IN THE SUPREME COURT
OF THE STATE OF GEORGIA

GEORGIA-PACIFIC CONSUMER PRODUCTS LP,

Appellant,

v.

KIRBI RATNER, AARON RATNER, DAVID L. McDONALD, and KATHY H. McDONALD, individually and on behalf of a class of persons similarly situated,

Appellees.

Case No. S13G1723

BRIEF OF THE GEORGIA CHAMBER OF COMMERCE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, GEORGIA AGRIBUSINESS COUNCIL, GEORGIA ASSOCIATION OF MANUFACTURERS, GEORGIA CHEMISTRY COUNCIL, GEORGIA MINING ASSOCIATION, GEORGIA PAPER AND FOREST PRODUCTS ASSOCIATION, INC., GEORGIA POULTRY FEDERATION, AND GEORGIA INDUSTRY ENVIRONMENTAL COALITION

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INTEREST OF *AMICI*

The Georgia Chamber of Commerce, Inc. (the Georgia Chamber), is the unified voice of business in the State of Georgia. Its members, which employ more than a million Georgians, operate in almost all of the 159 counties in Georgia and range from publicly owned manufacturing companies with thousands of employees to individuals working for themselves.

The Chamber of Commerce of the United States of America (the U.S. Chamber) is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country, including in Georgia.

The Georgia Agribusiness Council serves over 800 agribusinesses operating in the State's largest economic sector, which generates $7.1 billion in annual economic activity and employs more than 359,000 Georgians. In nearly two-thirds of Georgia's counties, agribusiness and related industries are the largest or second-largest economic sectors.

The Georgia Association of Manufacturers is a 113-year-old statewide trade association that represents Georgia manufacturers in legislative and regulatory matters. It provides services to manufacturers on a wide range of issues, including human resources, safety and health, employee benefits, and environmental quality.

The Georgia Chemistry Council is trade organization for the chemistry and chemical manufacturing industry in the State of Georgia. The Council represents 25 chemical and specialty chemical companies that employ thousands of employees in numerous counties throughout the State.

The Georgia Mining Association, Inc., is a trade association comprising approximately 35 mining companies and 180 associated companies. It promotes the responsible development of Georgia's mineral and natural resources.

The Georgia Paper and Forest Products Association, Inc., is a trade association comprising eleven companies who own and operate pulp/paper mills and other forest-products manufacturing facilities in Georgia. Paper and forest products is a critical industry in the State.

The Georgia Poultry Federation is a trade association representing poultry growers, processors, and allied industry in Georgia, the nation's leading poultry-producing state. The State's poultry industry has a $28 billion economic impact on the State and directly or indirectly employs 112,000 Georgians.

The Georgia Industry Environmental Coalition (GIEC) is a not-for-profit organization of Georgia industries subject to environmental regulation in Georgia that collectively employ more than 55,000 Georgians. GIEC promotes environmental regulations and policies founded on the protection of human health and the environment, sound science, and economic principles.

This case raises legal questions of immense importance not only to *amici* and their members, but to all businesses operating throughout Georgia. The decisions below are aberrations in class-action law that, if upheld, will endanger Georgia's manufacturing, chemical, and agricultural companies. They purport to throw open the door to crippling class litigation—including against heavily regulated, permitted facilities—whenever a handful of disgruntled neighbors perceive an offensive "smell" or other adverse effect. If upheld, the decisions below will threaten the right of defendants to litigate individualized issues and defenses and greatly increase the pressure to settle unmeritorious claims.

INTRODUCTION

The class action device represents a narrow "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700–01 (1979) (internal quotation marks omitted)). Even then, this extraordinary procedural exception must give way to the due process rights of defendants "to present every available defense." *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted). Particularly in the mass environmental tort context, "the overwhelming majority of state and federal courts have denied certification of environmental mass tort classes," *In re MTBE Prods. Liab. Litig.*,

209 F.R.D. 323, 347–48 (S.D.N.Y. 2002), precisely because such actions rarely if ever satisfy the stringent requirements of a class action and because classwide adjudication of inherently individualized tort claims threatens to run roughshod over defendants' due process rights.

This case is no exception to the general rule that plaintiffs must state and prove their own claims, and that defendants may present every available defense. To represent absent class members, named plaintiffs must establish numerosity, commonality, typicality, and adequacy. O.C.G.A. § 9-11-23(a). Under O.C.G.A. § 9-11-23(b)(3), they must also demonstrate both that common questions will predominate in the litigation over individual questions, and that a class action is superior to other available procedures. These Georgia class-action provisions are patterned after, and in all pertinent respects mirror, the requirements of Fed. R. Civ. P. 23. See *Rite Aid of Ga., Inc. v. Peacock*, 315 Ga. App. 573, 574–75 (2012). Court after court after court—especially after two recent class de-certifications by the U.S. Supreme Court—has held that these requirements are all but impossible to satisfy where, as here, plaintiffs claim that pollutants have caused a variety of adverse effects, over a number of years, on diverse and differently situated and exposed property holdings and on the health of individual owners.

