NOTE

GOING GREEN: THE CASE FOR ISSUE CLASSES IN COMPLEX ENVIRONMENTAL LITIGATION

BY
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A number of recent United States Supreme Court decisions have repeatedly weakened the litigation power of general class action claims brought under Rule 23(c). While these decisions have made bringing complex environmental tort claims more difficult, one key alternative which has started to fill this need is the issue class action under Rule 23(c)(4). This Article addresses the recent developments in issue class litigation, as well as looking at how modern suits have utilized the niche rule to ensure the continued success of complex environmental litigation.

I. INTRODUCTION 466
II. WHAT IS THE 23(C)(4) ISSUE CLASS? 467
III. DEVELOPING JUDICIAL TREATMENT FROM THE 1990'S TO PRESENT 469
IV. ISSUE CLASS CONCERNS 477
V. ISSUE CLASSES IN ENVIRONMENTAL LITIGATION 480
VI. CONCLUSION 483

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I. INTRODUCTION

A new green revolution is here. Environmental advocacy has a new level of national importance and a new level of institutional support.[1] A president's environmental policy is central to his administration[2] and lawmakers fill news headlines with a potential "Green New Deal."[3] Legislation with environmentally focused policies and choices encourages advocates focused on ensuring a livable and fair future for all. One key aspect of the Green New Deal which does not receive as much focus, but should, is holding bad environmental actors accountable. Disasters such as the BP oil rig explosion[4] or the crisis surrounding the Flint water system[5] pose challenges equally problematic as the far more "popular" aging power grid or electricity generation largely fueled by CO_2 generating resources.[6] However, while litigation strategies hardly receive the same public attention as a congressional or presidential climate plan, their importance to a green agenda is undeniable. Unlike the aging grid or carbon emitting energy production systems, private actors can address disastrous environmental events utilizing extensive litigation strategies.[7] Through the existing system for complex litigation we can treat human caused environmental disasters, while hardly reversible, in a way that can give the thousands, or even millions, of injured persons as much justice and recompense for their injuries as our legal systems can achieve.

In the early decades of this century, complex litigation faced an aggressively antagonistic Supreme Court, and, consequently, class action lawsuits became a more and more difficult method to achieve justice for the injured.[8] While this downward slide for complex litigation may have

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[1] *See* Gregory Krieg, Laura Dolan & Jason Carroll, *The Green Energy Revolution is Coming—With or Without Help from Washington*, CNN (June 10, 2021, 6:15 PM), https://perma.cc/D9Q5-MQYB (noting investments by the federal government in clean energy).

[2] *See* Jon Jackson, *Putin's Invasion Deals Joe Biden a Blow to Struggling Climate Change Agenda*, NEWSWEEK (Apr. 6, 2022, 10:05 AM), https://perma.cc/X5Z8-R2DJ (observing that President Biden has "placed climate change as one of the top issues of his administration").

[3] *See, e.g.*, Anthony Adragna, *Progressives Formally Reintroduce the Green New Deal*, POLITICO (Apr. 20, 2021, 1:10 PM), https://perma.cc/SX77-PYAU.

[4] *See Timeline: BP Oil Spill*, BBC (Sept. 19, 2010), https://perma.cc/2448-LFWB.

[5] *See In re* Flint Water Cases, 558 F. Supp. 3d 459, 473–81 (E.D. Mich. 2021) (describing the background of the Flint Water Crisis and the harm caused by the Crisis to the residents of Flint).

[6] Much of the political agenda of the Biden administration has surrounded energy issues such as clean energy and modernizing the electric grid. *See, e.g., Reimagining and Rebuilding America's Energy Grid*, U.S. DEP'T ENERGY (June 10, 2021), https://perma.cc/DQ6K-GPAV (describing the Department of Energy's goals around modernizing the electric grid and promoting clean energy).

