for an adventurous interpretation of the provision," and concluding that the Rule "simply cannot authorize an issue class action end-run around the predominance requirement for class actions that otherwise would fail to satisfy that requirement") with Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 263, 281 (arguing that issue certification "can fundamentally revamp the nature of class actions," and criticizing courts for "fail[ing] to grasp" the full meaning of Rule 23(c)(4)(A), which allows resolution of common issues while permitting complicated individual issues to be "severed away cleanly and painlessly").

The second issue is whether plaintiffs may alternatively obtain certification of a class under Rule 23(b)(2) by seeking declaratory relief as to particular common elements of the claim for damages. As petitioners have shown, the decision below is contrary to decisions of the First, Fifth, and Eleventh Circuits rejecting the certification under Rule 23(b)(2) of issue classes seeking such non-final declaratory relief. See Pet. 24 (citing *Christ* v. *Beneficial Corp.*, 547 F.3d 1292, 1298 & n.11 (11th Cir. 2008); *McKenna* v. *First Horizon Home Loan Corp.*, 475 F.3d 418, 426–427 (1st Cir. 2007); *Bolin* v. *Sears Roebuck & Co.*, 231 F.3d 970, 977–979 (5th Cir. 2000)).

In the experience of DRI and its members, the confusion in the district courts on these seemingly basic questions of class-certification procedure is even more pronounced, with results all over the map. The need to resolve this disarray is reason enough to grant the petition for certiorari. But the sheer importance of the questions presented by the petition is itself ample reason to grant review—and reverse—the decision below. This brief provides additional context for understanding why issue class certifications such as the ones in this case are inefficient and profoundly unfair to defendants.

To begin with, the certification of an issue class action is almost trivially easy. All that would-be class counsel needs to do is identify a single issue of law or fact that is common to the class—a standard that virtually every putative class action can satisfy. The normal safeguard against improper certification of a class seeking monetary damages is the predominance requirement, which operates to ensure that the proposed class is sufficiently cohesive to warrant certification. But by definition that requirement is

satisfied in an issue class action, as all individualized issues have been severed and rendered irrelevant. See Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 281 (noting that issue classes allow individualized issues to be "severed away cleanly and painlessly"). Or the predominance requirement is simply avoided altogether by repackaging the class action as one under Rule 23(b)(2)—for which predominance is not required—that seeks non-final declarations as to the cherry-picked common elements of the claim.

The chief consequence of this drastic lowering of class certification requirements will be to open the floodgates to a deluge of issue class actions that were filed simply to extort a settlement from the defendant. Because of the exponentially larger stakes of a class action and the huge expense of defending such a suit, class certification places tremendous pressure on defendants to settle even meritless claims.

Converting these lawsuits into issue class actions causes them to pose an even greater threat to defendants. First, the fact that the class members stand to gain no money from the suit greatly reduces their incentive to monitor class counsel—which means that these actions are particularly susceptible to being lawyer-driven. Second, the defendant in an issue class action loses one of the traditional safeguards of traditional class-action litigation: the assurance of finality. Because issue class actions are certified by side-stepping the predominance requirement of Rule 23(b)(3)—and also by depriving absent class members of their notice and opt-out rights if Rule 23(b)(2) provides the vehicle for the issue class—any class judgment or settlement may be vulnerable to a colla-

teral challenge by absent class members. In order to prevent a tidal wave of shake-down class actions, this Court should grant review and reverse the decision below.

ARGUMENT

A. Under The Interpretation Of Rule 23 Adopted Below, Virtually All Class Actions Would Be Certifiable.

One consequence of the lower courts' rulings is clear: Under their reasoning, just about every request to certify a class action seeking monetary damages would be granted, at least in part.

Normally, such a request could be granted only if the putative class representative could demonstrate that, among other things, "the questions of law or fact common to class members predominate over any questions affecting only individual members." FED. R. CIV. P. 23 (b)(3). Numerous courts—including this Court—have agreed that the predominance requirement is a "demanding" one that ensures that "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623; see also, *e.g.*, *Vega* v. *T-Mobile USA, Inc.*, 564 F.3d 1256, 1279 (11th Cir. 2009) (predominance requires "an independent and substantial" and "rigorous[] analysis"); *Steering Comm.* v. *Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006) ("predominance inquiry" is "rigorous"); *Thorn* v. *Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (predominance requirement is "stringent"); *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 186 (3d Cir. 2001) (same). One treatise writer advises that the predominance requirement "usually is the greatest obstacle to [Rule 23](b)(3) certifica-

tion" of dubious class actions. 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 5:23 (6th ed. Supp. 2009).

