Supreme Court, U.S.
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No.

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,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court may certify an "issue" class under Rule 23(b)(3) to adjudicate discrete issues that will not establish liability for any claim.

2. Whether a court may certify an "issue" class under Rule 23(b)(2) to adjudicate discrete issues that will not result in final declaratory relief.

3. Whether a court may certify a nationwide class under Rule 23(b)(2) to pursue state-law claims without analyzing the underlying state laws to determine that they are consistent.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Pella Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Petitioner Pella Windows and Doors, Inc. is a wholly-owned subsidiary of Pella Corporation.

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INTRODUCTION

Class actions seek to promote efficiency by allowing one or more representative plaintiffs to pursue claims on behalf of an entire class. But class actions are subject to abuse when a named plaintiff pursues claims that cannot be established on a classwide basis. Under these circumstances, class certification promotes inefficiency, as well as unfairness, by multiplying proceedings and allowing a named plaintiff to conjure up a ghost army of absent class members whose claims the named plaintiff—and his attorneys—have no right to pursue.

Rule 23 seeks to prevent such abuse by allowing certification only where the named plaintiff can establish liability or entitlement to relief on a classwide basis—*i.e.*, by proving his or her own individual claims, the named plaintiff also would prove the claims of absent class members. If absent class members must still pursue individual proceedings to establish liability or entitlement to final relief, class certification is unwarranted. Rule 23(b)(3) accomplishes this objective in opt-out classes by specifying that certification is warranted only when common issues "predominate" over individual issues. And Rule 23(b)(2) accomplishes this objective in non-opt-out classes by specifying that certification is warranted only when the named plaintiff seeks "final" injunctive or declaratory relief on behalf of the class as a whole. The upshot of both provisions is the same: a court cannot certify a class merely to litigate one or more discrete issues that will not establish liability or entitlement to final relief on a classwide basis.

The lower courts in this case missed this fundamental point, and thereby distorted Rule 23 and departed from the path other courts have followed in addressing these important class-action questions. The district court recognized that the named plaintiffs here cannot prove their state-law consumer-fraud claims on a classwide basis because certain issues (including the bedrock issue of causation) must be proved on an individual basis. The court nonetheless certified "issue" classes under both Rule 23(b)(2) and Rule 23(b)(3) that cannot establish liability or entitlement to final relief on a classwide basis, and thus will not eliminate the need for individual proceedings. And the Seventh Circuit affirmed certification of both the Rule 23(b)(2) and 23(b)(3) classes on the ground that it "makes good sense" to resolve particular discrete issues on a classwide basis "while leaving the remaining, claimant-specific issues to individual follow-on proceedings." App. 7a (internal quotation omitted).

The lower courts, moreover, exacerbated these errors by allowing certification of a nationwide "issue" class under Rule 23(b)(2) without analyzing the underlying substantive state laws to determine whether they are consistent. Until this case, it had been settled law for a generation that certification of a nationwide class to pursue state-law claims is *per se* impermissible without careful analysis of the underlying state laws to determine consistency. The federal Declaratory Judgment Act, 28 U.S.C. § 2201, provides no basis for bypassing such analysis; to the contrary, that Act simply creates a federal-law mechanism for the declaration of substantive rights, but does not itself create any such rights.

At the end of the day, this case underscores the wisdom of this Court's observation that "the rulemakers' prescriptions for class actions may be endangered by those who embrace Rule 23 too enthusiastically just as they are by those who approach the Rule with distaste." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997) (internal quotation and brackets omitted). By endorsing the certification of "issue" classes that will not establish liability or entitlement to final relief on a classwide basis, the Seventh Circuit departed from the plain language of Rule 23 and stretched class certification beyond all bounds of principle and precedent. Because the decision below is incorrect, and fosters instability and confusion in an important area of the law, this Court should grant review.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 606 F.3d 391 and reprinted in the Appendix ("App.") at 1-11a. The Seventh Circuit's unreported order denying rehearing is reprinted at App. 12-13a. The district court's opinion is reported at 257 F.R.D. 471 and reprinted at App. 46-84a.

JURISDICTION

The Seventh Circuit issued its decision on May 20, 2010, and denied a timely rehearing petition on June 14, 2010. App. 1a, 12a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT RULE PROVISIONS

Rule 23 provides in relevant part:

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions.

A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(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; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * *

(4) Particular Issues.

When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses.

When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

Fed. R. Civ. P. 23.

