CASE NO. 22-3765

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**KEVIN D. HARDWICK,**

*Plaintiff-Appellee,*

v.

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

*Defendants-Appellants.*

On Appeal from the United States District Court for the Southern District of Ohio,
The Honorable Edmund A. Sargus, Case No. 2:18-cv-1185

# BRIEF OF AMICUS CURIAE THE OHIO CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANTS-APPELLANTS

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## CIRCUIT RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Ohio Chamber of Commerce is not a publicly traded corporation. It has no parent corporation, and it is not a subsidiary or affiliate of a publicly owned corporation. There is no public corporation that owns 10% or more of its stock.

The Ohio Chamber of Commerce is unaware of any publicly owned corporation, not a party to the appeal or an *amicus*, that has a financial interest in the outcome.

/s/ *Brian A. Troyer*
Counsel for Amicus Curiae *The Ohio Chamber of Commerce*

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## INTEREST OF AMICUS CURIAE[1]

Founded in 1893, amicus curiae the Ohio Chamber of Commerce (the "Chamber") is a trade association of businesses and professional organizations. The Chamber is Ohio's largest and most diverse statewide business advocacy organization, representing over 8,000 businesses, ranging from small owner-operators to large multinational corporations, in all business sectors including manufacturing, construction, insurance, finance, retail, transportation and health care. The Chamber aggressively champions free enterprise, economic competitiveness, and growth on behalf of its members and for the benefit of all Ohioans. Through its advocacy with policymakers and in courts across Ohio, the Chamber seeks to promote and protect a stable and predictable legal system in which Ohio's economy and its citizens can prosper.

Class actions are powerful litigation devices that often target the Chamber's members. When constitutional and procedural limits on their use are not rigorously enforced, class actions are susceptible to abuse and pose significant risks to the Chamber's members and Ohio's economy. Class certification can greatly increase

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), the Chamber states that no party's counsel authored this brief, in whole or in part, that no party or party's counsel contributed money that was intended to fund preparation or submission of this brief, and that no person, other than the Chamber and the undersigned counsel, contributed money that was intended to fund preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

the cost and burden of litigation, magnify the risk posed by an adverse judgment, and force defendants to settle cases that lack merit. For these reasons, the Chamber has a strong interest in ensuring that constitutional limits on federal judicial power and the requirements of Rule 23 of the Federal Rules of Civil Procedure are properly applied.

The District Court's certification order misapplies Supreme Court and Sixth Circuit precedent in concluding that Plaintiff-Appellee Kevin Hardwick ("Hardwick") has standing to sue, and it dramatically and improperly expands class litigation under Rule 23. Its plan to supervise a scientific investigation of possible health effects of thousands of related but different chemicals violates principles of separation of powers the Supreme Court has cautioned federal courts to respect. If left to stand, the District Court's order threatens to attract more speculative litigation like it, exposing businesses to unjustifiable risks and costs of doing business in Ohio and harming Ohio's business community, economy, and citizens.

## SUMMARY OF ARGUMENT

The District Court made numerous reversible errors in certifying the unprecedented class in this case, and it failed to undertake the kind of rigorous analysis mandated by Supreme Court precedent to ensure that all prerequisites for class certification were satisfied. The order below poses a serious threat of harm to Ohio's economy and the welfare of its citizens.

The District Court certified the class not to pursue redress of any actual or imminent injury by valid judicial relief but as a basis upon which to form a "science panel" to *study* and make *binding* general conclusions about the health effects of thousands of different PFAS and PFAS-related compounds. This is a monumental task, especially considering that the investigation of a *single* PFOA chemical in a *single* region (the Mid-Ohio Valley) took eight years.[2] The certification order provides no details about the proposed science panel or its proposed work. It does not describe the formation, composition, or governance of the science panel or the scope, length, or methods of the study. Depending on the eventual findings of this vaguely defined study, the District Court also may order the defendants to fund unspecified "medical monitoring" programs for potentially hundreds of millions of class members, notwithstanding that there is no feasible means even to identify them.