That obstacle is shunted aside, however, when the plaintiff seeks certification of an "issue" class. 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" that are common to the class. Yet identifying a common issue of fact or law is a requirement that is "easily met in most cases." 1 WILLIAM B. RUBENSTEIN *ET AL.*, NEWBERG ON CLASS ACTIONS § 3:10 (4th ed. Supp. 2010).[3] If a class action for monetary damages can be certified under Rules 23(b)(3) and (c)(4) by cherry-picking one or more common questions, even though individual questions predominate for the case as a whole, then certification would become automatic: A court could "sever issues until the remaining common issue predominates over the remaining individual issues," thus "eviscerat[ing] the predominance requirement." *Castano*, 84 F.3d at 745 n.21; 2 WILLIAM B. RUBENSTEIN *ET AL.*, NEWBERG ON CLASS ACTIONS § 4:23 (4th ed. Supp. 2010) ("[T]he court's discretion" to limit "a class action to designated common issues * * * has the capability of automatically satisfying the predominance test under Rule 23(b)(3)."); 7A CHARLES ALAN WRIGHT *ET AL.*, FEDERAL PRACTICE AND PROCEDURE § 1778 (3d ed. Supp. 2010) (Rule

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[3] *See also*, *e.g.*, *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 19 (1st Cir. 2008) (the "requirement of commonality is a low bar"); 7A CHARLES ALAN WRIGHT *ET AL.*, FEDERAL PRACTICE AND PROCEDURE § 1763 (3d ed. Supp. 2010) ("[C]ommon questions have been found to exist in a wide range of contexts" because courts "have given [the commonality requirement] a permissive application.") (footnote omitted).

23(c)(4) may allow a court to "recast" non-predominating class actions into ones that "'predominate' for purposes of Rule 23(b)(3).").

In addition, the use of an issue class allows even serious concerns with the adequacy and typicality of a proposed class representative—which normally would halt class certification in its tracks—to be brushed aside. If the inquiry into the representative's adequacy and typicality is artificially confined to the common issues that the class counsel have artfully pleaded, then those requirements fall away as meaningful restrictions to class certification on demand. Thorny conflicts between the interests of the class representative and absent class members or between groups of class members can be ignored as irrelevant to resolution of a particular common issue. And particularized defenses to the class representative's claims—which otherwise would defeat typicality—can be assumed away.[4] The end result is automatic class certification in every case in which class counsel can identify even a single common issue.

The same is true if class counsel may repackage a class action for monetary damages as an "issue" class seeking declaratory relief as to any common element of a class claim. Rule 23(b)(2) authorizes

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[4] In addition, certification of an issue class action raises serious concerns about the manageability of class-wide proceedings. The courts below reasoned that severing the individualized issues rendered the remaining aspects of the case manageable for trial. See Pet. App. 10a, 83a. But when the individual proceedings would be centralized before a single decisionmaker—here the courts proposed to appoint a "Special Master" to resolve certain-to-follow disputes in every individual case (*id.* at 9a)—the question of manageability has simply been kicked down the road.

class certification if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that *final* injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2) (emphasis added).[5] If plaintiffs may obtain certification under this Rule merely by requesting declarations on a limited subset of disputed issues of law or fact—as the courts below in effect held[6]—then the class counsel's ability to articulate a single common question for which declaratory relief may be sought is the only limit on class certification.

B. Freewheeling Certification Of "Issue Classes" Invites A Flood Of Vexatious Litigation.

In construing Rule 23 to allow the certification of "issue classes" virtually at will, the courts below

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[5] Numerous courts have recognized that declaratory relief under Rule 23(b)(2) must correspond to a *final* injunction rather than—as here—a step along the way to an award of damages. See, *e.g.*, *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530 (D.C. Cir. 2006); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1008 (3d Cir. 1986); see also 7AA CHARLES ALAN WRIGHT *ET AL.*, FEDERAL PRACTICE AND PROCEDURE § 1775 (3d ed. Supp. 2010) ("[A]n action seeking a declaration concerning [the] defendant's conduct that appears designed simply to lay the basis for a damage award rather than injunctive relief would not qualify under Rule 23(b)(2).").

[6] To be sure, the court of appeals described "the cumulative effect" of the requested declarations as "an entitlement" for class members "to have their windows replaced" by the defendant. Pet. App. 9a. But the court elsewhere acknowledged that the class proceedings would not resolve the individualized causation and statute-of-limitations issues, which would be reserved for individual trials. *Id.* at 7a.

have invited a significant upswing in the opportunistic filing of shake-down class-action lawsuits against deep-pocket defendants. The outcome will have far-reaching and dire consequences for businesses; their owners, customers, and employees; and the judicial system as a whole.