STATEMENT OF THE CASE

A. Background

The case involves approximately six million aluminum-clad wood casement windows manufactured and sold by petitioners Pella Corporation and Pella Windows and Doors, Inc. (collectively Pella) across the Nation from 1991 until 2009. App. 1a, 19a, 21a. Although these windows were sold under the "ProLine" name, there were substantial changes over the years to the design of the windows and their recommended installation methods, maintenance requirements, and warranty.

Like other organic products, these wood windows may deteriorate as the result of any number of factors, including improper installation, when exposed to the elements. App. 7a, 21-22a, 30-31a, 61a, 80a. Pella provided a warranty on the windows, which was extended to ten years during the period at issue here, and in 2006 established a Service

Enhancement Program, which reimbursed distributors for labor costs associated with replacing windows under the warranty and partially subsidized the cost of replacing windows for five years after the warranty's expiration. App. 22a, 47a.

Respondents are individuals who own Pella aluminum-clad wood casement windows in their homes. Respondents Leonard E. Saltzman (who lives in Illinois), Kent Eubank (who lives in Iowa), and Thomas Riva (who lives in Florida), own Pella ProLine windows. App. 90-93a. Respondents William and Nancy Ehorn (who live in California) own Pella Architect, not ProLine, windows. App. 94a.[1]

B. Proceedings Below

Respondents brought this nationwide class action in 2006, alleging that the Pella aluminum-clad wood casement windows in their homes are unreasonably susceptible to moisture penetration and deterioration, and hence defective. Respondents did not, however, bring product-defect claims; instead, respondents brought state-law consumer-fraud claims, alleging that Pella's failure to notify them of the alleged defect violated their rights under the consumer-fraud statutes of their various States. Although respondents' claims arise under state law, they properly invoked federal jurisdiction under the

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[1] The complaint, as amended, included two other named plaintiffs, Lubo and Maria Hadjipetkov, who lived in New Jersey and owned Pella Architect, not ProLine, windows. App. 86a, 93a. They subsequently sought and were granted leave voluntarily to dismiss their claims.

Class Action Fairness Act, codified in relevant part at 28 U.S.C. § 1332(d), because this is a putative class action of more than 100 members in which the parties are at least minimally diverse and the amount in controversy exceeds $5 million. App. 87a.

Respondents thereafter moved for certification of several classes of owners of Pella ProLine casement windows, and the district court (Zagel, J., N.D. Ill.) granted the motion in relevant part. The court certified two separate and distinct classes: (1) an opt-out class seeking money damages under Rule 23(b)(3) under the consumer-fraud statutes of California, Florida, Illinois, Michigan, New Jersey, and New York consisting of those persons "whose windows have exhibited wood rot and who have replaced the affected windows," App. 51a, 84a, and (2) a nationwide non-opt-out class seeking declaratory relief under Rule 23(b)(2) consisting of those persons who owned "windows that have not manifested the alleged defect and [those persons] whose windows have some wood rot but have not yet been replaced," App. 51a, 83-84a.

With respect to the Rule 23(b)(3) class, the court held that respondents satisfied the threshold "commonality" requirement of Rule 23(a) based on the underlying question whether the Pella ProLine casement windows are defective. App. 58-61a. The court then declared that the commonality analysis of Rule 23(a) essentially satisfied the predominance requirement of Rule 23(b)(3). "Considerable overlap exists between the court's determination of commonality and a finding of predominance. A finding of commonality will likely satisfy a finding of predominance because, like commonality,

predominance is found where there exists a common nucleus of operative facts." App. 73-74a (internal quotation omitted).

The court conceded that respondents could not prove their consumer-fraud claims on a classwide basis, because those claims involved issues (like the bedrock issue of causation) that are inherently individualized. The court, however, dismissed causation as a "damages," as opposed to a "liability," issue. "It is clear that in many instances, inspection will be required, and individual inquiries will predominate. However, the fact that proving damages must be handled individually does not preclude certification on the issue of liability." App. 80a; *see also* App. 60a ("[T]he inquiry with regard to damages and causation is too individualized" for class adjudication); App. 61a ("I decline to certify a class for the issues of causation and damages."); App. 80-81a n.13 ("I agree that issues of causation are too individualized for class certification, and I have declined to certify a class on that issue."); App. 83a ("I am certifying the consumer fraud class as to the issue of liability only, and damages will be handled individually."). Because the court believed that it was carving at the joint by separating a determination of "liability" from "damages," the court further rejected Pella's argument that having different juries address different elements of liability (such as product defect and causation) would violate the Seventh Amendment's re-examination provision. App. 83a.