The courts below bucked that "overwhelming majority." Both the trial court and the Court of Appeals majority (which adopted wholesale and uncritically the

trial court's discussion) failed to conduct the requisite "rigorous analysis" (*Dukes*, 131 S. Ct. at 2251; *Rite Aid of Ga., Inc.*, 315 Ga. App. at 574–75) concerning whether the proposed class satisfied Rule 23's exacting standards. In place of that analysis, the decisions below throw open the class-action door to any representative plaintiff who alleges that a hodge-podge of "common issues" (cast in highly abstract terms) are likely to arise during the litigation.

That flawed approach transforms Rule 23 into a rote pleading standard. Any set of environmental tort claims involving a single alleged polluter could be pleaded in a way that the case appears to touch on a few "common issues." For instance, at the level of generality used in this case by the lower courts—which referred to the "nature of the alleged contaminant" and the defendant's alleged "policies and practices"—there could be "common issues" *in nearly every environmental tort case*. See opinion below ("Op.") 13–15 (relying on these "common issues" to uphold certification). Until the decisions below, however, the mere recitation of such abstract "common issues" did not establish commonality among proposed class claims. Rather, courts have undertaken a "rigorous analysis" of how the litigation *will actually proceed*—including what each class member would need to prove to establish his or her claims. Time and again, courts have concluded that individualized questions relating to liability, causation,

damages, and affirmative defenses predominate in an environmental tort case. Accordingly, class actions are not appropriate vehicles for resolving such claims.

That is not surprising. In environmental tort cases, liability in negligence, nuisance, or trespass is inherently plaintiff-specific. Courts have repeatedly recognized that there is no "typical" plaintiff who owns a "typical" property, is in "typical" health, and has had "typical" exposure to a defendant's alleged pollutant. Plaintiff-specific questions foreclose common answers to common questions—let alone common answers that predominate. Individual and corporate plaintiffs have to assert and establish their own particular injury and trace that alleged injury to a defendant's conduct. The legal and factual questions posed by the longtime homeowner across the street from the defendant's facility, for example, are meaningfully distinct from the questions posed by the new corporate owner of an empty lot nearly a mile away.

Not only did the trial court erroneously treat commonality as a matter of pleading, but it also incorrectly concluded that what it called "damages" issues—which it expansively defined to include whether, how, and to what extent any individual class member had actually suffered any injury or damage—could be punted to separate proceedings. In direct contravention of a recent decision by the U.S. Supreme Court, the trial court refused to "focus" its predominance inquiry on whether the many thorny, individualized questions to be posed in those separate

"damages" proceedings would outweigh the "common issues" it had identified as relating only to "liability." In short, the trial court's certification order presented a "rigorous analysis" in name only because it demonstrably failed to grapple with Rule 23's exacting requirements.

It does not have to be this way. Robust alternatives exist to the class-action device in environmental tort cases. Property-damage cases, like this one, often provide sufficient incentive for potential plaintiffs to bring any meritorious claims in individual lawsuits. And once actual litigants come forward with concrete and particularized evidence, procedural devices like joinder and consolidation are well-equipped to manage related claims.

The lower courts' decisions to permit the heavy hammer of class action in cases like this one have an alarming and obvious endgame: If upheld, they will transform Georgia into a forum for overreaching class actions that will generate "hydraulic pressure" on manufacturing, chemical, and agricultural companies to settle claims brought by their most litigious neighbors who can now claim to "represent" a class of absent plaintiffs. That new class-action paradigm, if endorsed by this Court, would meaningfully infringe defendants' due process rights in the Georgia courts by essentially eliminating their ability to present the plaintiff-specific defenses that are commonplace in environmental tort cases.

ARGUMENT AND CITATION OF AUTHORITIES

I. Environmental Mass Tort Cases Are Almost Never Appropriate For Class Action—Especially After *Dukes* And *Comcast*

A. *Dukes* and *Comcast* Confirm That Class Actions Must Offer Common Answers To Common Questions That Truly Predominate Over Such Plaintiff-Specific Issues As Causation And Damages

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2250 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013), the U.S. Supreme Court emphasized that class actions are a narrow exception to the rule that individual plaintiffs must state and prove their own claims. Courts must police the limits on this exceptional procedural device through "rigorous analysis." 131 S. Ct. at 2551; 133 S. Ct. at 1452–53. Plaintiffs purporting to represent a class of absent plaintiffs must establish that they meet the stringent requirements for doing so. In particular, the named plaintiffs must have claims typical of the proposed class in a case that will generate common answers to common questions. O.C.G.A. § 9-11-23(a)(2), (3). As relevant here, those common questions must also predominate, and a class action has to be the superior procedure for resolving plaintiffs' claims. *Id.* § 9-11-23(b)(3); accord Fed. R. Civ. P. 23(a), (b)(3).

