Case No. 22-3765

United States Court of Appeals
for the Sixth Circuit

KEVIN D. HARDWICK,
Plaintiff-Appellee.

v.

3M COMPANY; E. I. DU PONT DE NEMOURS AND COMPANY; THE CHEMOURS COMPANY; ARCHROMA MANAGEMENT LLC; ARKEMA, INC.; ARKEMA FRANCE, S.A.; AGC CHEMICALS AMERICAS, INC.; DAIKIN INDUSTRIES LTD.; DAIKIN AMERICA, INC.; SOLVAY SPECIALTY POLYMERS, USA, LLC,
Defendants-Appellants.

Brief of *Amicus Curiae* Lawyers For Civil Justice In Support of Appellants and Reversal of The District Court's Order

Appeal from the United States District Court, Southern District of Ohio
Hon. Edmund A. Sargus, No. 2:18-cv-1185

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INTEREST OF AMICUS CURIAE

Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases.[1] For over 35 years, LCJ has worked through the Rules Enabling Act process to propose and advocate for procedural reforms that promote balance in the civil justice system, reduce the costs and burdens associated with litigation, and make the resolution of civil disputes more consistent and efficient. LCJ, and its members, have deep knowledge of and interest in the correct interpretation and application of the Federal Rules of Civil Procedure.

LCJ has consistently advocated for an interpretation and application of Federal Rule of Civil Procedure 23 that is workable, leads to fair and predictable outcomes for litigants, and clearly defines the scope of permissible class actions. LCJ has submitted comments to the

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4), *amicus curiae* LCJ certifies that no counsel for a party authored this brief in whole or in part, and that no person, other than *amicus curiae*, its members, or its counsel has monetarily contributed to the preparation or submission of this brief. *Amicus curiae* further certifies that all parties have consented to the filing of this brief.

Advisory Committee on Civil Rules regarding proposed amendments to Rule 23 and has proposed reforms to the Rule to better deal with cases, such as this one, in which some or all putative class members have not suffered a cognizable injury.[2]

LCJ's members are routinely involved in class action litigation as both counsel and parties, and they have a significant interest in ensuring that courts apply Rule 23 in a manner that is fair to all parties and confines Rule 23 to its stated purpose of allowing for the efficient resolution of similar claims through aggregated proceedings. If upheld, the district court's certification order, which certifies a class of nearly 12 million people and effectively the entire population of Ohio, would drastically expand the previously understood limits of Rule 23. LCJ's members thus have an interest in ensuring that this case is not a vehicle to re-write Rule 23 and grant special rights and remedies to class action plaintiffs, not contemplated by that Rule, solely because they proceed on a collective basis.

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[2] *See* Lawyers for Civil Justice, Comment to the Advisory Committee and its Rule 23 Subcomittee (Apr. 7, 2015), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_23_conceptual_sketches_april_2015.pdf.

INTRODUCTION

The district court's order is unprecedented. It certified arguably the largest class in history—with nearly 12 million members at present, plus an anticipated expansion of that number to cover many millions more. The order's breadth compounds its errors: It impermissibly expands the substantive rights provided class action plaintiffs, limits the substantive rights of defendants, and eviscerates the cohesiveness requirement embedded in Rule 23. Reversal is required.

Rule 23 is procedural, and a district court may not use the Rule to expand or contract class action litigants' substantive rights. But this order does both. It provides putative class members a new substantive right to an extra-judicial remedy—a "science panel" that will *discern* liability in this case by studying, generally, the possible health effects of exposure to per- and polyfluroalkyl substances ("PFAS")—to which no individual plaintiff would be entitled in an individual action. It also deprives Defendants of their right to assert individualized defenses to each class member's unique claims (including, *e.g.*, the right to challenge causation). In so doing, the district court ignored the strictures of the Rules Enabling Act and Federal Rule of Civil Procedure 23. "The fact

that plaintiffs seek class certification provides no occasion for jettisoning the rules of evidence and procedure . . . or the dictate of the Rules Enabling Act." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018).

The district court also eviscerated Rule 23's cohesiveness requirement, sidestepping caselaw announcing and applying that requirement from this circuit and from seven others (including the First, Third, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits) in favor of a rogue interpretation (endorsed only by the Ninth Circuit) that is not legally sound. This Court should correct the district court's unauthorized enlargement of Rule 23, realign this circuit with the vast majority of others, and reverse the district court's extraordinary order certifying a class in this case.