The court acknowledged that the consumer-fraud statutes of the various States differ, so that it was necessary to divide the Rule 23(b)(3) class into

different subclasses. App. 74-78a & n.12. Accordingly, the court certified subclasses for claims under California, Florida, Illinois, Michigan, New Jersey, and New York law. *See id.*; *see also* App. 51a, 84a.

With respect to the Rule 23(b)(2) class, the court held that non-opt-out certification was warranted because respondents sought only declaratory relief in the form of six "Declarations" regarding discrete issues.[2] None of the requested Declarations,

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[2] The requested Declarations are as follows:

Declaration I: The Court finds that all Pella ProLine aluminum clad casement windows, manufactured from 1991 to present, have a defect in the aluminum cladding of the sash component that allows water to get behind the aluminum cladding resulting in premature rotting of the wood component of the sash which wood rot may progress to adjacent wood components. The rotting of the wood component may not be detectable until after the warranty provided by Pella has expired. The Court finds that this defect is material and requires disclosure to all of these windows.

Declaration II: In August of 2006 Pella initiated a Pella Service Enhancement Program to provide limited remediation of wood rot in ProLine aluminum clad casement windows manufactured from 1991 to 2003. All persons who owned structures containing ProLine casement windows manufactured from 1991 to 2003 were eligible for this program. Pella however did not disclose to the persons eligible either the existence of the enhancement of their warranties, the limited remediation available, or that the windows covered by the program were defective in material and workmanship when manufactured.

Declaration III: The Court finds that all Pella ProLine aluminum clad casement windows manufactured from 1991 to present have a defect in workmanship and material that allows water to penetrate behind the aluminum clad sash component of the window resulting in premature rotting of the wood component, which rot may progress to adjacent wood

components, and that the rotting of the wood component may not be detectable until after the existing warranty provided by Pella has expired. The Court declares that all persons who own structures containing Pella ProLine windows manufactured from 1991 to present are to be provided the best practicable notice of the defect, which cost shall be borne by Pella.

Declaration IV: In August of 2006 Pella initiated a Pella Service Enhancement Program to provide limited remediation of wood rot in ProLine transom, awning and casement windows manufactured from 1991 to 2003. Only persons who owned structures containing ProLine transom, awning and casement windows manufactured from 1991 to 2003 and who repeatedly complained to Pella were purportedly included in and eligible for this program. Because the Court has determined that all Pella ProLine aluminum clad casement windows manufactured from 1991 to present have a defect in workmanship and material that allows water to penetrate behind the aluminum clad sash component of the window resulting in premature rotting of the wood component against reasonable expectations, and because the Court has found that Pella knew of this defect when it first manufactured these windows, the Court finds that the Pella Service Enhancement Program is insufficient to remediate the defects know by Pella to exist. The Court therefore declares that Pella's existing warranty on ProLine aluminum clad casement windows, limited to ten years for this defect is invalid, and, as such that limitation is unenforceable. Pella shall provide notice to all persons covered by that warranty of the removal of this time limitation.

Declaration V: The Court declares that Pella shall re-audit and reassess all prior warranty claims, including claims previously denied in whole or in part, where the denial was based on warranty or on other grounds, of claims related to ProLine window wood rot, whether internally coded by Pella as 06 or similar.

Declaration VI: The Court declares that Pella shall establish an inspection program and protocol to be communicated to class members, which will require Pella to inspect, upon request, a class member's structure to determine whether wood rot is manifest. Any disputes over coverage shall be adjudicated by a

however, would entitle any class member to final relief. Indeed, as the district court noted, respondents themselves acknowledged that the Declarations "do not ask the court to presume causation in all individual instances, only to make a finding regarding the nature of the wood durability defect and its cause." App. 73a.

The district court did not, in analyzing certification of the proposed nationwide non-opt-out class under Rule 23(b)(2), analyze the underlying state laws under which their claims arose to determine consistency. Rather, the court apparently accepted respondents' argument that because they sought declaratory relief under the federal Declaratory Judgment Act, 28 U.S.C. § 2201, their claims arose under uniform federal law.

Pella timely sought review of the class certification order Fed. R. Civ. P. 23(f). *See* App. 14-45a. The Seventh Circuit called for a response to the petition, and then—without any additional briefing or oral argument—both granted the petition and affirmed the certification order. *See* App. 1-11a.