The *Dukes* Court recognized that Rule 23's "commonality" standard—that "[t]here are questions of law or fact common to the class" (O.C.G.A. § 9-11-23(a)(2))—can be "easy to misread." 131 S. Ct. at 2550–51. In a simplistic sense,

"[a]ny competently crafted class complaint *literally* raises common 'questions.'" *Id.* at 2551 (emphasis added). The Court said it is not enough, however, simply to raise "common 'questions'—even in droves." *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Rather, a class action must have the "'capacity . . . to generate common answers" that are "apt to drive the resolution of the litigation.'" *Id.* (same). Thus, class claims "must depend upon a common contention" that is "capable of classwide resolution" because "the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

In *Dukes*, the lower courts had strayed from that principle by certifying a class because plaintiffs alleged a common issue: an *implicit* corporate policy that allegedly facilitated discrimination against all of Wal-Mart's female employees. See *id.* at 2549–50. Plaintiffs contended that the existence, intent, and operation of that implicit corporate policy were questions common to the class. The Supreme Court reversed class certification. It held that plaintiffs' alleged and anecdotal experiences of discrimination were insufficient to establish a "general policy of discrimination," and so their injuries called for an individualized inquiry instead of a common one. *Id.* at 2553–57. Plaintiffs could not "demonstrate that the class members 'have suffered the same injury,'" and therefore could not establish commonality. *Id.* at 2551 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S.

147, 157 (1982)). The *Dukes* Court cautioned that courts actually have to grapple with "[d]issimilarities within the proposed class" that "have the potential to impede the generation of common answers." *Id.* (quoting Nagareda, *supra*, at 132).

Two years later, the Court confirmed in *Comcast* that common questions must also predominate over individualized issues also confronting the court. 133 S. Ct. at 1432. The predominance inquiry is, "[i]f anything," an "even more demanding" part of the "rigorous analysis" of class-certification motions. *Id.*; see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609 (1997).

Applying that "proper standard for evaluating certification," the Court de-certified a class because plaintiffs had fallen "far short of establishing that damages are capable of measurement on a classwide basis." *Comcast*, 133 S. Ct. at 1433. The Court carefully analyzed testimony by plaintiffs' damages expert, and concluded that he failed to establish that the class shared any metric by which damages could be ascertained expediently once any common questions had been answered. *Id.* at 1433–35. Plaintiffs needed—but had failed—to establish that any "resulting damages" for each class member "will not require labyrinthine individual calculations." *Id.* at 1434. Class members' damages do not have to be *equal*, but if individuals' variations cannot be dispatched by some common yardstick, then "[q]uestions of individual damage calculations *will inevitably overwhelm* questions common to the class." *Id.* at 1433 (emphasis added).

B. Georgia Requires The Same Rigorous Analysis Of Whether Common Issues Will Predominate In A Proposed Class Action

Even before *Dukes* emphasized that "commonality" requires common answers to common questions, this Court held in *Carnett's, Inc. v. Hammond* that "a common *question* is not enough when the *answer* may vary with each class member." 279 Ga. 125, 129 (2005) (emphasis added). In *Carnett's*, members of the proposed class were not similarly situated with respect to the defendant's conduct, and the defendant had the right to raise plaintiff-specific defenses to their claims. *Id.* This Court concluded that class certification was inappropriate because the litigation would require individualized determinations. *Id.*

The Court of Appeals followed that same approach after *Dukes*. In *Rite Aid of Georgia, Inc. v. Peacock*, the court explained that Georgia's class-action law is informed by interpretations of the federal rule from which this state borrowed the procedure. 315 Ga. App. 573, 574 (2012). Relying on *Dukes* and *Carnett's*, the Court of Appeals stated that "Georgia appellate courts have refused to condone the certification of a class when the circumstances surrounding a member's *actual response* to the defendant's allegedly wrongful act could vary widely." *Id.* at 577 (emphasis added).

Indeed, Georgia courts have repeatedly denied class certification when individualized inquiries are needed to establish an element of plaintiffs' claims. In *Tanner v. Brasher*, for example, the Court reversed certification of a class of

property owners because their claims raised significant "individual questions." 254 Ga. 41, 44 (1985). As the Court there explained, "[w]here the resolution of individual questions plays . . . an integral part in the determination of liability, a class action suit is inappropriate." *Id.*; see also *Ardis v. Fairhaven Funeral Home & Crematory, Inc.*, 312 Ga. App. 482, 485 (2011) (individualized evidence necessary to prove an element of plaintiffs' claims prevented certification); *Peck v. Lanier Golf Club*, 304 Ga. App. 868, 873 (2010) (same).