Even if the work of this proposed panel were feasible (and it is not), the supervision of such a study is not a judicial remedy within the District Court's equitable powers under Article III of the U.S. Constitution. Rather, the District Court is exercising powers delegated or reserved to the legislative and executive branches of the Federal and state governments. In certifying this class, therefore, the District Court compromised important principles of separation of powers and federalism.

[2] C8 Science Panel, http://www.c8sciencepanel.org/ (last updated Jan. 22, 2020).

The District Court started down this path with its erroneous finding that Hardwick satisfies the standing requirement of Article III. Hardwick lacks standing because he alleges no injury in fact, let alone one he can trace to any defendant or identify any judicial remedy to redress. He claims to have standing because he is at increased risk of disease as a result of PFAS exposure, but he admits that he does not know whether he is at any actual increased risk, and the very relief he seeks is a scientific study *from which he hopes to learn whether he is at increased risk*. Having admitted that the remedy he seeks is to investigate whether he has any actual injury—even in the dubious form of an increased risk of disease—he lacks Article III standing.

The District Court also applied incorrect standards and failed to conduct a rigorous analysis of evidence in determining that Hardwick satisfied Rule 23's requirements. The District Court erred, for example, in its commonality analysis under Rule 23(a)(2) and its failure to require cohesiveness under Rule 23(b)(2). In its commonality analysis, the District Court failed to follow the Supreme Court's mandate to consider *differences* among class members that could lead to different answers to ostensibly "common" questions. In rejecting a requirement of cohesiveness, the District Court eschewed or misconstrued this Court's decision in *Romberio v. UnumProvident Corp*., 385 F. App'x 423, 432 (6th Cir. 2009), rejected

the views of an overwhelming majority of federal courts, and failed to ensure that the purported class satisfies the terms of Rule 23(b)(2).

If upheld, the District Court's order would dramatically expand class action jurisprudence in this Circuit and make it and Ohio's federal courts magnets for novel and abusive class actions. While this could be good business for lawyers, it would cause serious harm to Ohio's business community and economy.

The Chamber accordingly urges the Court to reverse the District Court's order and remand with an order to dismiss for lack of standing.

## ARGUMENT

### I. The District Court's Certification Order Violates Important Principles of Separation of Powers and Federalism.

Federal courts provide plaintiffs with a venue to claim and then prove an actual injury and obtain judicial redress for it. But that is not the nature of this case. The District Court here instead has agreed to form an *ad hoc* panel of experts to investigate health effects that might be associated with thousands of PFAS compounds. Hardwick hopes to learn from this investigation whether he has any claim to be at increased risk of any disease, and whether he should have medical monitoring of that risk. This exploratory venture puts the cart before the horse and exceeds the powers of the federal judiciary assigned by Article III. *See United States v. Asakevich*, 810 F.3d 418, 420 (6th Cir. 2016) ("Article III of the U.S. Constitution empowers federal courts to hear 'Cases' or 'Controversies,' nothing more.").

The District Court certified the class under Rule 23(b)(2) on the premise that Hardwick seeks class-wide injunctive relief. But the relief he seeks is not injunctive, because it enjoins nothing. Rather, the certification order contemplates ordering defendants to fund a barely defined scientific study of the potential impact of thousands of different PFAS molecules on the human body. This is not injunctive relief in any conventional sense but a court-sponsored, defendant-funded public health study. The order provides no guidance about the panel's selection, organization or governance, its methods or protocols, how conclusions will be vetted, or even how long it will operate. Depending on the outcome, however, the defendants are also threatened with funding medical-monitoring obligations for millions of Ohioans and, if the class is expanded, what could be hundreds of millions of others. The costs of all this, if realized, would be staggering and would be borne by defendants selected at the plaintiff's sole discretion, even though he cannot even trace his exposure to them.