The Seventh Circuit affirmed certification of the Rule 23(b)(3) class on the ground that the issue of "defect" predominated, even though any individual plaintiff would still have to prove causation, so that liability could not be established on a classwide basis. "We ... hold that the district court properly ... exercised its discretion to conclude that the common

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Special Master appointed by the Court and/or agreed to by the parties.

App. 48-50a n.3.

predominant *issue* of whether the windows suffer from a single, inherent design defect leading to wood rot is the *essence* of the dispute and is better resolved by class treatment." App. 5a (emphasis added). The appellate court noted with approval that "[t]he district court held that the commonality requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) are both satisfied because the *central* questions in the litigation are the same for all class members—whether the ProLine windows suffered from an inherent defect when they left the factory, whether and when Pella knew of this defect, the scope of Pella's warranty, and the nature of the ProLine Customer Enhancement Program and whether it amended the warranty." App. 6a.

The Seventh Circuit acknowledged that the causation inquiry in this case "is necessarily an individual issue." App. 7a; *see also id.* ("Under the district court's plan, class members still must prove individual issues of causation and damages."). The appellate court nonetheless asserted that "the need for individual proof alone does not necessarily preclude class certification." *Id.* "A district court has the discretion to split a case by certifying a class for some *issues*, but not others, or by certifying a class for liability alone where damages *or causation* may require individualized assessments." *Id.* (emphasis added). Like the district court, the Seventh Circuit dismissed Seventh Amendment concerns on the ground that the class jury would be asked to decide different issues than subsequent juries in individual cases. App. 9-10a.

The Seventh Circuit also affirmed certification of the nationwide non-opt-out Rule 23(b)(2) class of all

Pella ProLine window owners. App. 8-9a. The court noted that the Rule 23(b)(2) class seeks declaratory relief only, even though it does not seek (as the Rule requires) "final" relief; any individual plaintiff would still have to prove causation if and when a defect manifested itself. App. 8a. According to the Seventh Circuit, such persons (whose windows either had not manifested any defect or who had not replaced their windows) "would want declarations that there is an inherent design flaw, that the warranty extends to them and specific performance of the warranty to replace the windows when they manifest the defect, or final equitable relief." *Id.*

The Seventh Circuit did not address Pella's argument that the nationwide Rule 23(b)(2) class was inappropriate because the district court had not analyzed the underlying laws of the fifty States for consistency. Rather, the court apparently dismissed this argument as one of several "minor concerns that relate primarily to the manageability of the class." App. 10a. "Under Rule 23," the court declared, "district courts are permitted to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues." *Id.* (internal quotation omitted).

The Seventh Circuit denied a subsequent petition for rehearing, *see* App. 12-13a, and this petition follows.

REASONS FOR GRANTING THE WRIT

I. A Court May Not Certify An "Issue Class" Under Rule 23(b)(3) To Adjudicate Discrete Issues That Will Not Establish Liability For Any Claim.

The Seventh Circuit erred, and intensified an existing conflict among the circuits, by holding that it was appropriate for the district court to certify an "issue" class under Rule 23(b)(3), even though resolution of the specified issues—the existence of an alleged design defect in Pella's ProLine casement windows, and Pella's response to that alleged defect—would not establish liability for respondents' consumer-fraud claims on a classwide basis. Under Rule 23(b)(3), the presence of one or more common issues is not enough to warrant class certification. To the contrary, such common issues must "*predominate* over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3) (emphasis added), and—as most circuits to have addressed the issue have held—common issues cannot "predominate" as a matter of law where, as here, one or more essential elements of liability (such as causation, injury, or reliance) must be proved on an individual basis in subsequent proceedings.

It is simply not true, as the district court held, that "[a] finding of commonality [under Rule 23(a)] will likely satisfy a finding of predominance" under Rule 23(b)(3). App. 73-74a. To the contrary, as this Court and others have explained, the predominance requirement "is far more demanding" than the commonality requirement. *Amchem*, 521 U.S. at 624; *see also Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1270, 1278-79 (11th Cir. 2009); *Steering*

Committee v. Exxon Mobil Corp., 461 F.3d 598, 601-02 (5th Cir. 2006); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir. 2001). The existence of one or more common issues under Rule 23(a) is necessary, but not sufficient, to warrant class certification; the whole point of the predominance requirement of Rule 23(b)(3) is to ensure that classwide adjudication of a common issue or issues is worth the candle. *See* Advisory Committee's Notes on Fed. R. Civ. P. 23, 1966 amendments, Subdivision (b)(3) ("It is only where this predominance exists that economies can be achieved by means of the class-action device."). A court thus cannot "bootstrap" a finding of commonality under Rule 23(a) into a finding of predominance under Rule 23(b)(3). *See, e.g.*, *Vega*, 564 F.3d at 1277-79.