Even before *Comcast*, moreover, this State's courts demanded a searching examination of plaintiffs' classwide proof before accepting the predominance of common questions. Where liability arguably turns on "individual evidence," Georgia courts explained, "[t]he predominance inquiry requires a court to consider how a trial on the merits would be conducted" and "the nature of the evidence that the plaintiff will have to present to prove the classwide claims." *Perez v. Atlanta Check Cashers, Inc.*, 302 Ga. App. 864, 872 (2010); see also *Winfrey v. Southwest Community Hospital, Inc.*, 184 Ga. App. 383, 384 (1987) (class members' mere assertion of "a common right" did not justify certification, because individual questions of law or fact could "yet predominate" including "the [determination of] individual damages which would have to be assessed in each of the myriad cases" (alternation in the original)); *Williams v. Cox Enters., Inc.*, 159 Ga. App. 333, 335

(1981) (denying certification because individualized damage determinations would dominate the tort litigation).

Until the decisions below, Georgia courts had refused to open an escape hatch from this rigorous analysis for class representatives who offer to defer individualized damages determinations to some later phase of the proceedings. In *Doctors Hospital Surgery Center, L.P. v. Webb*, for instance, the court held that class certification was not permitted just because plaintiffs intended to "bifurcate[e] the trial into a liability phase and a damages phase." 307 Ga. App. 44, 48 (2010). That case—like this one—involved a negligence claim, and the court acknowledged that "the essential elements of a negligence claim include" causation of injury by the defendant's conduct. *Id.* Accordingly, the court concluded that each plaintiff was going to have to prove, on an individualized basis, "that the defendant's negligence was both the 'cause in fact' and the 'proximate cause' of the injury." *Id.*; see also *Roland v. Ford Motor Co.*, 288 Ga. App. 625, 632 (2007) (rejecting certification where "individual issues would arise as to whether injury was caused by [the alleged] defect").

C. Class Treatment Is Almost Never Appropriate In Environmental Tort Cases Because They Are Dominated By Individualized Issues

The authors of the federal class-action rule, which Georgia has adopted, emphasized that mass torts

> resulting in injuries to numerous persons [are] ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Fed. R. Civ. P. 23 Advisory Committee's Note (1966), 28 U.S.C.App., p. 697. The U.S. Supreme Court has recognized that "warning" as a "call for caution" against expanding class actions to mass tort cases. *Amchem*, 521 U.S. at 625.

Ever since, "the overwhelming majority of state and federal courts have denied certification of environmental mass tort classes." *In re MTBE Prods. Liab. Litig.*, 209 F.R.D. at 347–48. This is true "in single-source cases," like this one, as well as in cases with multiple defendants. *Id.* And with good reason: "[I]ndividualized issues of fact abound" in such cases. *Id.* at 349. As a leading treatise puts it, "[c]ourts traditionally have been reluctant to certify class actions . . . in mass tort cases because individualized questions would predominate over common ones." MOORE'S FEDERAL PRACTICE ¶ 23.45[5][d][i] (3d ed. 2003); accord *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[H]istorically, certification of mass tort litigation classes has been disfavored.").

1. That "overwhelming majority" is all the more entrenched after *Dukes* and *Comcast*. See generally Douglas A. Henderson, et al., *Environmental Class Actions After Dukes: Is 'Rigorous' Analysis the New Rule of Law?*, 13 CLASS ACTION LITIG. REP. 1017, at 9 (2012) (concluding that, after *Dukes*, "the rule

appears to be the more rigorous the analysis of the class certification requirements, the fewer environmental class actions which ultimately are certified").

In the wake of *Dukes* and *Comcast*, courts are even more skeptical that differently situated property owners can advance common questions that will dominate litigation against an alleged offender. The Louisiana Supreme Court, for example, reversed certification of a property-owner class asserting claims against a neighboring facility's "toxic releases." See *Price v. Martin*, 79 So. 3d 960 (La. 2011). Applying *Dukes*, the court explained that a "common question is one that, when answered as to one class member, is answered as to all of them." *Id.* at 969. In particular, "each member of the class must be able to prove individual causation based on the same set of operative facts and law that would be used by any other class member to prove causation." *Id.*

The Louisiana Supreme Court reasoned that, under *Dukes*, plaintiffs could not show commonality simply by demonstrating that some "emissions occurred" in the class area. *Id.* at 969–70. Rather, they had to be able to prove through "common evidence" that "the emissions resulted in the deposit of unreasonably elevated levels of toxic chemicals *on plaintiffs' properties*." *Id.* (emphasis added). What is more, that "common evidence" had to be "significant." *Id.* at 970. In *Price*—as here—there were "divergent types of properties by the proposed class," and the court recognized that these dissimilarities among class members meant that

"neither the issue of breach nor that of causation [was] capable of resolution on a class-wide basis on common evidence." *Id.* at 970, 975. In those circumstances, the court explained, "the mere finding of a duty not to pollute will do little to advance the issues in this case." *Id.* at 975.

