No. 23-0039

In the Supreme Court of Texas

FRISCO MEDICAL CENTER, L.L.P. and
TEXAS REGIONAL MEDICAL CENTER, L.L.C.,
Petitioners,

v.

PAULA CHESTNUT and WENDY BOLEN,
on behalf of themselves and all others similarly situated,
Respondents.

On Petition for Review from the Court of Appeals for the
Fifth Judicial District, Dallas, Texas, No. 05-22-00058-cv

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[*]

The Chamber of Commerce of the United States of America is the world's largest business federation. 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 that, like this one, raise issues of concern to the nation's business community.

The Chamber seeks to promote a predictable, rational, and fair legal environment for its members and for the broader business community. And many of its members are or may end up defending against putative class actions. The Chamber therefore has a strong interest in ensuring that Texas courts only certify "issue classes" that meet the requirements of Rule 42.

[*] No counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. No person other than *amicus curiae*, its members, or its counsel made any monetary contribution to the preparation or submission of this brief. *See* Tex. R. App. P. 11.

INTRODUCTION

Last term, this Court reiterated the prohibition on "crossing the class-certification Rubicon" before conducting a "rigorous and searching judicial analysis" of whether "the claims are suitable for class resolution." *Am. Campus Cmtys., Inc. v. Berry*, 667 S.W.3d 277, 279 (Tex. 2023).

The court of appeals ignored that rule. It expressly held that none of plaintiffs' claims satisfied Rule 42's class-certification requirements. But rather than vacating the class-certification order, it carved out three distinct issues from the otherwise-uncertifiable claims and certified them as an "issue class."

That's the same misuse of "issue class" certification that the Fifth Circuit warned "would eviscerate" longstanding class-certification requirements and lead to "automatic certification in every case where there is a common issue." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) (that result "could not have been intended" under Rule 42's federal counterpart).

Class certification "fundamentally changes the nature of the proceeding, imposing unique burdens on the judicial system and raising the stakes for the parties and their lawyers, often exponentially so."

Berry, 667 S.W.3d at 279. The court of appeals' "certify now and worry later" approach—which this Court has spent the last quarter-century condemning—magnifies the burdens, multiplies the stakes, and threatens to impose staggering hardship on businesses, consumers, and the Texas economy as a whole.

Businesses spent over $3.5 billion fending off class actions in 2022 alone—a figure that has steadily climbed for the past eight years. Carlton Fields, *2023 Class Action Survey* 1, 4 (2023), https://t.ly/9ZrMV. Unsurprisingly, class-action defendants often capitulate to *in terrorem* settlements in an effort to limit the enormous exposure and control the costs of defending against these suits. *Id.* at 33. This Court should tolerate neither the court of appeals' unprincipled, unfounded expansion of Rule 42 nor the deleterious consequences that are sure to follow.

The Court should reaffirm its holding in *Berry*: Rule 42 prohibits certifying claims that are unsuited for class resolution—regardless of whether a court can pluck a few common issues from among the deficient claims. It should grant the petition, reverse the court of appeals' judgment affirming certification of "three discrete issues," and remand the case to the trial court for further proceedings.

ARGUMENT

I. Rule 42 bars certification of "issue classes" unless the claim as a whole is certifiable.

Rule 42(d) can't be used to transform otherwise-uncertifiable claims into certifiable ones. It's a case-management tool that allows trial courts to break down class actions that already meet the requirements of Rule 42(a) and Rule 42(b) into discrete "issue classes" for ease of litigation. This reading of Rule 42 is faithful to its text and structure, consistent with this Court's precedent, and aligned with the Fifth Circuit's interpretation of federal Rule 23. *See Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 455 (Tex. 2007) (quoting *Castano*, 84 F.3d at 745 n.21).[1]

The Court should grant review, enforce Rule 42's plain meaning, and unequivocally reject the court of appeals' limitless approach to class certification.

A. Rule 42(d)(1) is a housekeeping rule—it comes into play *only if* an entire claim already satisfies Rule 42(a) and Rule 42(b).

Rule 42(d)(1) states that "*[w]hen appropriate*, an action may be brought or maintained as a class action with respect to particular issues."

[1] "Because Rule 42 is patterned after Federal Rule of Civil Procedure 23, federal decisions and authorities interpreting current federal class action requirements are instructive." *Riemer v. State*, 392 S.W.3d 635, 639 (Tex. 2013).