The district court in this case, however, did just that, and the Seventh Circuit blessed that decision. *See* App. 73-74a, 5-7a; *see also* App. 4a (noting that "the district court explicitly declined to certify issues related to causation, damages, and statute of limitations"); App. 6-7a (where there are "common issues," it "makes good sense ... to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings") (internal quotation omitted). According to the Seventh Circuit, the district court properly concluded that "the common *predominant* issue" of design defect "is the *essence* of the dispute," and outweighed the individualized elements of the consumer-fraud claims (including causation) that every class member would need to prove to establish liability. App. 5a (emphasis added); *see also* App. 6a (asserting that "the *central* questions in the litigation

are the same for all class members") (emphasis added).

By endorsing such non-dispositive "issue" classes under Rule 23(b)(3), the Seventh Circuit gutted the "predominance" requirement and deepened a circuit conflict. As the Fifth Circuit has explained, the predominance requirement ensures that commonality governs *a claim as a whole*. *See, e.g.*, *Castano v. American Tobacco Co.*, 84 F.3d 745 n.21 (5th Cir. 1996) ("[A] cause of action, *as a whole*, must satisfy Rule 23(b)(3)'s predominance requirement.") (emphasis added); *see also Steering Committee*, 461 F.3d at 601 (same); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421-22 (5th Cir. 1998) (same). For most claims (including those at issue here), alleging that a defendant engaged in a common course of wrongdoing takes a plaintiff only so far; the plaintiff generally must prove additional elements of a claim (such as causation, injury, or reliance) to establish liability.

Where, as here, a plaintiff cannot prove all elements of liability on a classwide basis with classwide proof, then common issues cannot "predominate" in the claim *as a whole*. *See, e.g.*, *Newton*, 259 F.3d at 172 ("If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable."); *see also Vega*, 564 F.3d at 1274; *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008); *Gene & Gene LLC v. Biopay LLC*, 541 F.3d 318, 326-27 (5th Cir. 2008); *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 393-94 (5th Cir. 2007); *Unger v. Amedisys Inc.*, 401 F.3d 316, 321-22 (5th Cir. 2005); *Gariety v.*

Grant Thornton, LLP, 368 F.3d 356, 362-63 (4th Cir. 2004); *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218-19 (5th Cir. 2003); *Andrews v. AT&T Co.*, 95 F.3d 1014, 1023-24 (11th Cir. 1996). In all of these cases, in sharp contrast to this case, the plaintiffs' allegation that the defendant engaged in a common course of wrongdoing was insufficient as a matter of law to warrant certification limited to that discrete issue in light of the individualized nature of other elements of liability.

Indeed, allowing "issue" classes under Rule 23(b)(3), like the one certified below, would undermine the efficiency concerns that animate the Rule in the first place. If subsequent individual proceedings are necessary to establish liability, the utility of a class action is sharply limited. *See, e.g.*, *Allison*, 151 F.3d at 419-20; *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 & n.12 (11th Cir. 1997). Certification of an "issue" class to litigate only discrete elements of plaintiffs' claims does not *prevent* individual proceedings, but *guarantees* them.

Trying different elements of liability before different juries, moreover, raises serious Seventh Amendment problems. *See* U.S. Const. amend. VII ("[N]o fact tried by a jury shall be otherwise re-examined in any Court of the United States."). Because the various elements of a cause of action often turn on the same facts, a jury addressing one discrete element of liability may find facts differently than another jury addressing another discrete element of liability, in violation of that constitutional command. *See, e.g.*, *Allison*, 151 F.3d at 423-24 & n.21; *Castano*, 84 F.3d at 750-51 & n.30; *see*

generally Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 500 (1931); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318-19 (5th Cir. 1978).

This case underscores the point. A jury addressing causation in an individual proceeding would necessarily have to understand the alleged design defect to decide whether it caused the failure of a particular window, and therefore may re-examine facts relating to defect that were already tried to a class jury. A case involving comparative fault would present this problem even more starkly. It is common for plaintiffs to blame multiple parties (*e.g.*, manufacturers, builders, and contractors) for window failure. In comparative-fault jurisdictions, a jury would be required to assess the comparative fault of all responsible parties, which in turn would require the jury to re-examine the facts relating to defect that were already tried to a class jury, in violation of the Seventh Amendment.[3]

The Seventh Circuit's assertion that Rule 23(b)(3) gives a district court "the discretion to split a case by certifying a class for some issues, but not others," App. 7a, exacerbates a festering circuit conflict on the propriety of "issue" classes. Like the Seventh

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[3] Both the district court and the Seventh Circuit dismissed the Seventh Amendment problem on the ground that the class jury would determine "liability," while an individual jury would determine "damages." App. 9-10a, 83a. Causation, however, is an element of liability, not damages. Regardless of whether it is generally permissible under the Seventh Amendment to "split" a case between liability and damages, *but see Blue Bird*, 573 F.2d at 318-19, the lower courts here impermissibly "split" this case between discrete elements of liability.