The Seventh Circuit likewise relied on *Dukes* to reverse class certification in an environmental tort case. *Parko v. Shell Oil Co.*, 739 F.3d 1083 (7th Cir. 2014) (Posner, J.). It held that the trial court had abused its discretion by certifying a class premised on the contention that plaintiffs posed a "common question" about whether defendants' failure to contain manufacturing byproducts resulted in property damage. *Id.* Moreover, the trial court had impermissibly ignored that determining any plaintiff's damage would require a parcel-by-parcel analysis. *Id.*

Relying on *Dukes* and *Comcast*, the Seventh Circuit also criticized the trial court's treatment of "predominance as a pleading requirement." *Id.* It held that the "[m]ere assertion by class counsel that common issues predominate is not enough. That would be too facile. Certification would be virtually automatic." *Id.* "If [class counsel's] intentions (hopes, in other words) were enough," the court explained, then "predominance, as a check on casting lawsuits in the class action mold, would be out the window" because "[n]othing is simpler than to make an unsubstantiated allegation." *Id.* Accordingly, the court refused to "assume[ ] that every class member ha[d] experienced the same diminution in the value of his

property even if every one ha[d] experienced the same level of contamination." *Id.* Varying property values in the class area, for example, made the predominance of common questions unlikely, because "the greater the variance . . . the less likely it is that contamination would affect the value of all or most properties by the same amount of money or the same percentage of market value." *Id.* The trial court's failure to address these issues required reversal.

In *Gates v. Rohm and Haas Co.*, the Third Circuit also held that "potential difference[s] in contamination on the [class members'] properties" meant that "common issues [did] not predominate." 655 F.3d 255, 272 (3d Cir. 2011). In that case, like this one, plaintiffs' expert purported to show that properties in the class area shared a generalized risk of exposure to a facility's emissions. The Third Circuit rejected that such evidence could sustain a class action. A neighborhood's *general* exposure to emissions, the court explained, "did not reflect the exposure *of any specified individuals within the class*." *Id.* at 261 (emphasis added). It was self-evident, moreover, that each property presented unique circumstances, and therefore that "individual issues would require trial, undoing any efficiencies of class proceedings and possibly leading a second jury to reconsider evidence presented to the jury in the class proceeding." *Id*.

Indeed, so significant are the decisions in *Dukes* and *Comcast* that they have caused at least one trial court *to reverse its own certification order*. *Powell v.*

Tosh, 2013 WL 4418531 (W.D. Ky. Aug. 2, 2013), *reversing* 280 F.R.D. 296 (W.D. Ky. 2012). The *Powell* plaintiffs—much like Plaintiffs here—asserted nuisance claims against the "noxious odors" of a pig farm on behalf of a putative class of neighboring property owners. *Id.* at *3. After initially certifying the class, the trial court did a volte-face when it came to appreciate that the landowners' nuisance claims necessarily turned on individualized, property-by-property inquiries. *Id.* at *3, *7–*10. The pig farm's liability, the court concluded, could not "adequately be resolved by a common answer." *Id.* at *3; see also *id.* at *9. The *Powell* court held—as this Court should—that when each plaintiff's "property is situated uniquely" with respect to the source of an offending odor, litigation will turn on a "highly individualized inquiry" to establish liability and damages. *Id.* at *8. In such a case, the named plaintiff's effort to prove his or her own claim "would not, by virtue of the necessarily individualized inquiry required, prove the claim of any other named plaintiff or class member." *Id.* at *10. So, too, here.

Plaintiffs' post-*Dukes* cases are easily distinguishable. In *Jackson v. Unocal Corp.* (see Ratner Br. 25), for example, plaintiffs' expert opined that he *could* establish the "loss in value for the properties in the class area . . . based on class-wide proof." 262 P.3d 874, 889 (Colo. 2011). In this case, by contrast, Plaintiffs' expert candidly admitted that a "seat of the pants," property-by-property analysis will be necessary. See GP Supp. Br. 12.

In short, the "overwhelming majority" of courts that have rebuffed environmental tort class actions has grown since *Dukes* and *Comcast*. This Court should prevent Georgia from breaking ranks and becoming an outlier jurisdiction.

2. The post-*Dukes*, post-*Comcast* consensus against environmental tort class actions confirms the federal and state courts' historical disfavor of representative litigation in such cases. As commentators observed nearly two decades ago, "the class action device is generally not applicable to litigation classes involving traditional environmental tort claims. Experience has demonstrated that these kinds of cases involve too many complex individual issues, and certification has little utility except to class counsel by boosting the settlement value of his or her case." Charles W. Schwartz & Lewis C. Sutherland, *Class Certification for Environmental and Toxic Tort Claims*, 10 TUL. ENVTL. L.J. 187, 233 (1997). Plaintiffs point (Ratner Br. 25) to a handful of aberrational decisions upholding class certification in this setting, but those cases are truly outliers among decades of decisions holding that class actions are poorly suited for environmental tort litigation. Historical practice soundly refutes Plaintiffs' assertion that "[e]nvironmental tort claims are suitable for class treatment." Ratner Br. 25.