(Emphasis added). In "interpret[ing] rules of procedure," this Court applies the ordinary "principles of statutory interpretation." *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 654 (Tex. 2020). Because Rule 42 does not expressly define when certifying an "issue class" is "appropriate," the Court must "consider the context and framework" of the rule. *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 326 (Tex. 2017). That framework is straightforward.

Rule 42 delineates detailed class-certification standards in subsections (a) and (b). Rule 42(a) sets out the four familiar "prerequisites" for all class actions: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation.

Rule 42(b) then lays out the three types of class actions, which are categorized by the nature or effect of the relief sought, and explains that an "action may be maintained as a class action *if* the prerequisites of subdivision (a) are satisfied, *and in addition*" the specific additional requirements of (b)(1), (b)(2), or (b)(3) are met. (Emphases added.) Those include:

(b)(1) separate actions would risk inconsistent rulings for plaintiffs or incompatible standards of conduct for defendants;

(b)(2) class-wide injunctive or declaratory relief is needed because the defendant acted (or refused to act) on grounds applicable to a cohesive class; or

(b)(3) all other cases, including large-scale complex cases seeking money damages, *if* (i) common questions of law or fact predominate *and* (ii) a class action is superior to other methods of adjudication.

See Allison v. Citgo Petrol. Corp., 151 F.3d 402, 412–13 (5th Cir. 1998); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614–18 (1997).

So, to qualify for certification, a claim must not only meet all four Rule 42(a) prerequisites but also satisfy the requirements of Rule 42(b)(1), (b)(2), or (b)(3).

Rule 42(d) then introduces post-certification case-management tools, which can be used for administering certified class actions "[w]hen appropriate." Rule 42(d)(1) authorizes severing the common issues for a class trial, and Rule 42(d)(2) authorizes the creation of subclasses.

Read any other way, Rule 42(d)(1) would become a dangerous roadmap to limitless class certification. Unbounded by the procedural safeguards of Rule 42(a) and Rule 42(b), courts could sever and trim an otherwise-uncertifiable claim until it yields one (or three) "discrete

issues" to certify. *See Frisco Med. Ctr., L.L.P. v. Chestnut*, 2022 WL 16735383, at *13 (Tex. App.—Dallas Nov. 7, 2022, pet. filed).

Allowing courts (and litigants) to use Rule 42(d)(1) as an end-run around Rule 42(a) and Rule 42(b) would not only violate a fundamental canon of statutory interpretation by rendering those provisions "meaningless or superfluous," *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008), but also result in "automatic certification in every case where there is a common issue"—"a result that could not have been intended." *Castano*, 84 F.3d at 745 n.21.

Yet that's exactly what the court of appeals did here. After expressly holding that plaintiffs' claims were uncertifiable under Rule 42(b)(1), (b)(2), or (b)(3), *see* 2022 WL 16735383, at *7, *9, *11–12 & n.8, the court of appeals nevertheless proceeded to uphold the trial court's "Rule 42(d)(1) certification of a Rule 42(b)(2) class action as to . . . three 'discrete issues.'" *Id.* at *13. Under the court of appeals' reading of Rule 42, courts can use Rule 42(d)(1) to resuscitate—and certify for class treatment—a concededly uncertifiable claim simply by peeling off the individualized issues until only "discrete," common, certifiable issues remain.

This Court need look no further than the plain text of Rule 42 to recognize the court of appeals' error. If a claim isn't certifiable, neither is an "issue class" comprising one or more elements of that claim. So once the court of appeals concluded that plaintiffs' "entire claims" lacked "cohesiveness" and couldn't be certified under Rule 42(b)(2), that should've been the end of the matter. 2022 WL 16735383, at *12 n.8. There was no "Rule 42(b)(2) class action" from which to sever common issues under Rule 42(d)(1). *Id*.

Because Rule 42(d)(1) doesn't grant a roving commission to certify "discrete issues" in the absence of a claim that, as a whole, satisfies the requirements of Rule 42(a) and Rule 42(b), the Court should grant review, reverse the court of appeals' judgment affirming certification of the three distinct issues, and remand the case to the trial court for further proceedings.

B. Decisions from this Court and the Fifth Circuit confirm Rule 42's plain text—no certification unless an entire claim satisfies Rule 42(a) and Rule 42(b).