Circuit, the Second and Ninth Circuits have held that district courts may certify "issue" classes to adjudicate particular *elements* of claims, even if individualized issues preclude classwide adjudication of those claims *as a whole*. *See, e.g.*, *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (holding that class certification warranted to address defendant's conduct, regardless of individualized defenses); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Rule 23 authorizes the district court in appropriate cases to isolate the common issues ... and proceed with class treatment of these particular issues."); *cf. Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 109 (2d Cir. 2007) (noting that, in light of *Strip Search*, a district court could certify a class "to litigate the first element of [an] antitrust claim—the existence of a Sherman Act violation," regardless of whether other elements of such a claim are individualized); *Brown v. Kelly*, 609 F.3d 467, 483-85 (2d Cir. 2010) (same). These other circuits buttress their interpretation with Rule 23(c)(4), which authorizes certification "with respect to particular issues." Fed. R. Civ. P. 23(c)(4). *See Strip Search*, 461 F.3d at 227; *Valentino*, 97 F.3d at 1234.

As the Fifth Circuit has explained, however, Rule 23(c)(4) cannot reasonably be read to "eviscerate" the predominance requirement of Rule 23(b)(3) by allowing the certification of "issue" classes where, as here, common issues do not predominate in a claim *as a whole*. *Castano*, 84 F.3d at 745 n.21; *see also Steering Committee*, 461 F.3d at 601; *Allison*, 151 F.3d at 421-22. Rather, Rule 23(c)(4) "is a housekeeping rule that allows courts to sever the

common issues for a classwide trial" if and only if the undiluted predominance requirement of Rule 23(b)(3) is satisfied. *Castano*, 84 F.3d at 745 n.21.

The upshot is that this case highlights a circuit conflict on the propriety of certifying "issue" classes to resolve discrete elements of claims on a classwide basis where (as here) other elements of those claims concededly require individualized adjudication. *See, e.g.*, *Strip Search*, 461 F.3d at 226-27 (expressly disagreeing with the Fifth Circuit's ruling in *Castano* that "a cause of action, as a whole, must satisfy the predominance requirement of (b)(3)"); *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 200 n.25 (3d Cir. 2009) (noting that this issue "has generated divergent interpretations among the courts"); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) (same). Given the ubiquitous role of class actions in our contemporary legal culture, the propriety of certifying discrete "issue" classes under Rule 23(b)(3) warrants this Court's review.

II. A Court May Not Certify An "Issue" Class Under Rule 23(b)(2) To Adjudicate Discrete Issues That Will Not Result In Final Declaratory Relief.

The Seventh Circuit next erred, and created a conflict among the circuits, by holding that it was appropriate for the district court to certify a non-opt-out class under Rule 23(b)(2), even though that class cannot obtain final declaratory (or other) relief. Under the plain language of that provision, non-opt-out certification is warranted where "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). "Declaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief." Advisory Committee's Notes on Fed. R. Civ. P. 23, 1966 amendments, Subdivision (b)(2); *see also* Charles A. Wright *et al.*, *Federal Practice & Procedure* § 1775 (3d ed. 2005) (to be "corresponding," "the declaration should be equivalent to an injunction"). Thus, whether a plaintiff seeks injunctive or declaratory relief, certification under Rule 23(b)(2) is warranted only where the plaintiff seeks *final* relief.

