No. 22-90030

In the United States Court of Appeals for the Fifth Circuit

COREY PRANTIL; BETTY WHATLEY; LARRY ANDERSON; TANYA ANDERSON; BEVERLY FLANNEL; AND ROLAND FLANNEL,
Plaintiffs-Respondents,

v.

ARKEMA INCORPORATED,
Defendant-Petitioner.

On Petition for Permission to Appeal from the United States District Court for the Southern District of Texas, Houston Division, No. 4:17-cv-2960

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF DEFENDANT'S PETITION FOR PERMISSION TO APPEAL

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CERTIFICATE OF INTERESTED PERSONS

No. 22-90030

Corey Prantil; Betty Whatley; Larry Anderson; Tanya Anderson;
Beverly Flannel; and Roland Flannel,
Plaintiffs-Respondents,
v.
Arkema Incorporated,
Defendant-Petitioner.

The undersigned counsel of record certifies that, in addition to the persons and entities listed in Defendant-Petitioner's Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification.

Amici Curiae:

The Chamber of Commerce of the United States of America. The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

American Fuel & Petrochemical Manufacturers. The American Fuel & Petrochemical Manufacturers ("AFPM") has no parent corporation. No publicly held company has any ownership interest in AFPM.

American Chemistry Council. The American Chemistry Council ("ACC") is an incorporated, non-profit trade association. ACC has no outstanding shares or debt securities in the hands of the public and no

parent company. No publicly held company has a ten percent (10%) or greater ownership interest in ACC.

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association representing nearly all U.S. refining and petrochemical manufacturing capacity. AFPM members support more than three million quality jobs, contribute to our economic and national security, and enable the production of thousands of vital products used by families and businesses throughout the U.S.

The American Chemistry Council ("ACC") represents companies engaged in the business of chemistry—an innovative, $486 billion enterprise that is helping solve the biggest challenges facing our nation and the world.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

The business of chemistry drives innovations that enable a more sustainable future, creates 529,000 manufacturing and high-tech jobs that support families and communities, and enhances safety through the products of chemistry and investment in research.

Amici seek to promote a predictable, rational, and fair legal environment for their members and the broader business community. And many of amici's members and affiliates are or may become defendants in putative class actions. Amici therefore have a keen interest in ensuring that the courts rigorously and consistently analyze whether plaintiffs have satisfied all the requirements of Rule 23—and Article III—before certifying a class. That did not happen here. The district court certified classes for two forms of injunctive relief without any serious consideration of whether the certified classes contain members that lack Article III standing.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011). But the district court certified two Rule 23(b)(2) classes for injunctive relief without conducting any substantive analysis of whether absent class members have Article III standing to pursue this relief. *Prantil v. Arkema France S.A.*, 2022

WL 1570022, at *37 (S.D. Tex. May 18, 2022).[2] The district court's terse analysis gives short shrift to the relationship between Article III and the procedural mechanisms afforded by the Rules of Civil Procedure.

Neither Article III nor Rule 23 permits the federal courts to certify classes that include more than a trivial number of absent class members that lack standing. At core, Article III forbids federal courts from awarding relief to parties that cannot demonstrate "the irreducible constitutional minimum of standing." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). And because standing is "an indispensable part of the plaintiff's case, each element must be supported. . . with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. Federal Rule of Civil Procedure 23 cannot dispense with that constitutional minimum, and thus its "requirements must be interpreted in keeping with Article III constraints." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). When courts fail to heed both those constraints on Rule 23, they run afoul of the Rules Enabling Act and create due-process concerns for plaintiffs and defendants like.

Yet the district court essentially ignored those constraints. *See* Pet.11-13. It analyzed the standing of only the six named plaintiffs and relegated its discussion of potentially tens of thousands of absent class members to a two-

[2] Defendant's Petition raises additional important reasons the certified classes violate Rule 23(b)(2)'s requirements. *See* Petition ("Pet.") at 14-27.

sentence footnote. *Prantil*, 2022 WL 1570022, at *37 n.28. *See* Pet.11. More generally, the district court dismissed the idea that class certification imposes a duty on courts to evaluate the standing of putative class members. *Prantil*, 2022 WL 1570022, at *37.

In addition to its legal defects, the district court's erroneous certification will distort the litigation. Because class certification "magnifies and strengthens the number of unmeritorious claims," *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996), it can put "'insurmountable pressure' on a defendant to settle" even a meritless suit, *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007). And the cost of such class-action abuse reverberates throughout the economy. The substantial resources that businesses expend defending and settling such class actions will be passed along to consumers and employees through higher prices and lower wages.