SUMMARY OF THE ARGUMENT

The district court's order certifying a class of over 12 million people was improper and must be reversed for multiple reasons.

First, the order violates the Rules Enabling Act ("REA") because it both abridges and enlarges the parties' substantive rights. A class violates the REA if it precludes a defendant from asserting individualized

defenses to each class member's specific claims. The district court's order does just that—it contemplates the possibility of a class-wide injunction that would require Defendants to pay millions of dollars to establish a "science panel" to study the possible effects of PFAS, en masse, without allowing Defendants the opportunity to challenge the underlying premise that PFAS proximately caused harm to any individual class member.

Furthermore, the district court's order creates a new substantive right to relief for class members who assert claims for negligence or battery, impermissibly granting them substantive rights that they would not have in an individual action. Neither Plaintiff nor the district court points to any prior case or substantive law that would justify the establishment of a wide-ranging, extra-judicial science panel in a negligence or battery case brought by an individual plaintiff. This extraordinary remedy has never been awarded to any individual plaintiff in any prior case. Granting Plaintiff a new substantive right to seek this unprecedented remedy violates the REA and must be reversed.

Second, the district court shirked caselaw in this circuit and seven others that requires Rule 23(b)(2) class members' claims to be sufficiently "cohesive" to certify the class. This cohesiveness requirement, which

stems directly from the Rule's text and structure, embodies the Rule's mandate that injunctive relief awarded to a Rule 23(b)(2) class be appropriate to address the harms of the class *as a whole*. The district court's certification of a class that does not even meet Rule 23(a)'s commonality requirement, let alone the higher threshold required for 23(b)(2) cohesiveness, was improper and should be reversed.

ARGUMENT

I. The Rules Enabling Act Does Not Allow Certification Where A Class Action Would Modify Substantive Rights.

The Federal Rules of Civil Procedure, including Rule 23, are promulgated pursuant to the REA, 28 U.S.C. § 2072. That statute provides the Supreme Court, through the Judicial Conference's Committee on Rules of Practice and Procedure, "the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals." *Id.* § 2072(a). But it also specifically provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right." *Id.* § 2072(b); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997).

In the context of Rule 23, the REA limits "judicial inventiveness," and the Supreme Court has recognized that "[c]ourts are not free to amend a rule outside the process Congress ordered." *Id.* at 620. This means courts cannot create new substantive rights or remedies or alter parties' existing substantive rights or remedies under the guise of "innovative and effective" case management solutions. *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 676 (6th Cir. 2020); *see Amchem Prods.*, 521 U.S. at 628-29 (rejecting proposed settlement class adopting "nationwide administrative claims processing regime" because "Congress . . . has not adopted [that] solution" and Rule 23 could not support it "with fidelity to the Rules Enabling Act"). Put differently, because Rule 23, like all rules of civil *procedure*, is "fundamentally a *procedural* device," courts cannot interpret or apply it in such a way as to "abridge, modify, or enlarge any substantive right" available to any litigant. 1 William B. Rubenstein, *Newberg on Class Actions* § 1:1 (5th ed. 2011) (Rule 23 is "fundamentally a *procedural* device" that allows a representative to

"litigate on behalf of many absent class members" but cannot "abridge, modify, or enlarge any substantive right").[3]

A class certification order that expands or abridges a party's substantive rights thus violates the REA. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (holding that courts cannot certify a class "on the premise that [defendants] will not be entitled to litigate its statutory defenses to individual claims."); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-47 (1999) (holding that courts cannot abrogate an absent class member's due process right to "have his own day in court" by certifying a mandatory class in all but the "limited circumstances" in which the Rules allow a person's claims to be resolved "regardless of either their consent, or, in a class with objectors, their express wish to the contrary") (internal quotations omitted).