The district court nonetheless certified a non-opt-out class seeking declaratory relief under Rule 23(b)(2) while acknowledging that the class could not obtain—and indeed did not seek—any final relief. As the court pointed out, the various Declarations sought by respondents, *see supra* n.2, "do not ask the court to presume causation in all individual instances, only to make a finding regarding the nature of the wood durability defect and its cause." App. 73a. In other words, a declaration regarding a "defect" would not establish liability for any particular claim, and individual proceedings would still be necessary for any class member to obtain any final relief—whether injunctive or monetary in nature. The Seventh Circuit endorsed the district court's analysis, expressly rejecting Pella's argument that "the class does not seek *final* injunctive relief as the rule requires." App. 8a (emphasis in original). It suffices, the Seventh Circuit held, that class members would benefit from certain declarations

regarding discrete elements of their claims. *See* App. 8-9a.[4]

That holding cannot be squared with Rule 23(b)(2) or cases from other circuits applying that provision. The point here is essentially the same as the point made above with respect to Rule 23(b)(3): a class action is not an appropriate device for adjudicating discrete legal issues that will then require individual adjudication by each class member to establish liability or obtain any relief. Rule 23(b)(3) makes the point through its "predominance" requirement; Rule 23(b)(2) makes the point through its "final" relief requirement. Where, as here, common issues do not "predominate" so that class certification is inappropriate under Rule 23(b)(3), plaintiffs cannot simply turn to Rule 23(b)(2) to pursue similarly non-final declaratory relief regarding one or more discrete elements of their claims.

Given the plain language of Rule 23(b)(2), it is hardly surprising that the First, Fifth, and Eleventh

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[4] The Seventh Circuit also suggested that "the cumulative effect" of the Declarations for class members "will be an entitlement to have their windows replaced." App. 9a. As the district court recognized, that suggestion is incorrect, because the Declarations do not purport to resolve individual liability issues, including the bedrock issue of causation. App. 73a. Indeed, as the district court pointed out, plaintiffs themselves disavowed any suggestion that the Declarations would resolve causation in individual cases. *See id.* Thus, even if the Declarations were granted, each class member would still have to prove that any moisture-related damage was caused by the declared defect, as opposed to some other factor like improper window installation.

Circuits have expressly rejected the certification of "issue" classes seeking non-final declaratory relief under Rule 23(b)(2). *See 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, 426-27 (1st Cir. 2007); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1344-45 (11th Cir. 2006); *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 977-79 & n.39 (5th Cir. 2000). In those cases, as here, the requested declaratory relief would not resolve any class member's claim—rather, each class member still would need to initiate follow-on proceedings to adjudicate individualized liability issues. This, of course, would undermine the very "judicial economy and efficiency" that are "[a]mong the primary rationales behind the class action mechanism." *McKenna*, 475 F.3d at 427. A Rule 23(b)(2) class, in other words, cannot serve merely as a stepping-stone to subsequent individual proceedings, but must resolve the parties' rights. *See, e.g., id.* at 422 (rejecting certification of class "aimed at clearing the way for [individual] rescission claims").

It is hard to overstate the practical implications of the Seventh Circuit's cavalier approach toward certification of "issue" classes for non-final declaratory relief under Rule 23(b)(2). As this case shows, a plaintiff can virtually always allege a common course of wrongdoing. If such an allegation alone were sufficient to warrant certification of a non-opt-out class seeking declaratory relief with respect to that single issue, then such declaratory "issue" classes could be certified in virtually every case. The fact that Rule 23(b)(2), in sharp contrast to Rule 23(b)(3), does not require the court to provide

absent class members with either notice or an opportunity to opt out of the class only heightens the problem. The decision below opens the door for classwide declaratory adjudication of discrete elements of potential individual claims for money damages without any notice to absent class members. Neither the Rule nor due process tolerates that result.

III. A Court May Not Certify A Nationwide Class Under Rule 23(b)(2) To Pursue State-Law Claims Without Analyzing The Underlying State Laws To Determine That They Are Consistent.

Finally, the Seventh Circuit erred, and strayed from the well-worn path followed by other circuits, by affirming the district court's certification of a nationwide class under Rule 23(b)(2) to pursue state-law claims without analyzing the underlying state laws to determine that they are consistent. Under that provision, class certification is warranted only where final injunctive or declaratory relief is warranted for "the class as a whole." Fed. R. Civ. P. 23(b)(2). Needless to say, a court cannot determine whether relief is warranted for a nationwide class "as a whole," *id.*, without analyzing each of the laws alleged to provide the basis for such relief to determine that they provide a consistent basis for classwide relief.

The district court, however, engaged in no such analysis before certifying the nationwide Rule 23(b)(2) class in this case. Indeed, the court's cursory analysis of the Rule 23(b)(2) class addresses only the Rule's first requirement—"the party opposing the class has acted ... on grounds that apply generally to

the class"—and does not address the Rule's second requirement that "the class as a whole" must be entitled to final injunctive or declaratory relief. *See* App. 71-73a. Pella's Rule 23(f) petition challenged the district court's failure to analyze differences in state law before certifying a nationwide class, *see* App. 35-37a, but the Seventh Circuit appears to have dismissed that point as no more than a "minor concern[] that relate[s] primarily to the manageability of the class." App. 10a.