In *Benefield v. Int'l Paper Co.*, for example, the court refused to certify a class of property owners who sought to litigate nuisance and negligence claims against a paper-manufacturing facility. 270 F.R.D. 640, 642–43 (M.D. Ala. 2010).

The *Benefield* plaintiffs proffered expert testimony that facility-generated pollution caused real-estate devaluation that could be proven classwide. *Id.* at 643. Unlike the trial court in this case, the court in *Benefield* closely scrutinized that proffer, and therefore concluded it was insufficient. To establish liability, the court explained, the "unnamed class members" would each have to prove "injury as a proximate cause of the actions of the Defendant." *Id.* at 650–51. Plaintiffs' evidence—like in this case—spoke only in "general terms" about property in the class area that "has been damaged and can be damaged." *Id.* at 651. There, as here, such evidence falls short of "establish[ing] on a class-wide basis that all residential property owners in the class area suffered injury to property." *Id.*

Indeed, the *Benefield* court's holding fits this case like a glove: "[A]t most," the court there held, plaintiffs' evidence showed that "releases" from the paper-manufacturing facility "*can* cause property damage" and "have caused property damage to *some* class members." *Id.* (emphasis added). "Even in light of this testimony," the court added, "individualized determinations will have to be made of whether each class member has suffered injury and whether that injury was proximately caused by the Defendant's actions." *Id.* Although "'individualized damages issues do[]not prevent a finding that the common issues in the case predominate,'" those issues usually correspond to "causation issues" and "individualized questions going to liability" in an environmental case. *Id.* at 650.

To take another pre-*Dukes* example, the court in *Mays v. Tennessee Valley Authority* denied class certification in a single-defendant case where plaintiffs asserted negligence, nuisance, trespass, and other claims arising out of environmental contamination. 274 F.R.D. 614 (E.D. Tenn. 2011). As in this case, the plaintiffs in *Mays* contended that their claims posed common, predominant issues of "liability determinations and defendants' course of conduct." *Id.* at 626. They, too, trumpeted their voluntary "elect[ion] not to pursue certain claims as a class" and to focus on "their pursuit of property damage and nuisance claims." *Id.* at 625.

The court denied certification. Commonality was lacking:

> [E]ach plantiff's claim will turn primarily on individualized inquiries into how the [contaminant] affected each plaintiff's specific property interest. Given the unique location of each plaintiff's individual property, and the unique situation of each plaintiff and his or her use and enjoyment of the property, individualized inquiries will apply to both the property damage and nuisance claims.

Id. In addition, there was no "typical" proof of how the contaminant "came to be on each unique piece of property," "whether the [contaminant] affected or damaged each property," or "how each individual property owner used or enjoyed his or her property." *Id.* Those individualized inquiries into "specific, proximate causation and damages" would necessarily "predominate" even if there were "common causes" of the contamination. *Id.* at 625; see also *id.* at 626–28.

Mays also addressed a decision relied on by Plaintiffs (see Ratner Br. 23): *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988). Although

Sterling was binding precedent, the *Mays* Court had no trouble distinguishing it, relying on the Sixth Circuit's own recognition that class certification is *not* appropriate "'when 'no single proximate cause equally applies to each potential class member . . . and individual issues outnumber common issues.'" *Mays*, 274 F.R.D. at 627 (quoting *Sterling*, 855 F.2d at 1197). *Mays* was such a case—and this one is, too—because the divergent circumstances of each property at issue necessarily predominated over any "common issues of causation." *Id.* at 627–28.

The list goes on. State and federal courts have repeatedly taken their cue from the authors of the federal rule, and denied class certification in environmental mass tort cases. See, *e.g.*, *Sher v. Raytheon Co.*, 419 Fed. App'x 887, 889 & n.2 (11th Cir. 2011) (unpublished) (reversing class certification because diminution in property value from environmental contamination could not be established by class-wide proof); *Robertson v. Monsanto Co.*, 287 Fed. App'x 354, 362 (5th Cir. 2008) (unpublished) (same where negligence claims against a single-source gas leak posed "highly individualized" "issues of causation and damages" including proximate causation of "the specific injuries complained of"); *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006) (affirming denial of certification because individualized questions of causation and damages were "vastly more complex" than any common questions, where plaintiffs experienced different magnitudes and periods of exposure).