This Court's longstanding caution regarding class certification—and the Fifth Circuit's interpretation of Rule 42's federal counterpart—both confirm that certification of "issues" under Rule 42(d)(1) is

untenable absent the certification of a claim that otherwise satisfies the prerequisites of Rule 42(a) and Rule 42(b).

1. In 2000, this Court diagnosed a misapplication of Rule 42 that was spreading across the courts of appeals: "certify now and worry later." *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000). In holding that courts can't certify a Rule 42(b)(3) class unless the predominance requirement is met, the Court called to task several courts of appeals that failed to "vigorously apply[]" and "carefully scrutiniz[e]" predominance. *Id.* at 434–35.

Some courts of appeals thought "creative means may be designed to deal with" individualized issues that otherwise would have thwarted predominance, and upheld certifications "without identifying those means." *Bernal*, 22 S.W.3d at 434. Others opted to "indulge[] every presumption in favor of" certification, "frankly acknowledg[ing] that if they erred, it would be in favor of certification." *Id.* And still others concluded that Rule 42(b)(3)'s predominance requirement was "not really a preliminary requirement at all," because unresolved individual issues "can always later be decertified." *Id.*

Admonishing that the "text of a rule" of civil procedure "limits judicial inventiveness," the Court reaffirmed that "actual, not presumed, conformance with [Rule 42] remains . . . indispensable." *Bernal*, 22 S.W.3d at 435 (quoting *Amchem*, 521 U.S. at 620, and *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982)). The Court condemned the lower courts' cavalier approach and reiterated "that a cautious approach to class certification is essential." *Id.*

Four years later, in *Compaq Computer Corp. v. Lapray*, the Court confronted a new twist on the same error. 135 S.W.3d 657 (Tex. 2004). This time, the court of appeals upheld class certification under Rule 42(b)(2) (and under Rule 42(b)(3) in the alternative), but postponed assessing Rule 42(b)(3)'s predominance or superiority requirements rather than analyzing them on the front end. *Id.* at 662.

That was error, the Court held, because the class sought both declaratory relief under Rule 42(b)(2) and money damages under Rule 42(b)(3)'s "stricter certification requirements," which include not only the predominance and superiority requirements but also the notice and opt-out procedural rights. 135 S.W.3d at 667–68. By delaying consideration of these vital issues, the court of appeals circumvented Rule 42(b)(3)'s

procedural safeguards. *Id.*; *see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361–62 (2011) (reversing certification of damages claims that were "inconsistent with the structure" of federal Rule 23(b)(2)).

The court of appeals in *Lapray* at least believed the class was certifiable under one of the Rule 42(b) subparts—which stands in stark contrast to the decision below. The *Lapray* Court's concerns—about parties "artful[ly] pleading" damages claims as declaratory claims "to circumvent what are perceived as stricter certification requirements under [Rule 42](b)(3)"—are thus amplified here: Allowing the court of appeals' decision to stand will provide a roadmap for evading the structure of Rule 42(b) altogether. 135 S.W.3d at 667.

This Court's unbroken chain of enforcing Rule 42's plain language reached "issue classes" in 2007. In *Daccach*, the Court held that Rule 42(d) allows courts to certify a class whose representative abandoned or split claims, but that any final judgment would be preclusive on the class. 217 S.W.3d at 455.

The Court echoed the Fifth Circuit's *Castano* decision, describing Rule 42(d)(1) as "a housekeeping rule that allows courts to sever the common issues for a class trial," but underscoring that "Rule 42(d) cannot

be used to manufacture compliance with the certification prerequisites." 217 S.W.3d at 455 (quoting *Castano*, 84 F.3d at 745 n.21). That is, plaintiffs' "cause of action, as a whole, must satisfy" Rule 42(b)(2)'s requirements—Rule 42(d)(1) can't be used to sever individualized issues in order to "save the class action." *Castano*, 84 F.3d at 745 n.21.

2. In *Castano*, the Fifth Circuit reversed the district court's class certification in part because the certification order failed to specify whether the reliance element of the class's fraud claim would be tried individually or on a class basis. 84 F.3d at 737, 744–45.

The trial court's "certify now, worry later" approach was problematic because it would've presented the court "with the difficult choice of decertifying the class after phase 1 and wasting judicial resources, or continuing with a class action that would have failed the predominance requirement of rule 23(b)(3)." 84 F.3d at 745.