1. The defendants in class actions already face tremendous pressure to capitulate to what Judge Friendly termed "blackmail settlements." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973). As this Court has observed, because of the sheer stakes of a class action once it has been certified, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial * * *." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975); see also, *e.g.*, *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims."); *Castano*, 84 F.3d at 746 (because "[c]lass certification magnifies and strengthens the number of unmeritorious claims," it "creates insurmountable pressure on defendants" to agree to "settlements [that] have been referred to as judicial blackmail"); *Rutstein* v. *Avis Rent-a-Car Sys., Inc.*, 211 F.3d 1228, 1240 n.21 (11th Cir. 2000) ("[T]he blackmail value of a class certification * * * can aid the plaintiffs in coercing the defendant into a settlement"); FED. R. CIV. P. 23(f), 1998 advisory committee's note ("An order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."). And the threat of inevitably costly and disruptive class-

wide discovery adds an additional "*in terrorem* increment" to the settlement value of the claim. *Blue Chip Stamps*, 421 U.S. at 741. Indeed, even frivolous lawsuits are often settled, simply because they generally are "as costly to litigate as legitimate claims." *Developments in the Law—The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 HARV. L. REV. 1806, 1812 (2000).

Thus, it is unsurprising that businesses often yield to the hydraulic pressure generated by class certification to settle even meritless claims. See, *e.g.*, Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1291–1292 (2002) ("[W]hat most class action lawyers know to be true" is that "almost all class actions settle, and the class obtains substantial settlement leverage from a favorable certification decision."); Michael E. Solimine & Christopher O. Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1546 n.74 (2000) ("[T]hat defendants would rather settle large class actions than face the risk * * * of crushing liability from an adverse judgment on the merits is widely recognized.").

For example, one study of securities class actions concluded that the underlying merits have very little effect on whether and for how much a defendant settles; rather, the chief determinants are the size of the decline in the defendant's stock price and the amount of the defendant's insurance coverage. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 516–519 (1991); see also, *e.g.*, Thomas Willging

et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 179 tbls. 39–40 (Fed. Judicial Ctr. 1996) (even excluding class actions that were certified solely for settlement purposes, only three of 93 certified class actions reached trial, with the vast majority terminating in a settlement or a stipulated dismissal), available at http://ftp.resource.org/courts.gov/fjc/rule23.pdf.[7]

2. The ability to obtain virtually automatic certification of an issue class will exacerbate the problem of blackmail settlements drastically. Every lawsuit against a business could be converted into an abusive class action whenever the would-be class counsel can point to but a handful of common issues. And because class members would not be able to establish liability as a consequence of the proceeding, they would have inadequate incentives to monitor the conduct of the litigation. Commentators have long

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[7] As many commentators have recognized, the prevalence of blackmail settlements has tainted the reputation of class-action litigation. See, *e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 371–372 (2000) ("Correspondingly, where the plaintiffs' attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self-interest."); James A. Henderson, Jr., Comment, *Settlement Class Actions and the Limits of Adjudication*, 80 CORNELL L. REV. 1014, 1021 (1995) ("Rather than creating the appearance of a public confession of guilt, which might deliver a lesson in morality, settlement class action agreements more closely resemble the payment of blackmail by a corporation whose very survival is threatened by what might well, if taken to trial, prove to be groundless claims.").

warned of the risk for abuse of the class-action mechanism when class members exercise insufficient oversight of class counsel.[8] Indeed, the high incidence of lawyer-driven class actions in the securities context spurred Congress to enact the Private Securities Litigation Reform Act of 1995, PUB. L. NO. 104-67, 109 STAT. 737 (1995). See H.R. CONF. REP. NO. 104-369, at 32 (1995). That problem will become omnipresent. Moreover, the ease of obtaining blackmail settlements will lead to a flood of additional issue class actions.