The district court's certification order violates the REA in two ways, simultaneously abridging and enlarging substantive rights. First, it

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[3] Although procedural in nature, the Federal Rules of Civil Procedure carry the force of law. *See, e.g.*, *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020) ("Promulgated pursuant to the Rules Enabling Act, 28 U.S.C. § 2072, [the Federal Rules of Civil Procedure] are binding upon court and parties alike, with fully the force of law.").

abridges Defendants' rights to challenge each individual class member's proof that Defendants are liable for causing their harm. Second, the order creates a novel remedy, potentially requiring Defendants to establish and fund a "science panel" to study the alleged increased risk of disease caused by Defendants' conduct. Plaintiff would not be entitled to such a remedy in an individual negligence or battery suit, and allowing that remedy solely because Plaintiff seeks to proceed on behalf of a (gargantuan) class drastically enlarges Plaintiff's substantive rights, in violation of the REA.

A. A Class That Deprives Defendants Of Their Right To Present Individual Defenses Cannot Be Certified.

The REA does not allow certification of a class if certification would deprive a defendant of its right to present individualized defenses to each litigant's claim. This is a question of fundamental fairness: Courts have made clear that Rule 23 may not, in the name of managerial efficiency, ignore the core principle that the REA requires that "the defendant . . . be offered the opportunity to challenge each class member's proof that the defendant is liable to that class member." *In re Asacol Antitrust Litig.*, 907 F.3d at 55 (citing *Dukes*, 564 U.S. at 366-67).

The Supreme Court addressed this issue in *Wal-Mart Stores, Inc. v. Dukes*, where it rejected class action plaintiffs' efforts to apply statistical samplings across the entire class in a gender discrimination suit in which the putative class sought back pay, among other things. 564 U.S. at 367. There, the Ninth Circuit had approved a process that would derive the percentage of valid claims across the entire class by evaluating a subset of the claims, and then the percentage of valid claims "would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings." *Id.* The Court held that this "Trial By Formula," which deprived Wal-Mart of "individualized determinations" of each putative class member's entitlement to relief, was impermissible because, under the REA, "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id.* Because the class certification in that case abridged Wal-Mart's substantive rights by preventing it from asserting individualized defenses to each plaintiff's unique claim, certification violated the REA. *Id.*

The Supreme Court further discussed this principle in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016). There, the Court explained that

the key issue in assessing the validity of a common method of proof in a class action under the REA is whether an individual plaintiff could have "prevailed in an individual suit by relying on" the proposed common method of proof. *Id.* at 458. The Court explained that in *Dukes*, extrapolating harm gleaned from individual instances of discrimination to the more than 1.5 million suits in that case was impermissible because "the employees were not similarly situated, [so] none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which *other employees* were discriminated against by their particular store managers." *Id.* (emphasis added). Certifying a class and permitting class-wide proof in that situation "would have violated the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Id.*; *see also id.* at 455 (noting such a procedure "would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot abridge any substantive right.") (internal quotation marks omitted).

In *Tyson Foods*, by contrast—where the question was whether plaintiffs were entitled to pay for donning and doffing time—the generalized study relied on to certify the class "could have been sufficient

to sustain a jury finding as to hours worked if it were introduced in each employee's individual action," because "each employee worked in the same facility, did similar work, and was paid under the same policy." *Tyson Foods*, 577 U.S. at 459.

Applying *Dukes* and *Tyson Foods*, the First Circuit's decision in *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018), further outlines the boundaries the REA sets on class certification. Plaintiffs in that case challenged the defendants' purported anticompetitive conduct in manipulating the availability of certain prescription drugs to prevent consumers from obtaining the generic version of the drug. *Id.* at 45-46. The defendants objected to class certification, claiming that the putative class included individuals who did not switch to the generic version of the drug even after the allegedly anticompetitive conduct ceased, meaning they were not injured by defendants' conduct. *Id.* at 53. The district court approved a scheme in which "prior to judgment" class members would submit a claim form with data and documentation and a claims administrator would "evaluate each claim pursuant to a formula" to determine the extent of each class member's harm, if any. *Id.* at 52. Only

then would the defendants have the opportunity to "contest the calculations" and challenge the administrator's finding of harm. *Id.*