Accordingly, this Court should grant the Petition and hold that district courts must "vigorously" enforce Article III's standing requirements at the class-certification stage. *Cf. Flecha v. Medicredit, Inc.*, 946 F.3d 762, 766 (5th Cir. 2020).

ARGUMENT

I. Article III demands that absent class members have standing and that courts enforce this requirement at the class-certification stage.

This Court should squarely hold what it has already observed: Certified classes have "standing issues" under Article III when "[c]ountless unnamed class members lack standing." *Flecha*, 946 F.3d at 768; *see id.* at 770-71 (Oldham, J., concurring) (identifying reasons that Article III's standing requirements should apply at the class-certification stage). The district court's belief that this Court concluded otherwise in Arkema's previous appeal in this case is incorrect; it is black letter law that this Court did not need to resolve the standing issue first to reverse the prior class certification based on Rule 23. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999). And in any event, courts should not be presumed to have made "drive-by jurisdictional rulings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). Of course, even if this Court had previously resolved the standing issue here—it did not—the district court would have been obligated to consider the issue anew in light of the intervening decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).

In *TransUnion*, the Supreme Court reiterated and clarified the fundamental limitations on the power of the federal courts to exercise jurisdiction over private parties: "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Id.* at 2208 (quotation marks omitted). So "Article III is just as important in class actions as it is in

individual ones." *Flecha*, 946 F.3d at 771 (Oldham, J., concurring); *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) ("The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate.").

The Supreme Court has articulated two principles that compel applying Article III's standing requirement at the class-certification stage.

First, plaintiffs must demonstrate Article III standing "with the manner and degree of evidence required at [each] successive stage[] of the litigation." *TransUnion*, 141 S. Ct. at 2208. Class certification "is the critical act" rendering unnamed class members "subject to the court's power." *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 250 (5th Cir. 2020). "Nothing in Rule 23 could exempt the class-certification stage from [Article III's standing] requirement"—indeed, the "standing analysis" must "be particularly rigorous at this stage, given the transformative nature of the class-certification decision." *Flecha*, 946 F.3d at 770 (Oldham, J., concurring) (collecting cases).[3] To

[3] This argument does not conflict with *Flecha*'s recognition that courts must "first decide whether a proposed class satisfies Rule 23, before deciding whether it satisfies Article III." *Flecha*, 946 F.3d at 768. While a proper Article III analysis of unnamed class members may make a class noncertifiable under Rule 23, that will not always be the case. Both are threshold considerations, and a proposed class that satisfies Rule 23 may still violate Article III—and be noncertifiable by the district court. Indeed, the standing of *un*named

assert jurisdiction to resolve the claims of unnamed class members who lack standing is to exceed the judicial power.

Second, Rule 23 can provide only a procedural device, "ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980).[4] Under the Rules Enabling Act, Rule 23 cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b); *see Ortiz*, 527 U.S. at 845 ("[N]o reading of the Rule can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.") (cleaned up); *Amchem*, 521 U.S. at 613 ("Rule 23's requirements must be interpreted in keeping with. . . the Rules Enabling Act").

Awarding individualized injunctive relief to class members without standing would impermissibly "enlarge" those class members' rights and "abridge" defendants' rights, 28 U.S.C. §2072(b), by permitting uninjured

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class members is only relevant when a court is otherwise prepared to certify a class under Rule 23.

[4] At a minimum, "whether absent class members can establish standing may be exceedingly relevant to the class-certification analysis required by Federal Rule of Civil Procedure 23." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019). For instance, in an injunctive class, absent class members' lack of injury may demonstrate that there is no common injury among the class, that the proposed class lacks cohesiveness, *see* Pet.14-18, or even that the requested injunctive relief lies outside the power of federal courts and is therefore inappropriate.

class members to receive relief they could not secure on their own. *E.g.*, *Laurens v. Volvo Cars of N. Am., LLC*, 868 F.3d 622, 625 (7th Cir. 2017) ("an individual plaintiff bears the burden of showing that he has standing for each type of relief sought," which includes "a stake in injunctive relief in particular") (cleaned up). *See* Pet.10 & n.2 (explaining why the Supreme Court's holdings in cases requesting damages apply equally to cases for injunctive relief). Because Rule 23 cannot be used to resolve such claims, they cannot be made part of a class action through certification.