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[8] See, *e.g.*, Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77–83 (often "what purports to be a class action, brought primarily to enforce private individuals' substantive rights to compensatory relief, in reality amounts to little more than private attorneys acting as bounty hunters"); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7–8 (1991) ("[T]he single most salient characteristic of class and derivative litigation is the existence of 'entrepreneurial' plaintiffs' attorneys [who, because they] are not subject to monitoring by their putative clients * * * operate largely according to their own self-interest * * *."); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882–883 (1987) ("High agency costs" inherent in class-action litigation "permit opportunistic behavior by attorneys" and, "[a]s a result, it is more accurate to describe the plaintiff's attorney as an independent entrepreneur than as an agent of the client."); cf. Neil Weinberg, *Shakedown Street*, Forbes.com, Feb. 11, 2008, at http://www.forbes.com/2008/02/11/lerach-milberg-weiss-biz-cz_nw_0211lerach.html (noting that former securities class action attorney William Lerach once boasted, "I have the greatest practice of law in the world. I have no clients").

In addition, certification of an "issue class" may condemn the defendant to having to defend an unwinnable lawsuit. If the class prevails on the common elements of its claims, the defendant faces potentially enormous liability to the class in subsequent proceedings. But if the defendant wins on the certified issues—or even if the defendant reaches a class settlement—it has no assurance of finality because absent class members may argue that they are not bound by the class settlement or adverse judgment. Some courts may accept these arguments and refuse to give issue class settlements or judgments preclusive effect.

The absent class members of an issue class seeking monetary damages would have a potentially powerful argument that certification violates their due process rights. As this Court has explained, as "part of our deep-rooted historic tradition that everyone should have his own day in court," a "judgment or decree among parties to a lawsuit * * * does not conclude the rights of strangers to those proceedings." *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989) (internal quotation marks omitted). Accordingly, class actions "implicate the due process principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party." *Ortiz*, 527 U.S. at 846 (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940)). A properly certified class action satisfies due process because "the named plaintiff at all times adequately represent[s] the interests of the absent class members." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985) (citing *Hansberry*, 311 U.S. at 42-43). But issue class actions permit representative litigation without regard to one of the funda-

mental safeguards of absent class members' due process rights: the predominance requirement.

The absent class members of an issue class action have good reason to insist upon a showing of predominance. In *Amchem*, this Court explained that the "mission" of the predominance requirement—which winnows out classes in which the members' claims are riddled with factual and legal idiosyncrasies that defeat class unity—is to "assure the class cohesion that legitimizes representative action in the first place." 521 U.S. at 623. In an issue class, however, the predominance requirement fades into irrelevance because all individualized issues have been severed. Because the predominance test was met by artificially limiting the inquiry to the remaining common issues, subsequent courts may sustain collateral challenges to the class judgment on the ground that the issue class was not "sufficiently cohesive to warrant adjudication by representation," thus violating the due process rights of absent class members. *Ibid.*

Due process concerns cannot be avoided through the expedient of certifying an issue class action under Rule 23(b)(2) instead. To the contrary, the absent members of these classes will also have a powerful argument that they cannot be bound by the judgment of a Rule 23(b)(2) issue class. Normally, "due process require[s] that the member[s]" of a class seeking monetary damages under Rule 23(b)(3) "'receive notice plus * * *, at a minimum[,] * * * an opportunity to remove himself from the class.'" *Ortiz*, 527 U.S. at 848 (quoting *Shutts*, 472 U.S. at 812). When the Rule 23(b)(3) class has been repackaged as an issue class under Rule 23(b)(2) seeking declaratory relief as to a limited set of elements of a claim for

monetary damages, however, the absent class members no longer are guaranteed notice and opt-out rights. See FED. R. CIV. P. 23(c)(2); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974) ("By its terms subdivision [23](c)(2) is inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b)(2)."). Some courts may therefore conclude that a judgment in a Rule 23(b)(2) issue class action is not entitled to preclusive effect on the absent class members.

3. The businesses targeted by abusive issue class actions will not be the only victims. As noted above, the ease of obtaining class certification—and thus blackmail settlements—will encourage the filing of many more class actions. This avalanche of lawsuits will clog court dockets, adding to the workload of an already overburdened judiciary.

Moreover, the ripple effects of these lawsuits will be felt throughout the economy. Defending and settling these lawsuits—not to mention potential litigation over collateral attacks on the judgments—will require business defendants to expend enormous resources. But these costs will not be borne by businesses alone. To the contrary, the vast majority of these expenses likely will be passed along to their customers and employees in the form of higher prices and lower wages and benefits.

* * * * *

In sum, the decision below dramatically waters down class certification requirements and thereby threatens to invite the filing of class-action lawsuits aimed at extorting blackmail settlements from the targeted businesses. But more so than the typical class action, issue class actions raise heightened con-

cerns because they are especially likely to be lawyer-driven and to deprive defendants of the safeguard of finality. In order to prevent a tidal wave of shake-down class actions, this Court should grant review and reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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