The Fifth Circuit also made clear that Rule 23(c)(4)—the federal counterpart of Rule 42(d)(1)—provided no quarter: "Severing" the reliance issue "does not save the class action" because courts "cannot manufacture predominance through the nimble use of subdivision (c)(4)." *Castano*, 84 F.3d at 745 n.21. That is, Rule 23(c)(4) is merely "a housekeeping rule

that allows courts to sever the common issues for a class trial"—it in no way eliminates the requirement "that a cause of action, *as a whole*, must satisfy" the requirements of Rule 23(b). *Id.* (emphasis added).

The Fifth Circuit's reasoning in *Castano* illuminates this Court's warning in *Daccach* against using Rule 42(d)(1) to "manufacture compliance" with the certification prerequisites laid out in Rule 42(a) and Rule 42(b). 217 S.W.3d at 455 (citing *Castano*, 84 F.3d at 745 n.21).

The court of appeals here disregarded that admonition. Despite holding that plaintiffs' "entire claims" lacked "cohesiveness" and were therefore uncertifiable under Rule 42(b)(2), the court nevertheless affirmed the trial court's "Rule 42(d)(1) certification of a Rule 42(b)(2) class action as to the three 'discrete issues.'" 2022 WL 16735383, at *12–13 & n.8. It's hard to imagine a more blatant example of "manufactur[ing] compliance with the certification prerequisites." *Daccach*, 217 S.W.3d at 455.

This case presents yet another egregious example of lower courts' willingness to "certify now and worry later"—an approach to Rule 42 that this Court has spent the last quarter-century condemning. *See* Part I.B.1. In *Castano*, the Fifth Circuit sensibly looked to the plain meaning of Rule 23's text and charted a clear path for this Court to follow

with respect to Rule 42.[2] The Court should grant the petition and make clear that Rule 42(d)(1) has no application unless and until a class is certified on at least one entire claim that meets the requirements of Rule 42(a) and Rule 42(b).

II. Allowing "issue classes" to be certified out of otherwise-uncertifiable claims harms Texas businesses, consumers, and ultimately the entire economy.

By certifying for class treatment three discrete issues—in a case that otherwise involves concededly uncertifiable claims—the court of appeals dramatically "raise[d] the stakes of a lawsuit that ought to have no stakes at all." *Berry*, 667 S.W.3d at 286. Allowing plaintiffs to proceed as a class, even on discrete issues, would "create[] insurmountable pressure on defendants to settle, whereas individual trials would not." *Castano*, 84 F.3d at 746. And here, plaintiffs say the quiet part out loud, predicting that resolution of the certified issues "will have a major

[2] The D.C. Circuit reached the same conclusion last year. *Harris v. Med. Transp. Mgmt., Inc.*, 77 F.4th 746, 756–59 (D.C. Cir. 2023). Other federal courts of appeals have diverged from the D.C. Circuit and Fifth Circuit's principled view, entertaining class certifications under Rule 42(d)(1) even though other Rule 42(a) or (b) prerequisites remained unsatisfied. *See*, *e.g.*, *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008); *Rahman v. Mott's LLP*, 693 F. App'x 578, 579 (9th Cir. 2017). But, unlike the D.C. Circuit and Fifth Circuit's approach, those decisions fail to grapple with the Rule's text, context, or structure—so none provides any persuasive reason to depart from those circuits in construing Texas law.

impact" on not just the defendants, but the *entire emergency-room industry* "throughout Texas"—even though none of the issues is dispositive of plaintiffs' claim. *See* Resp. Br. 13–14.

This is an all-too-common predicament for class-action defendants—being forced to decide between risking crushing liability at trial or capitulating to what many judges have called "blackmail settlements." *See*, *e.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

This pressure is all the more unjustifiable here because the court of appeals held that plaintiffs' claims *failed* to meet *any* of Rule 42(b)'s certification requirements. *See* 2022 WL 16735383, at *7, *11–12 & n.8. That should've been the end of the matter—and the court of appeals should've vacated the class-certification order, full stop. The court of appeals' decision to instead bless the trial court's creation of an "issue class" out of plaintiffs' otherwise-uncertifiable claims runs roughshod over Rule 42's text and structure, "exponentially" raises the stakes of this case, and sets a dangerous precedent that will hurt Texas businesses, Texas consumers, and the Texas economy as a whole. *Berry*, 667 S.W.3d at 279.