Hardwick has argued that federal courts are "the only option" to "address the massive public health threat caused by Defendants' PFAS contamination." Class-Cert. Mot., R.164, PageID#1522. But the Supreme Court has made clear that "[v]indicating the public interest is the function of the Congress and the Chief Executive," not the federal judiciary. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992). Federal and state legislative bodies and regulatory agencies, not federal

judges, are the proper agents to initiate and oversee public health studies related to PFAS. They are better suited to gather facts, assess health effects, and develop public health responses to any risks that may be identified. *Cf. Rink v. Cheminova, Inc*., 203 F.R.D. 648, 661-62 (M.D. Fla. 2001) (refusing to order a class-wide "program [that] would in actuality be more akin to a study than to a monitoring program, [as] this appears entirely unsupported in the law as a separate cause of action."). By misconstruing Article III standing requirements and certifying the class, the District Court has claimed responsibilities and powers well beyond the judiciary's proper role. *See Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 408 (2013) (explaining that "Article III standing ... serves to prevent the judicial process from being used to usurp the powers of the political branches" and confines the federal courts to a proper judicial role).

These concerns are not merely theoretical but real and significant. Other branches have the capacity and resources to investigate and address any public health implications of PFAS without treating every Ohioan (and, potentially, American) as a tort plaintiff. Federal and state legislators and administrative agencies are actively investigating and addressing the same concerns with PFAS that Hardwick raises in this litigation. Multiple federal agencies including the United States Environmental Protection Agency (EPA) have taken steps to regulate PFAS. In the last year alone, EPA has (i) issued a proposal to regulate two PFAS chemicals under the

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);[3] (ii) released four drinking water health advisories for PFAS;[4] (iii) developed a national PFAS testing strategy;[5] (iv) added five PFAS to a list of risk-based values for site cleanups;[6] and (v) proposed a rule requiring all manufacturers of PFAS since 2011 to report certain information to the EPA in order to improve recordkeeping and maintain data on PFAS chemicals.[7]

In addition to the EPA's enhanced regulatory focus on PFAS, the National Toxicology Program (NTP), an interagency testing program, has been leading ongoing toxicology studies to evaluate the potential health effects of PFAS.[8] Based

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[3] *See* Designation of Perfluoroctanoic Acid (PFOA) and Perfluoroctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54,415 (Sept. 6, 2022) (to be codified at 40 CFR Part 302).

[4] *See* Lifetime Drinking Water Advisories for Four Perfluoroalkyl Substances, 87 Fed. Reg. 36,848 (June 21, 2022).

[5] *See* NATIONAL PFAS TESTING STRATEGY: IDENTIFICATION OF CANDIDATE PER- AND POLY-FLUOROALKYL SUBSTANCES (PFAS) FOR TESTING, United States Environmental Protection Agency, October 2021.

[6] *See* Regional Screening Levels (RSLs) – What's New, United States Environmental Protection Agency (November 2022), https://www.epa.gov/risk/regional-screening-levels-rsls-whats-new.

[7] *See* TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances; Notice of Data Availability and Request for Comment, 87 Fed. Reg. 72,439 (November 25, 2022).

[8] To date, NTP has conducted a systematic literature review of six PFAS chemicals—PFNA, PFHxS, PFHxA, PFDA, PFOS, PFBS to determine whether they weaken the body's response to vaccinations. NTP also conducted a two-year animal study on PFOA and a 28-day study on seven PFAS chemicals.

on that research, EPA and Congress have proposed regulations and legislation to address PFAS. In the current Congressional Session, legislators have drafted at least forty-four different bills to address PFAS. This legislation would provide funding to test fire-suppression systems containing PFAS,[9] require the EPA to complete studies and reports on PFAS knowledge gaps,[10] and mandate that PFAS be evaluated for designation as pollutants under the Clean Water Act and Clean Air Act.[11]

At the state level, the District Court's order could interfere with the ongoing work of the Ohio Legislature. In 2019, at the direction of Governor DeWine, the Ohio Environmental Protection Agency and Ohio Department of Health developed an action plan for addressing PFAS in drinking water.[12] To date, the Ohio EPA has tested more than 1,500 public drinking water systems for PFAS.[13] Ohio legislators

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[9] Senate Bill 3662, Preventing PFAS Runoff at Airports Act. Introduced by Senator Gary Peters.