Indeed, where "individual plaintiffs who could not recover had they sued separately" are permitted to recover "because their claims were aggregated with others' through the procedural device of the class action," serious due-process concerns arise for defendants. *Cf. Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers). That is yet another reason that the Supreme Court has recognized that courts cannot certify classes "on the premise that [the defendant] will not be entitled to litigate its. . . defenses to individual claims." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).[5]

As Defendant's Petition makes clear, the certified classes here contain more than a de minimis number of members who lack standing. *See* Pet.13.

[5] Though *Dukes* specifically discussed "statutory defenses," *Dukes* did not limit its reasoning to statutory defenses. *Dukes*, 564 U.S. at 367. The Court's rationale applies equally to constitutional defenses, like the argument that a class member lacks Article III standing. *See* Pet.18-19.

Moreover, the district court declined to engage in the rigorous analysis required for class certification. *Dukes*, 564 U.S. at 351. *See* Pet.12-13. Instead, the district court declared in a two-sentence footnote that the "lion's share" of absent class members have standing. *Prantil*, 2022 WL 1570022, at *37 n.28. That is not enough to satisfy Article III, particularly when the court relied primarily upon (1) plaintiffs' sampling of only 0.23% of the class area, which itself determined that only 17.5% of samples exceeded the proposed remediation goal, *id.* at *34, (2) a model suggesting that only "48% [of the class area] was initially affected by particulate matter," *id.* at *40, and (3) the opinions of an "expert" that the district court thought sat "on the precipice of reliability," *id.* at *23. This is hardly the evidence necessary to meet the plaintiffs' burden to show standing at the class-certification stage.

II. Enforcing Article III's requirements at the class-certification stage is necessary to prevent the undue and burdensome settlement pressure that improper class certification places on defendants.

Failing to enforce standing requirements at the class-certification stage not only violates Article III, it has enormous practical consequences. *See* Pet.27-28.[6] Class certification is subject to strict standards because the "class

[6] Improperly certified classes can also negatively affect the plaintiffs. *See Flecha*, 946 F.3d at 770-71 (Oldham, J., concurring) ("[A] post-certification judgment can prevent unnamed class members from bringing their claims again.") (citations omitted). This is particularly important in classes certified under Rule 23(b)(1) or (2) for which there is no opt-out opportunity.

action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 564 U.S. at 348 (cleaned up). And when courts fail to address whether absent class members have standing, district courts can end up certifying large classes of people lacking actual injury. This can only invite abuse of the class-action device—with profound consequences for businesses, their customers, their employees, and the entire judicial system.

As the Supreme Court has recognized for decades, class certification exerts enormous pressure on defendants to settle claims "which by objective standards may have very little chance of success." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). "Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail"); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class. . . places pressure on the defendant to settle even unmeritorious claims.").

It is unsurprising, then, that "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (Dec. 2010). In 2021, for example, companies reported

settling 73.1% of class actions. *See* Carlton Fields 2022 Class Action Survey 26, https://bit.ly/3m1TTvA. That is up dramatically from 60.3% in 2019 and 58.5% in 2020. *Id.*

Defending and settling class-action lawsuits impose no small costs on the economy. Defendants reported spending approximately $3.37 billion to defend against class actions in 2021. *Id.* at 7. But such costs will not be borne exclusively by business defendants. They will likely be passed along to customers and employees through higher prices and lower wages and benefits.

A proper application of Article III and Rule 23 helps to mitigate these costs. And it does so by ensuring that federal courts do not stray beyond claims that they have jurisdiction to resolve in the first place. This Court recognized the importance of the standing question presented here when it granted permission to appeal a similarly erroneous order in *Earl v. Boeing*, No. 21-40720. To ensure that the district court's error in this case likewise does not evade review or correction, it should also grant Arkema's permission to appeal.

CONCLUSION

This Court should grant the Petition for Permission to Appeal.

Dated: June 8, 2022

Respectfully submitted,
/s/ *Scott A. Keller*

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CERTIFICATE OF SERVICE

On June 8, 2022, this brief was served via CM/ECF on all registered counsel and via email to all counsel listed in the Petition's service list and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses. No paper copies were filed in accordance with the COVID-19 changes ordered in General Docket No. 2020-3.

/s/ Scott A. Keller
Scott A. Keller

CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rules of Appellate Procedure 5(c)(1) and 29(a)(5) because it contains 2289 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

/s/ Scott A. Keller
Scott A. Keller

CERTIFICATE OF CONFERENCE

As stated in amici's motion for leave to file this brief, counsel for amici conferred with counsel for Petitioner and Respondents. Petitioner consents to the filing of this brief. Respondents do not consent to the filing of this brief.

/s/ Scott A. Keller
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