By aggregating the claims of tens of thousands of plaintiffs (60,000 here), class certification dramatically inflates a defendant's potential liability. This is particularly true where, as here, the judgment can ultimately be used to support claims for statutory damages—transmogrifying even discrete "issue class" actions into "bet-the-company" cases. *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 103–06 (2009). In short, aggregating even elements of claims for "large numbers" of plaintiffs "potentially distorts the purpose of both statutory damages and class actions." *Parker v. Time Warner Ent. Co.*, 331 F.3d 13, 22 (2d Cir. 2003).

Courts "cannot be blind to the reality that certifying a class may, practically speaking, dictate the outcome of the litigation by fundamentally changing the parties' incentives to settle." *Berry*, 667 S.W.3d at 286. The prospect of protracted litigation and the risk of massive, class-wide judgments are often enough to persuade defendants to abandon even meritorious defenses and give in to "*in terrorem*" settlement pressures. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476

(1978) ("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.").

Class actions can drag on for years with no "resolution or even a determination of whether the case could go forward on a class-wide basis." U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 1, 5 (Dec. 2013), https://t.ly/h-6I.

Actual settlement rates demonstrate the power of this pressure. One empirical study of every federal class action from 2006 to 2007 noted 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 (2010) (emphasis added).

Although settlement rates declined in 2022, the number of class actions companies faced increased: "Companies reported almost a full additional class action in 2022 over 2021, which reverses a two-year decline since 2019." Fields, *2023 Class Action Survey* at 14. And settlements increased as an effective means of controlling the cost of

defending against class actions. *Id.* at 33. So it's no surprise that "[c]lass action spending has increased for eight consecutive years." *Id.* at 1.

The class-action system, including *in terrorem* settlement pressure, imposes enormous costs on businesses, employees, and consumers. Class-action defendants reported spending a record-breaking $3.5 billion to defend against class actions in 2022 alone, and that number is projected to increase. Fields, *2023 Class Action Survey* at 2, 4. Small businesses disproportionately shoulder the burden of these expenses. *See* U.S. Chamber of Commerce Institute for Legal Reform, *Tort Costs for Small Businesses* 2–3, 13, 18 (Dec. 2023), https://t.ly/-2ARd (small businesses earn only 20 percent of total business revenue but bear almost half the costs of business tort liability).

And the costs will inevitably be passed along to consumers and employees through higher prices and lower wages. *See Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1100 n.20 (5th Cir. 1991); *see also* U.S. Chamber of Commerce Institute for Legal Reform, *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform* 26 & n.88 (2022), https://t.ly/4ntec.

Allowing the court of appeals' decision to stand will only serve to increase the well-documented settlement pressure that accompanies class certification by opening the door to "certification in every case where there is a common issue." *Castano*, 84 F.3d at 745 n.21.

As this Court has observed, "class actions are extraordinary proceedings with extraordinary potential for abuse." *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 953 (Tex. 1996). Given the stakes of certification and the inexorable settlement pressure, this Court should make clear that Texas courts "cannot gerrymander predominance by suggesting that only a single issue be certified for class treatment (in which, by definition, it will 'predominate') when other individualized issues will dominate the resolution of the class members' claims." *Hyderi v. Wash. Mut. Bank, FA*, 235 F.R.D. 390, 398 (N.D. Ill. 2006) (citing *Castano*, 84 F.3d at 745 n.21).

Only this Court can put a stop to this by making clear that Rule 42(d)(1) is a case-management tool and that "issue classes" are permissible only when the plaintiffs' entire claim is otherwise properly susceptible to class treatment (because it satisfies Rule 42(a) and Rule 42(b)). To get a claim certified, plaintiffs must prove—not ignore—the procedural protections embodied in Rule 42(a) and Rule 42(b).

PRAYER

This Court should grant the petition, reverse the court of appeals' judgment affirming the "Rule 42(d)(1) certification" of three distinct issues, and remand the case to the trial court for further proceedings.

Dated: January 18, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2)(B), I certify that this brief contains 3,832 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ *Bradley G. Hubbard*
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CERTIFICATE OF SERVICE

I certify that, on January 18, 2024, a true and correct copy of this Brief for *Amicus Curiae* was served via electronic service on all counsel of record.

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