[10] House Resolution 7289, Federal PFAS Research Evaluation Act. Introduced by Representative Lizzie Fletcher.

[11] House Resolution 2467, PFAS Action Act of 2021. Introduced by Representative Debbie Dingell. *See also* House Resolution 7142, Prevent Release of Toxic Emissions, Contamination, and Transfer Act (PROTECT) Act of 2022. Introduced by Representative Haley Stevens.

[12] Office of Governor DeWine, "Governor DeWine Orders Analysis of PFAS in Ohio Drinking Water," September 27, 2019. https://governor.ohio.gov/media/news-and-media/analysis-of-pfas-in-drinking-water.

[13] All data results can be accessed at: https://oepa.maps.arcgis.com/apps/MapSeries/index.html?appid=893553c5007f410d9bc55d9cf985342e. In addition to testing public drinking water systems for PFAS, Ohio has implemented regulations for the

also introduced House Bill 365, which would set a maximum level for PFAS in public drinking water systems.[14]

The District Court's certification order may disrupt such regulatory decisions and legislation—both in Ohio and throughout the country—without the vetting and other procedures and protections that normally accompany legislative and rule-making processes. The District Court should not be permitted to override the work and judgment of dozens of agencies and hundreds, if not thousands, of actively engaged federal and state legislators and regulators.

Citizens normally would have opportunities to comment on new regulations that would impact entire industries that use, and are potentially impacted by, PFAS chemicals. Instead, the District Court here envisions enacting far-reaching public health measures in the context of private litigation in which citizens likely have no opportunity to be heard. This tension between the sweeping public reach of the District Court's proposed course and the private litigation process through which it will be pursued perfectly encapsulates the fundamental error here: The broad health

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testing of PFAS in drinking water. Ohio Administrative Code, Rule 3745-9-09 (September 1, 2022).

[14] Ohio House Bill No. 365. Introduced in 134th General Assembly, Regular Session. The legislation would amend §6111.041 and enact §6109.26 to require the Ohio EPA to adopt rules establishing maximum allowable contaminant levels in drinking water and water quality standards for certain contaminants, including PFAS. *Available at*, https://searchprod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/hb365/IN/00/hb365_00_IN?format=pdf.

study and policy determinations contemplated by the certification order are better suited to legislative and executive bodies, which have the means to gather facts and input and develop appropriate responses to complex problems affecting the general public. The judicial role, in contrast, is to resolve private disputes involving concrete injuries; courts lack the means, expertise, and proper authority to address broader public health issues.

## II. The District Court Misapplied Precedent and Erroneously Found that Hardwick Has Standing to Sue.

The District Court's departure from its proper judicial role begins with its finding that Hardwick has Article III standing. To establish standing, Hardwick was required to demonstrate (1) an injury in fact (2) traceable to one or more defendants (3) that is redressable by judicial remedies. *See Lujan,* 504 U.S. at 560-61. He must have suffered a particularized injury distinct from any injury shared by all members of the public. *See United States v. Richardson*, 418 U.S. 166, 179-80 (1974).

The District Court found that Hardwick alleges an injury in fact, and that *Hirsch v. CSX Transport, Inc.*, 656 F.3d 359 (6th Cir. 2011), "is on point and binding" on this question. Order, R.233, PageID#6675. The court's error here is twofold.