The First Circuit rejected this scheme and reversed the district court's certification order. The scheme relied on a claims administrator (rather than a jury) and hearsay documentation (rather than admissible evidence) to establish "injury to each class member at or after trial." *Id.* at 53. This hearsay evidence would not have been admissible in an individual suit to prove an antitrust injury, which was an essential "element of liability" in that case. *Id.* Accordingly, the Court held that the proposed scheme "would fail to be protective of defendants' Seventh Amendment and due process rights" and "jettison[ed] . . . the dictate of the Rules Enabling Act" by permitting plaintiffs to proceed in a class action in a manner that would have been foreclosed by the Federal Rules of Evidence in an individual action. *Id.* (internal quotation marks omitted). The court also rejected the plaintiffs' alternative argument that they could prove class-wide injury through expert testimony at trial. Allowing such expert evidence to prove injury would abrogate the defendants' rights to present defenses to individual claims because "plaintiffs point[ed] to no . . . substantive law that would make an

[expert] opinion that ninety percent of class members were injured both admissible and sufficient to prove that *any given individual class member* was injured." *Id.* at 54 (emphasis added).

The upshot of all these cases is that a certification order violates the REA when it allows a plaintiff to establish liability, or prevents a defendant from contesting liability, in a manner that would not be allowed in an individual suit.

The class certification order in this case fails that standard because it deprives Defendants of their opportunity to challenge causation as to each individual class member. Plaintiff here claims negligence and battery resulting in a need for medical monitoring. If permitted to proceed on a class-wide basis, those claims would require that *each class member* prove Defendants' unlawful actions caused the injury alleged (increased risk of developing severe disease) to receive the equitable relief Plaintiff requests. *See In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279, 311 (N.D. Ohio 2007) (declining to certify medical monitoring class requesting only equitable relief because "no finder of fact can determine, on a class-wide basis, whether the defendants' conduct was 'unreasonable' toward every plaintiff"). But Plaintiff offers no evidence

demonstrating that Defendants caused the alleged harm. Instead, Plaintiff merely alleges "[t]here is no naturally-occurring 'background,' normal, and/or acceptable level or rate of any PFAS in human blood," all PFAS detected in any person are the "direct and proximate result of the acts and/or omission of Defendants." First Amended Compl., R. 96, Page ID # 574; *see also* Pl.'s Mot. to Certify Class, R. 164, Page ID ## 1531-32.

If Plaintiff were to bring an individual action against all the Defendants in this case (which encompass only a fraction of all the manufacturers and users of PFAS in the world), it would do him no good to simply show that he had some amount of certain types of PFAS in his bloodstream, and then point to each of the Defendants and claim they all are liable for his medical monitoring costs because they used PFAS in some of their manufactured goods. This strategy of lumping all Defendants together without showing whether, when, and how Plaintiff was exposed to *any* Defendant's PFAS-containing product would be "too attenuated and speculative to state a claim for relief." *SUEZ Water New York Inc. v. E.I. du Pont de Nemours & Co.*, 578 F. Supp. 3d 511, 542 (S.D.N.Y. 2022) (rejecting tort claims based on alleged PFAS

contamination because Plaintiff included no allegations about each Defendant's PFAS-containing products supporting causation).

The essential elements of negligence liability—to say nothing of jurisdictional standing principles—require something more. Plaintiff also would have to show that he was exposed to each Defendant's PFAS-containing products, and that his exposure to each was a but-for and proximate cause of his alleged injury—an increased risk of developing a disease. *See Baker v. Chevron U.S.A. Inc.*, 533 F. App'x 509, 525 (6th Cir. 2013) ("[I]t is well-settled that the mere existence of a toxin in the environment is insufficient to establish causation without proof that the level of exposure could cause the plaintiff's symptoms[,] the symptom being, in this case, a substantially 'increased risk' of contracting a number of serious diseases." (internal quotation marks omitted)); *see also In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. at 292 (medical monitoring plaintiffs must offer proof that an exposure to a defendant's toxic substance caused an increased risk of serious disease).

Defendants would then have the opportunity to challenge the veracity of these claims by contesting whether each Plaintiff ever actually exposed to their products, or whether individualized factors such as age,

gender, weight, genetic predispositions, medical history, lifestyle, and existing health issues contribute to an increased risk of disease, mitigating the need for medical monitoring. *See Baker*, 533 F. App'x at 525-26 (rejecting medical monitoring claim where evidence showed "it is not likely a specific point source of exposure or single risk factor is playing a role in the increased cancer burden").