3. There is a narrow category of mass tort cases in which courts have effectively employed the class-action device: "single incident" cases in which plaintiffs' injuries are traceable to a one-time disaster or event. But those "single-incident" cases are easily distinguishable from cases—like this one—in which plaintiffs allege environmental "contamination over many years." *In re MTBE Prods. Liab. Litig.*, 209 F.R.D. at 350. Airplane crashes or train derailments, for example, are the kind of single-event disasters in which courts sometimes have concluded that individualized issues do not overwhelm a common theory of liability and causation. See, *e,g.*, *Sala v. Nat'l R.R. Passenger Corp.*, 120 F.R.D. 494 (E.D. Pa. 1988) (train derailment). In *Sala*, the court recognized that "courts have not looked favorably upon class certification in mass tort cases," but nevertheless allowed certification in that case because "all potential class members were on the same train and endured the same collision and derailment." *Id.* at 494.

Not surprisingly, some of Plaintiffs' cited cases (see Ratner Br. 23–25) are single-incident cases that are readily distinguishable from the multi-year impacts alleged here. For example, *In re MTBE Products Liability Litigation* involved "a single release of gasoline." 241 F.R.D. 435, 442 (S.D.N.Y. 2007). In certifying a class, the court emphasized that "such single-incident mass accidents are suitable for class-wide adjudication," and noted its earlier refusal to certify a class claiming a period of contamination that stretched over years. *Id.*

Even in "single accident" cases, rigorous analysis of the class-action prerequisites does not necessarily lead to certification. In *Madison v. Chalmette Refining, L.L.C.*, for example, plaintiffs moved to certify a class of individuals who were present in a particular area at the specific time a refinery released toxic gas. 637 F.3d 551 (5th Cir. 2011). The Fifth Circuit faulted the trial court's certification order for "simply conclud[ing]"—like the trial court did here—"that '[t]he common liability issues can be tried in a single class action trial with any individual issues of damages reserved for individual treatment.'" *Id.* at 556. The trial court lacked a "detailed trial plan[]," the appeals court explained, that identified "the substantive issues that will control the outcome" and "predominate" at trial. *Id.* at 556–57. In particular, the trial court had failed to evaluate "the relevant state law that applies to Plaintiffs' claims, and what Plaintiffs must prove to make their case." *Id.* at 557. So, too, here.

4. This case provides no special reason to depart from the federal and state courts' widespread skepticism of class actions in environmental tort cases. See *Steering Comm.*, 461 F.3d at 604 (requiring "exceptional features" in an environmental tort case "that warrant departing from the general rule and treating [a case] as a class action"). On the contrary, it presents all of the complex, individualized issues of law and fact that routinely prevent class certification in environmental tort cases. The properties in the class area range from residences, to

industrial business, to vacant lots—with not a "common" or "typical" lot among them. The named Plaintiffs allege that several years of chemical releases caused property devaluation due to an intermittent "smell" and a corresponding potpourri of physical consequences. They also claim corrosion of air conditioning units—although not every class member has a unit, not every class member with a unit has corrosion (let alone chemical-induced corrosion), and some class members with corroded units have received voluntary reimbursement from GPCP.

II. Class Actions Are Not The Only Economical Way To Litigate Environmental Tort Claims

Plaintiffs contend that holding them to the exacting standards of Rule 23 will "close the courthouse doors" and leave them "powerless to seek retribution." Ratner Br. 30. Contrary to Plaintiffs' submission, there are realistic alternatives to class actions in environmental tort cases like this one—alternatives that would not deprive defendants of their constitutional right to present all available defenses.

Even though the named Plaintiffs purport to represent a class of 116 individual and 16 corporate owners of residential, commercial, and other property, when the named Plaintiffs canvassed their neighbors for like-minded litigants, "just a handful . . . [a]pproximately four or five homes" had any interest in "get[ting] involved" in any sort of lawsuit. A. Ratner Tr. 46–47. That is no surprise: Plaintiffs' own experts never even attempted to conclude how many putative class members have actually experienced any injury. See GP Br. 9–11. The proposed

class thus implicates claims by a small group of property owners in one county with particularized claims (assuming that they have supportable claims at all).

Those owners—if the claimed injuries in fact exist—may have every incentive to bring their own individual actions. Plaintiffs here allege significant damage to real property and physical health. They allege an inability to sell residential property, corrosion to air-conditioning systems, and physical effects like breathing problems, vomiting, headaches, coughing, and burning of the eyes, nose, and throat. See Ratner Br. 4, 7. Plaintiffs who allege a meaningful "reduction of property value . . . may employ tort lawyers, on a contingency basis, to bring individual actions." *In re MTBE Prods. Liab. Litig.*, 209 F.R.D. at 350.

In its recent *Parko* decision, the Seventh Circuit explained why class actions are generally unnecessary when plaintiffs allege a diminution in property value. 739 F.3d 1083. The court noted that "[t]he damages [in an environmental tort case] may not be huge, but may well be sizable enough for individual (or joined) suits to be a feasible alternative to a class action." *Id.* In a dramatic departure from this analysis, however, the courts below simply assumed—without any record support—that individual recoveries sought from GPCP would not be enough to justify the expense of litigation. See Op. 15–16. If there is any merit to Plaintiffs' claims, then there is every reason to believe that individual damages would be significant enough to justify the maintenance of separate actions to obtain them.