First, *Hirsch* was a review of summary judgment that did not even address injury in fact or other elements of Article III standing. Although the District Court's opinion does not make its reasoning from *Hirsch* clear, it appears to have inferred

that *Hirsch* supports a finding of standing merely because this Court affirmed summary judgment rather than ordering dismissal for lack of jurisdiction. This reasoning contradicts two centuries of Supreme Court precedent holding that silence is not jurisdictional precedent. *See Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."); *Hagans v. Lavine* , 415 U.S. 528, 533, n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("Even as to our own judicial power of jurisdiction, this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.").[15]

Second, Hardwick plainly does *not* meet the test for having suffered an injury of increased risk and medical monitoring costs under Ohio law as articulated in *Hirsch* and *Baker*. Ohio courts have not clearly answered when and under what

[15] An alternative interpretation of the District Court's reasoning is that Hardwick has standing because he satisfies the test of injury under Ohio law as explained in *Hirsch,* and that pleading a state cause of action satisfies Article III. But the Supreme Court has made clear that the mere recognition of a cause of action in state law does not constitute an injury for purposes of Article III. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 341-42 (2016).

conditions, if ever, an alleged increased risk of disease constitutes a legal injury, but this Court in *Hirsch* defined a minimum factual predicate below which it is clear that no injury exists under Ohio law. *Hirsch*, *supra*, 656 F.3d at 363. Hardwick undoubtedly does not meet that minimum threshold.

The plaintiffs in *Hirsch* alleged that they had been exposed to carcinogenic substances as a result of a train derailment. *Id.* at 361. They sued for medical monitoring relief, claiming increased risk of unspecified diseases. *Id.* In the appeal of summary judgment, this Court explained that the minimum factual predicate for such an injury would be an increased risk of disease for which a reasonable physician would prescribe medical monitoring:

> Assuming that Ohio would recognize such an injury, the remedy could be a medical monitoring program that would spare the Plaintiffs these expenses. But the question remains: are these Plaintiffs *actually* at such an increased risk of disease that they are entitled to a medical monitoring program?
>
> After all, not every increased risk of disease warrants increased medical scrutiny. The expenses must be reasonable. In other words, for the Plaintiffs to prevail, *there must be evidence that a reasonable physician would order medical monitoring for them*.

*Id.* at 363 (citation omitted) (emphasis added).

Then, in *Baker v. Chevron USA, Inc.*, 533 F. App'x 509 (6th Cir. 2013), this Court considered an appeal by plaintiffs who claimed to need medical monitoring as a result of years of exposure to a refinery gasoline plume. The Court affirmed the dismissal of their claims because they had failed to proffer sufficient evidence of a

"legally significant increased risk" and, like the *Hirsch* plaintiffs, "failed to establish that a reasonable physician would order medical monitoring for such a *de minimis* risk of future harm." *Id.* at 526. Given these failures, this Court found that *Hirsch* "compelled" dismissal of their claims. *Id.*

Together, *Hirsch* and *Baker* establish that, if Ohio recognizes such an injury at all, the plaintiff must establish a present, significantly increased risk of a specific, serious disease, for which a reasonable physician would prescribe medical monitoring tailored specifically to that risk.

Hardwick plainly does not satisfy these requirements because he *does not allege*, let alone present evidence, that he is in fact at any increased risk of a serious disease, or that he needs specific medical monitoring for the disease as a matter of reasonable medical care. To the contrary, he admits that he *does not know* whether he is at any increased risk, or whether he needs medical monitoring. Most tellingly, the relief he seeks is a broad scientific study of PFAS health effects, which he hopes will shed light on those questions. He argues, in other words, that he has standing not because he *is at increased risk* of disease but because he *could be at increased risk* and wants someone to underwrite scientific research on the topic.

This is not an injury under *Hirsch* and *Baker*. This Court clearly established in those cases that only an actual, significantly increased risk of disease and resulting actual need for monitoring based on accepted medical science, not a mere possibility

of them, could constitute an injury. Hardwick claims only the possibility. Moreover, according to Hardwick, virtually everyone in the United States has had some exposure to PFAS and shares the same *possibility of increased risk*.[16] He thus alleges no injury that differentiates him from the general public. *See Richardson*, 418 U.S. at 179-80; *see also Protecting Air for Waterville v. Ohio Env't Prot. Agency*, 763 F. App'x 504, 508 (6th Cir. 2019) (finding no concrete injury based on the "bare allegations" that allegedly polluting "compressor stations [would] produce airborne emissions, that some of those emissions [would] include toxic industrial chemicals, and that some of its unidentified members [would] be exposed at some point to those airborne emissions" (citations omitted)).