The district court's certification order provides no avenue for Defendants to raise these challenges to individual class members' claims. Indeed, the district court's certification order does not address the looming question whether each Defendant caused an individual class member's injury *at all*. *See* Order, R. 233, Page ID ## 6690-703 (addressing commonality without discussing inherent individualized causation issues). Under *Dukes*, *Tyson Foods*, and *Asacol Antitrust Litig.*, such a certification order fully deprives Defendants of "the opportunity to challenge each class member's proof that the defendant is liable to that class member," thereby abridging Defendants' substantive rights, and is invalid under the REA. *In re Asacol Antitrust Litig.*, 907 F.3d at 55.

B. A Court Cannot Enlarge Substantive Rights By Creating A Remedy To Which Only A Class Is Entitled.

A certification order also violates the REA when it creates a remedy to which only those proceeding as part of a class, and not as individual plaintiffs, would be entitled. When the relief requested is so broad that it will only be awarded to address harms of numerous of litigants in a class action, that relief inherently "enlarge[s]" litigants' substantive rights, and violates the REA. 28 U.S.C. § 2072(b); *see also* Rubenstein, *supra*, § 1:1 (Rule 23 is "fundamentally a *procedural* device" that allows a representative to "litigate on behalf of many absent class members" but cannot "abridge, modify, or enlarge any substantive right").

The district court's certification order in this case is unlawful for precisely this reason. The district court certified a class in which the relief it purports to seek is the establishment of a "science panel" "tasked with independently studying, [and] evaluating" the potential impacts PFAS may have on human health. First Am. Compl., R. 96, Page ID ## 590-91. But Plaintiff would not be entitled to the sweepingly broad injunctive relief he requests here outside the context of a class action. Even in awarding equitable relief, "[e]ach individual's claim

[is] . . . necessarily proportional to his or her exposure to toxic [substances]," *Ball v. Union Carbide Corp.*, 385 F.3d 713, 728 (6th Cir. 2004), meaning Plaintiff would not be entitled to such a broad form of relief (*i.e.,* a multi-million-dollar science panel assessing all the potential health effects of exposure to thousands of different forms of PFAS) if he proceeded through an individual suit.

Further, as this Court has already recognized, the function of the proposed "science panel" is to "*discern* liability," *In re 3M Co.,* No. 22-0305, 2022 WL 4149090, at *5 n.3 (6th Cir. Sept. 9, 2022) (Guy, Donald, Bush, JJ.), or to discern whether Defendants' conduct could have increased the putative class members' risk of developing any disease. But neither Plaintiff nor the district court has cited *any* substantive law allowing a plaintiff to require a defendant to pay for a preliminary investigation into *whether* the defendant caused harm to a plaintiff *at all* in an individual negligence or battery action. This outcome defies how fact development works in civil cases.

The cases cited by the district court do not establish that a plaintiff has a free-standing right to have a "science panel" established *as a remedy* in a negligence suit. Rather, the cases cited by the district court

merely acknowledge that courts could supervise medical monitoring of class members if negligence were proven, *not* determine whether defendants were negligent in the first place. *See Wilson v. Brush Wellman, Inc.*, 2004-Ohio-5847, ¶ 23, 103 Ohio St. 3d 538, 543, 817 N.E.2d 59, 65 (acknowledging that court-supervised monitoring of plaintiffs may be an acceptable form of relief, but rejecting class certification); *In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. at 311 (declining to certify class because "[i]n light of the different welding products, warnings, employers, work environments, and so on, *there is ultimately no single course of conduct* by all of the defendants").

Other cases in which courts have appointed experts during ongoing litigation are also inapposite because plaintiffs in those cases sought recognized remedies, not the appointment of experts *as the remedy*. *See Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1393 (D. Or. 1996) (appointing advisors to the court for the sole purpose of evaluating expert evidence presented in the case); *In re Silicone Gel Breast Implant Prods. Liab. Litig.* (MDL 926), No. CV 92-P-10000-S, 1996 WL 34401813, at *3 (N.D. Ala. May 31, 1996) (appointing experts to evaluate "general causation" for ongoing litigation).