Decertification of the proposed class will not foreclose the use of other procedural devices to manage related claims after such claims have been asserted by individual plaintiffs. Consolidation under Rule 42, or joinder under Rule 20, may become appropriate once individual plaintiffs have stated their own claims and developed actual *evidence* showing that their particular cases raise identical factual or legal issues or arise out of the same occurrence or series of occurrences. See O.C.G.A. §§ 9-11-20, 9-11-42. One can safely assume, for instance, that if complaints are filed by the owners of "four or five homes," those claims may present more similarities than those posed by the divergent circumstances of 116 individual and 16 corporate property owners (who own everything from homes to vacant parcels, and many of which may have suffered no injury or received compensation from the defendants). See Op. 9. A number of courts have correctly recognized that where, as here, "the identities of all potential class members are known . . . [and] located in [the same] district . . . inefficiency can be largely avoided . . . by joinder and intervention." *Sanft v. Winnebago Indus., Inc.*, 214 F.R.D. 514, 526 (N.D. Iowa 2003), *amended by* 216 F.R.D. 453 (N.D. Iowa 2003).

The Court of Appeals mistakenly assumed that the potential availability of joinder here amounts to a concession of commonality. Op. 9 n.7. It missed the point: The class includes 116 individuals and 16 corporations who hold a variety of claims—or no claims at all—implicating diverse property types and individual

circumstances. Joinder or consolidation may turn out to be permissible if a smaller, cohesive group of plaintiffs come forward with their own individual suits. Recognizing as much says nothing about the coherence of the proposed class.

III. Overreaching Class Actions Undermine The Due Process Rights Of Georgia Businesses And Absent Class Members

By approving class certification in environmental tort cases that turn on a welter of individualized issues, the decisions below, if allowed to stand, would have the effect of forcing defendants in Georgia courts to abandon their plaintiff-specific defenses and settle unmeritorious cases. But a procedural device should not deprive defendants of their right to litigate their defenses in full—and case-by-case, where appropriate. "Due process requires that there be an opportunity to present every available defense." *Lindsey*, 405 U.S. at 66. An abandonment of Rule 23's "rigorous analysis" replaces that fundamental due-process right with a "hydraulic pressure to settle." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001).

O.C.G.A. 9-11-23's stringent prerequisites for class actions are supposed to prevent that. Those "procedural protections" against overreaching class actions are "grounded in due process." *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). In particular, "due process requires that class actions not be used to diminish the substantive rights of any party to the litigation." *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 205 (Tex. 2007). GPCP has articulated many reasons why

individual claims might be subject to tailored defenses. To take just one example, the Ratners already accepted replacement air conditioners provided by the defendant, and agreed to release some of their claims against GPCP in exchange. GP Br. 22; see also *id.* at 21 (class members may have "com[e] to the nuisance").

The trial court brushed these plaintiff-specific defenses aside, however, by simply taking Plaintiffs' word for it that GPCP's "liability" and "affirmative defenses" raised "common issues." But these are not questions susceptible to "common answers" for each plaintiff, and pretending otherwise to certify a class likely prevents GPCP from asking those questions at trial in the first place.

The result is, almost always, to compel a defendant's settlement. "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Nagareda, *supra*, at 99. A concentration of diverse individual claims into a single, winner-take-all litigation magnifies the costs to the defendant of any error when the class claims are decided. Where commonality is imaginary—as it is here—weaker individual claims ride the coattails of stronger claims (often brought by class counsel's hand-picked, "representative" plaintiffs). This creates liability by "judicial blackmail." *Castano*, 84 F.3d at 746.

The corresponding increase in a defendant's liability risk and litigation expense often makes it "economically prudent to settle and to abandon a

meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). In the environmental tort context, this pressure is compounded by the negative publicity engendered when a handful of disgruntled neighbors purport to speak for numerous absent class members who may have experienced no injury at all.

The decisions below present a substantial danger to doing business in Georgia. They impose considerable liability risk on manufacturing, chemical, or agricultural interests across the state at the hair-trigger of any party offended by "smells," "fumes," or other perceived contaminants. The resulting complaints—once dealt with on their own terms—would now engender sweeping class-action lawsuits by plaintiffs ostensibly "representing" absent plaintiffs who own different kinds of property, who experienced any pollution for different periods, and who allege different personal injuries. This Court should avoid those undesirable effects by insisting on the "rigorous analysis" required under O.C.G.A. 9-11-23, and by adopting the "overwhelming majority" approach of other federal and state courts under which plaintiffs with highly individualized environmental tort claims such as those involved here are required to bring separate actions.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals and remand for further proceedings.

Respectfully submitted, this 7th day of February, 2014.

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