[7] *See* discussion *infra* Part V, for a discussion on the suitability of environmental issue classes to address environmental disasters in *In re Flint Water Cases*, 558 F. Supp. 3d 459 (E.D. Mich. 2021), and *Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910 (7th Cir. 2003).

[8] *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. UNIV. L. REV. 729, 827–28 (2013) [hereinafter, Klonoff, *Decline of Class Actions*].

stalled in recent years,[9] it has not rebounded to its previous highs—the rules and decisions that made class action certification more difficult remain in place.[10] As such, advocates need to maximize the utility of the litigation strategies available. One key strategy that would not require new legislation or precedent is the use of Rule 23(c)(4)[11] issue classes.[12] In fact, the use of issue classes should be one of the most valued options in an environmental litigator's toolbox and, if prioritized, issue classes could lead to the condemnation of bad actors and bring about the justice owed to the injured in this new age of environmental activism.

II. WHAT IS THE 23(C)(4) ISSUE CLASS?

The Federal Rules of Civil Procedure give very little assistance in evaluating the correct breadth and use of an issue class. Barely more than two lines are dedicated to this specialized subclass,[13] and alterations to the Rules have by and large left issue classes untouched;[14] the Rules leave the circuit courts largely to their own devices for determining the rules and requirements for issue classes.[15] Additionally, no binding Supreme Court precedent exactly on point exists to help guide the circuits.

The Federal Rules of Civil Procedure generally require that after determining what the issue class is—the parties involved and the adjudicated issues—the issue class must independently satisfy the other requirements of Rule 23.[16] The Rule 23(a) requirements, including numerosity,[17] commonality,[18] typicality,[19] and adequacy of representation,[20]

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[9] *See* Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971, 971–72 (2017) [hereinafter, Klonoff, *Class Actions Part II*] (noting that the trend of the Supreme Court and federal circuit courts cutting back plaintiffs' ability to bring class action suits has subsided).

[10] *Id.* at 972 (expressing doubt that seminal cases restricting class action suits will be overruled).

[11] FED. R. CIV. P. 23(c)(4).

[12] *See* discussion *infra* Part II.

[13] "When appropriate, an action may be brought or maintained as a class action with respect to particular issues." FED. R. CIV. P. 23(c)(4).

[14] The most recent alteration to Rule 23(c)(4) was in 2007, when the rule was split into two: (c)(4) for issue classes and (c)(5) for subclasses. *See* Order Adopting Ams., FED. R. CIV. P. 23(c)(4), 23(c)(5) (2007); *cf.* FED. R. CIV. P. 23(c)(4) (2000). Additionally, the language was slightly changed, removing the following instruction which appeared at the end of the rule, "and the provisions of [Rule 23] shall then be construed and applied accordingly." FED. R. CIV. P. 23(c)(4); *cf.* FED. R. CIV. P. 23(c)(4) (2000). However, the language was changed "to make them more easily understood and to make style and terminology consistent throughout the rules. *These changes are intended to be stylistic only.*" FED. R. CIV. P. 23, advisory committee's note to 2007 amendment (emphasis added).

[15] *See* discussion *infra* Part III (comparing the different approaches used by circuit courts).

[16] FED. R. CIV. P. 23(c)(1)(B) ("An order that certifies a class action must define the class and the class claims, issues, or defenses.").

[17] FED. R. CIV. P. 23(a)(1) ("the class is so numerous that joinder of all members is impracticable"); *see also* Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 594–95 (3rd Cir. 2012) ("[Numerosity] promotes three core objectives[:] . . . it promotes judicial economy[,]

face identical tests for both the specialized Rule 23(c)(4) issue class and the more traditional Rule 23(b) class actions.[21] More importantly, as discussed below, Rule 23(b) class actions have more specific requirements.[22] Depending on the type of Rule 23(b) class associated with the issue class, this could require a traditional inquiry into the predominance and superiority factors.[23]

As a result of the relative paucity of language, commentators and courts generally agree that Rule 23(c)(4) boils down to the idea that issue class certification is reserved for when *specific* issues can be adjudicated for a large, nearly class-action viable group of plaintiffs, but a more traditional Rule 23(b) class would fail one of the various requirements for certification.[24] As such, these group issues allow for adjudication in a class setting, leaving more individualized issues for adjudication in future, individualized lawsuits.[25] Particularly in a mass tort

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. . . creates greater access to judicial relief, particularly for those persons with claims that would be uneconomical to litigate individually[,] . . . [and] prevents putative class representatives and their counsel . . . from unnecessarily depriving members of a small class of their right to a day in court to adjudicate their own claims.").