Hardwick thus admittedly fails to allege or offer proof of an injury recognized under Ohio law, as articulated by this Court, and the District Court erred to the extent that it found that he claims such an injury. Therefore, even if the existence of a state law cause of action alone satisfied Article III, Hardwick would still lack standing because he has not alleged an injury that is cognizable under state law.

[16] While the "class of persons" contemplated in the District Court's order as entitled to judicial relief is effectively the entire general public of Ohio—and anyone else bound by Ohio law—there is little doubt that the District Court envisions the order reaching every citizen of the United States, provided that other states' laws would recognize the mere serological presence of a chemical compound as an injury.

## III. The District Court Applied Erroneous, Overly Expansive Standards for Class Certification.

In addition to its faulty Article III standing analysis, the District Court incorrectly applied Rule 23, adopting overly lenient standards and neglecting the rigorous analysis required by Supreme Court precedent. The Chamber highlights two of these errors. The District Court erroneously found that Hardwick satisfied the commonality requirement despite failing to identify any salient question that could be answered for all class members with common proof. It also erroneously declined to apply a requirement of class cohesiveness and instead held that a class may be certified under Rule 23(b)(2) using a standard *lower than* the predominance standard of Rule 23(b)(3).

### A. The District Court Did Not Properly Assess Commonality.

The Supreme Court has explained that Rule 23(a)(2)'s requirement of questions "common to the class" is satisfied only by "the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). A proceeding can only generate such "common answers" if the evidence relevant to those questions is uniform across all class members. If there are any individual variations in the relevant evidence, the questions are not common ones.

The District Court referred to this standard but engaged in no rigorous analysis of potential dissimilarities among class members that could "impede generation of

common answers"—the inquiry the Supreme Court has held is the critical one. *Id*. Instead, the District Court relied upon general reference to "tobacco and asbestos class actions from the 1980s and 1990s," noting that "Plaintiff maintains the same general pattern [alleged in those cases] has occurred here." Order, R.233, PageID#6695.[17] The isolated cases relied upon by the District Court long predated the guidance of the Supreme Court tightening class certification standards in *Dukes* and other more recent cases. Nevertheless, relying on those outdated cases, the District Court satisfied itself with the observation that "Mr. Hardwick raises common questions relating to the extent to which having PFOA and at least one other PFAS at the levels required for class membership causes an increased risk of disease in the class members." *Id*., PageID#6696. The District Court did not probe beyond that broad generalization for the kinds of "dissimilarities" that would prevent the generation of common *answers* to questions of this nature, such as differences in exposures, PFAS, and individual health and risk profiles.

### B. The District Court Erred by Certifying a Non-Cohesive Class under Rule 23(b)(2).

A large majority of circuit and district courts require that a Rule 23(b)(2) class be "cohesive," meaning, among other things, that the class "is amenable to uniform

[17] The District Court quoted a passage from Hardwick's brief citing *In re Sch. Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986), and *Scott v. Am. Tobacco Co.*, 725 S.2d 10 (La. App. 4 Cir. 1998).

group remedies." *Shook v. Bd. of Cty. Comm'rs of Cty. of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008) (Gorsuch, J.) (citation omitted)); *see also Reid v. Donelan*, 17 F.4th 1, 11 (1st Cir. 2021); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998); *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 847 (5th Cir. 2012); *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 893, n.8 (7th Cir. 2011); *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016).

This Court has endorsed the cohesiveness requirement as "well-established." *See Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 432 (6th Cir. 2009) ("Because homogeneity is required [for a Rule 23(b)(2) class], unitary adjudication of the claims is feasible without the devices of notice and opt-out."). The Ninth Circuit is the only circuit that has declined to apply a rigorous cohesiveness requirement to Rule 23(b)(2) classes. *See Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918, 937 (9th Cir. 2019).