Plaintiff's (and the district court's) rationale for this novel, sweeping remedy is the alleged unparalleled scope of Defendants' supposed wrongdoing. *See* Order, R. 233, Page ID # 6666 (quoting Pl.'s Reply, R. 210, Page ID #6304). But that rationale shows precisely why the certification order is impermissible: It *endorses* what the REA specifically *prohibits*—that Plaintiff is entitled to a different remedy *because* he is proceeding through a class action instead of an individual suit. This unquestionably "enlarge[s]" the rights Plaintiff would have under a negligence or battery claim, and thus violates the REA. 28 U.S.C. § 2072(b). As this Court has recognized, no matter how "innovative and effective" a proposed procedure may be in aiding "the resolution of mass tort claims," the court is "not free to amend a rule outside the process Congress ordered," particularly where doing so violates the REA's mandate that "rules of procedure shall not abridge [enlarge, or modify] any substantive right." *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 676 (internal quotation marks omitted). The district court's order, which obliterates this mandate, is accordingly unlawful.

II. Rule 23 Does Not Allow Certification Without Cohesion.

Contrary to the district court's order in this case, a class cannot be certified under Rule 23(b)(2) if the class members and their claims lack sufficient cohesiveness. This "cohesiveness" requirement is "well established," *Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 433 (6th Cir. 2009), and has been endorsed by this circuit and by all but one of the other circuits to consider the issue.

The principle that the vast majority of circuit courts have labeled a "cohesiveness" requirement stems from the textual mandates of Rule 23(b)(2). The Rule states that certification is appropriate only when "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*." *Id.* (emphasis added). As then-Judge Gorsuch explained in *Shook v. Board of County Commissioners of County of El Paso*, 543 F.3d 597 (10th Cir. 2008), the Rule imposes "two independent but related requirements." *Id.* at 604. First, the defendant's actions or inactions must apply to all members of the putative class in a similar way. The second and more restrictive requirement is that the final injunctive relief must be

appropriate for the class as a whole. *Id.* "Put differently, Rule 23(b)(2) demands a certain cohesiveness among class members with respect to their injuries, the absence of which can preclude certification." *Id.*

Thus, while the text of the Rule does not use the term "cohesiveness," courts have recognized that cohesiveness is a condition that is necessarily met if an injunction is truly appropriate to address the harms of the entire class. *See* Charles Alan Wright & Arthur R. Miller, *Class Actions for Injunctive or Declaratory Relief Under Rule 23(b)(2)—In General*, 7AA Fed. Prac. & Proc. Civ. § 1775, n.5 (3d ed. 1999) ("[I]n fact, cohesiveness is the touchstone of a class authorized on this ground, in that the relief sought must perforce affect the entire class at once."). In *Reid v. Donelan*, 17 F.4th 1 (1st Cir. 2021), for example, the First Circuit recognized that the cohesiveness requirement for a (b)(2) class stems directly from "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Id.* at 11 (quoting *Dukes*, 564 U.S. at 360) (internal quotation marks omitted).

Further, the cohesiveness requirement under Rule 23(b)(2) is more stringent than Rule 23(b)(3)'s predominance requirement. *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016). Again, far from being a judicially created appendage to the Rule, this principle stems directly from the core purpose of (b)(2) and the larger structure of Rule 23. A (b)(2) class is mandatory, and "unnamed members with valid individual claims are bound by the action without the opportunity to withdraw and may be prejudiced by a negative judgment in the class action." *Romberio*, 385 F. App'x at 433 (quoting *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998)). This process comports with due process only *because* "the relief sought must perforce affect the entire class at once," and the lawsuit raises no individualized issues a class member must be able to litigate on their own behalf. *Dukes*, 564 U.S. at 361-62. Because a (b)(2) class lacks the same due process safety valves as a (b)(3) class, in which members receive notice and can opt out, courts must be *more* vigilant in protecting class members' due process rights by ensuring the class members' interests are truly aligned (*i.e.,* cohesive). *See Ebert,* 823 F.3d at 480 ("Because a (b)(2) class is mandatory, the rule provides no opportunity for (b)(2) class members to opt out, and does not oblige the

district court to afford them notice of the action . . . the cohesiveness requirement of Rule 23(b)(2) is more stringent than the predominance and superiority requirements for maintaining a class action under Rule 23(b)(3)."); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983) ("Subsection (b)(2) by its terms, clearly envisions a class defined by the homogeneity and cohesion of its members' grievances, rights and interests." (internal quotation marks omitted)).