That dismissive approach conflicts with numerous decisions recognizing that certification of a nationwide class to pursue state-law claims is *per se* unwarranted without a careful analysis of the relevant laws of the fifty States to determine whether the claims can be proved on a classwide basis. *See, e.g.*, *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001); *Andrews,* 95 F.3d at 1024; *Castano*, 84 F.3d at 741-44; *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1011-12, 1016-17 (D.C. Cir. 1986) (R.B. Ginsburg & Edwards, JJ.); *In re Asbestos School Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986). Differences in state law are not a matter that can be swept under the rug; rather, as then-Judge R.B. Ginsburg, joined by Judge Edwards, explained, "nationwide class action movants must credibly demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles." *Walsh*, 807 F.2d at 1017 (internal quotation omitted). The decision below affirming certification of a nationwide class to pursue state-law claims without *any* analysis of the relevant laws of the fifty States cannot be squared with these precedents.

Nor does the federal Declaratory Judgment Act, 28 U.S.C. § 2201, allow courts to sidestep the requisite analysis of state law. As this Court has long explained, that Act is "procedural only," insofar as it creates a mechanism for declaring rights under substantive law but does not create any such rights. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). Thus, the Act "does not create a basis for class certification under Rule 23(b)(2) if none exists" under the relevant substantive law. *Christ*, 547 F.3d at 1298; *see also Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 729 (9th Cir. 2007); *Bolin*, 231 F.3d at 978-79; *cf. Walsh*, 807 F.2d at 1011-12, 1016-17 (vacating certification of nationwide class under federal Magnuson-Moss Act, 15 U.S.C. § 2301 *et seq.*, which in turn incorporates state law). Under no circumstances does the Declaratory Judgment Act relieve a court of its obligation to analyze differences in state law before certifying a nationwide class to pursue state-law claims.

The Seventh Circuit's affirmance of the Rule 23(b)(2) class without any consideration of respondents' underlying claims is particularly egregious because many jurisdictions have specifically refused to recognize "no injury" claims. As noted above, this class includes persons who own "windows that have not manifested the alleged defect." App. 51a, 83-84a. Because many (if not most) States do not recognize "no-injury" claims (*i.e.*, claims regarding products that "have either not yet experienced a malfunction because of the alleged defect or have experienced a malfunction but not been harmed by it," *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 455 n.4 (5th Cir. 2001)) there is certainly no basis to assume that uninjured owners

of ProLine casement windows in all fifty States have a common claim for which they may seek declaratory relief. *See, e.g.*, *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503-05 (8th Cir. 2009); *Cole v. General Motors Corp.*, 484 F.3d 717, 729-30 (5th Cir. 2007); *Briehl v. General Motors Corp.*, 172 F.3d 623, 627-28 (8th Cir. 1999); *Ford Motor Co. v. Rice*, 726 So.2d 626, 627-31 (Ala. 1998). Needless to say, the Declaratory Judgment Act does not authorize declaratory relief in the absence of an underlying claim. *See, e.g.*, *Aetna Life*, 300 U.S. at 240-41. The Seventh Circuit has thus blessed a Frankenstein nationwide declaratory-judgment class of non-injured plaintiffs to pursue claims that may or may not even exist under the laws of any particular State.

The bottom line is that certification of a nationwide class action is an extraordinary step, and district courts may not take that step without carefully analyzing the laws of the fifty States for consistency. Here, there is no question that the laws of the fifty States differ with respect to respondents' claims. Indeed, the district court itself acknowledged those differences by certifying six state-specific damages subclasses under Rule 23(b)(3), App. 51a, 74-78a & n.12, 84a, and refusing to certify a seventh such subclass under North Carolina law, App. 62a n.7. *A fortiori*, that means that respondents cannot prove that final injunctive or declaratory relief is warranted for a nationwide class "as a whole." Fed. R. Civ. P. 23(b)(2). This Court should bring the Seventh Circuit back into line, lest that circuit become a magnet for nationwide "issue" class actions that could not be certified elsewhere. The Seventh Circuit's enthusiasm for "imaginative solutions" under Rule 23, App. 10a (internal quotation omitted),

must be tempered by this Court's admonition that "the text of [the] rule ... limits judicial inventiveness." *Amchem*, 521 U.S. at 620.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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