The District Court rejected the overwhelming majority position, holding that no class cohesion beyond the requirements of Rule 23(a) is required by Rule 23(b)(2). Order, R.233, PageID#6704-07. It dismissed *Romberio's* significance on the ground that this Court did not elaborate on the demands of cohesiveness or say it is more demanding than predominance. *Id.* Yet the majority in that case stressed "the well-recognized rule that Rule 23(b)(2) classes must be cohesive" and quoted

from two leading cases from circuits that have adopted it as a standard more demanding than predominance. *Romberio*, 385 F. App'x at 432.

This Court should now make it unavoidably clear that the requirement of class cohesion leaving no possibility of dispositive differences among class members is inherent in Rule 23(b)(2). As the Supreme Court has explained, "[t]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful *only as to all of the class members or as to none of them*." *Dukes*, 564 U.S. at 360 (citation omitted and emphasis added). Consequently, (b)(2) certification is only proper where "the relief sought must perforce affect the entire class at once." *Id*. at 361-62*; see also Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000) ("Rule 23(b)(2) operates under the presumption that the interests of the class members are cohesive and homogeneous such that the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members.").

The class certified by the District Court is not cohesive, and the District Court erred by holding that it was not required to meet that standard under Rule 23(b)(2). This Court should reverse.

## IV. The Expansive Certification Standards Adopted by the District Court Would Harm Ohio's Business Environment and Economy.

Ohio businesses depend on a fair, predictable, stable legal system conducive to hiring and retaining talented employees, engaging in productive commerce, and maintaining profitable enterprises. The District Court's order undermines that environment, and, if affirmed by this Court, will burden Ohio companies, their employees, and all Ohio citizens.

The certification standards applied by the District Court, if affirmed, would make this Circuit's class certification standards among the most expansive and toothless in the United States. The impact would be predictable in its harm to Ohio businesses. Affirmance would quickly attract more class litigation to this Circuit and its member states. Ohio could expect its federal courts to become a magnet for similar actions seeking certification of classes of millions of class members with widely disparate claims, lacking concrete injuries and seeking adventurous and novel remedies outside the bounds of the traditional judicial powers. Ohio would become a home to enormous and amorphous class actions seeking to investigate possible injuries rather than to redress actual injuries suffered by cohesive classes.

Ohio companies would be a natural target of such litigation in cases filed in or removable to its federal courts. They would face an increasingly disruptive litigation environment, imposing significant costs, risks, and burdens. These

impacts would deter formation and expansion of businesses in Ohio, and Ohio's business community, its economy, and all its citizens would be harmed.

## V. CONCLUSION

The District Court erroneously concluded that Hardwick meets Article III's standing requirement and applied improper class certification standards under Rule 23. It certified a class that is unprecedented in size and amorphous in composition. In doing so it departed from the judicial role of adjudicating cases and controversies and instead claimed powers and functions reserved to the legislative and executive branches. If left to stand, the certification order would make Ohio a laboratory for experimental litigation serving not to redress concrete injuries but to fund broad public health studies at the expense of targeted companies. Ohio's economy and citizens will suffer as a result. This Court should reverse the District Court's order, provide clear guidance regarding the rigorous standards for class certification established by precedents of this Court and the Supreme Court, and order the case dismissed for lack of jurisdiction.

Dated: December 28, 2022

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g) and Sixth Circuit Rule 32(a), I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 29(a)(5) because it contains 5,045 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Sixth Circuit Rule 32(b)(1), as counted using the word-count function on Microsoft Word software.

I further certify that this brief complies with the typeface and type styles requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in 14-point Times New Roman, proportionally spaced font, using Microsoft Word.

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**CERTIFICATE OF SERVICE**

I certify that on December 28, 2022, an electronic copy of the foregoing was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. The undersigned also certifies that service of the foregoing on the parties in this matter was accomplished through the CM/ECF system.

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