Nearly every circuit court to address the issue, including this Court, has reached the same conclusion—that Rule 23(b)(2) requires plaintiffs to demonstrate that the class members' claims are sufficiently cohesive.[4] The Ninth Circuit is the only circuit to conclude otherwise. *See Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918 (9th Cir. 2019). But the

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[4] *See Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 433 (6th Cir. 2009); *Reid v. Donelan*, 17 F.4th 1, 11 (1st Cir. 2021); *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016); *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 847 (5th Cir. 2012); *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 893 (7th Cir. 2011); *Shook v. Bd. of Cnty. Commissioners of Cnty. of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983) (noting that "[t]he very nature of a (b)(2) class is that it is homogeneous without any conflicting interests between the members of the class" in determining that a claim for back pay was better framed as a (b)(3) class) (internal quotation marks omitted).

Ninth Circuit in *Senne*, on which the district based its erroneous decision, did not grapple with the actual implications of the text and structure of Rule 23. *See* Order, R. 233, Page ID # 6706. In fact, the only rationale the Ninth Circuit offered in rejecting the cohesiveness requirement is that "courts that have imposed such a test treat it similarly to Rule 23(b)(3)'s predominance inquiry," and because Rule 23(b)(2)'s text does not explicitly include a cohesiveness requirement, it must not have one. 934 F.3d at 937-38. Such a superficial "textual" analysis of Rule 23(b)(2), however, actually (and paradoxically) overlooks the text and purposes of the Rule.

Rule 23(b)(2) does not specifically include a predominance requirement because it *already requires* that the final injunctive relief awarded be appropriate to resolve the claims of the class as a whole. *See* Rule 23(b)(2) ("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*.") (emphasis added); *see also Shook*, 543 F.3d at 604. And, as discussed above, the Rule sets more stringent commonality requirements in demanding that a single form of relief apply to all class members,

specifically because it does not provide class members notice and an opportunity to opt out. The Ninth Circuit's decision in *Senne* addresses none of these issues, and its overly simplistic conclusion that (b)(2) classes do not require cohesiveness among the class members' claims is wrong.

The district court here likewise erred in determining Rule 23(b)(2) does not include a stringent cohesiveness requirement. The district court justified its decision by claiming the cohesiveness requirement is a-textual, relying on *Senne* and unpersuasively sweeping aside this Court's decision in *Romberio* (and ignoring that, in doing so, it joined the minority side of an eight to one circuit split on this issue). *See* Order, R. 233, Page ID # 6706. But just as *Senne* is wrong and ignores the text and structure of Rule 23(b)(2), so too is the district court's decision.

Alternatively, the district court half-heartedly suggests that "to the extent it is required, Plaintiff has met the cohesiveness/homogeneity requirement." *Id.* at Page ID # 6707. But the district court offers as support for this suggestion only the conclusory statement that "Mr. Hardwick has sufficiently shown that the defendants acted in a manner that affects the class members generally such that injunctive relief would

be appropriate for all." *Id.* This is a far cry from actually assessing cohesiveness. And it is clear, as Defendants argued below and as they set forth again in their brief to this Court, that the myriad individualized issues in each class member's case—including different exposure scenarios, different PFAS products involved, different demographic and health factors, and different alleged injuries—preclude the required finding of even commonality under Rule 23(a)(2), let alone the heightened requirement of cohesiveness under Rule 23(b)(2). *See* Def.'s Opp. To Pl.'s Mot. for Class Certification, R. 200, Page ID ## 4778-98; Appellants' Br. at Arg. § I.A, pp. 20-40. The district court's perfunctory treatment of this issue and its certification of a (b)(2) class without actually requiring Plaintiff to demonstrate the requisite cohesiveness demanded by Rule 23(b)(2) should be reversed.

CONCLUSION

For these reasons, this Court should reverse the district court's certification order.

Respectfully Submitted,

Dated: Dec. 28, 2022 */s/ Barbara A. Smith*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,656 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2010 Century Schoolbook 14-point font.

/s/Barbara A. Smith
Barbara A. Smith

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I hereby certify that on December 28, 2022, I filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit using the Court's CM/ECF system, which serves all counsel of record in this case who are registered CM/ECF users.

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