[18] FED. R. CIV. P. 23(a)(2) ("there are questions of law or fact common to the class"); *see also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) ("What matters to class certification . . . [is] the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009))).

[19] FED. R. CIV. P. 23(a)(3) ("the claims or defenses of the representative parties are typical of the claims or defenses of the class"); *see also Marcus*, 687 F.3d at 598 ("To determine whether a plaintiff is markedly different from the class as a whole, we consider the attributes of the plaintiff, the class as a whole, and the similarity between the plaintiff and the class.").

[20] FED. R. CIV. P. 23(a)(4) ("the representative parties will fairly and adequately protect the interests of the class); *see also* Black v. Rhone-Poulenc, Inc., 173 F.R.D. 156, 162 (S.D.W. Va. 1996) ("When assessing the class representatives' ability to adequately represent the interests of the class, the Court must consider the abilities of both the attorneys who represent the class representatives, and the class representatives themselves." (quoting United Bhd. of Carpenters & Joiners of Am., Local 899 v. Phoenix Assocs., Inc., 152 F.R.D. 518, 523 (S.D.W. Va. 1994))).

[21] *See* FED. R. CIV. P. 23(a) (listing requirements applicable to all types of classes).

[22] *See* discussion *infra* Part III.

[23] *See* FED. R. CIV. P. 23(b)(3) ("[T]he court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members . . . ."); *Id.* ("[A] class action is superior to other available methods for fairly and efficiently adjudicating the controversy."); Martin v. Behr Dayton Thermal Prods. LLC (*Behr*), 896 F.3d 405, 411 (6th Cir. 2018) (noting that some courts have adopted the "broad view" of 23(c)(4) certification under which "courts apply Rule 23(b)(3) predominance and superiority prongs"), *cert. denied*, 139 S. Ct. 1319 (2019).

[24] *See* Joseph A. Seiner, *The Issue Class*, 56 B.C. L. REV. 121, 123 (2015) (noting that "[e]ven when a class has not been permitted to proceed under Rule 23(b), then, litigants can still certify particular issues common to a class under Rule 23(c)(4)," which allows the judge to "tailor the certified issues to the facts of the specific case").

[25] *Id.* at 154. The individualized issues to be litigated later are usually the reason issue classes are necessary. *Id.* at 154–55. Those individualized issues, when they are determined as predominant, are generally the downfall of the certification of the more traditional form of class action. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 745–47 (5th

situation, like some modern environmental classes, these issue classes are generally reserved for determining common issues related to the conduct of the defendant or the relevant facts which identically impact all members of the plaintiff class.[26]

III. DEVELOPING JUDICIAL TREATMENT FROM THE 1990'S TO PRESENT

Starting in the 1990s and continuing for more than a decade and a half, class action litigation faced an increasingly demanding and antagonistic court system.[27] Almost all aspects of class action litigation faced more exacting and specific requirements, making certification and maintenance of class action lawsuits increasingly difficult.[28] As a single part of the broader complex litigation landscape, Rule 23(c)(4) was not immune to this antagonistic view, and in some circuits suffered harsher treatment than nearly any other aspect of class action. This was particularly true in the circuits that supported the narrow view of how issue classes interacted with Rule 23(b)(3) class actions, as first introduced in *In re Rhone-Poulenc Rorer, Inc.*[29] and *Castano v. American Tobacco Co.*[30]

In *Rhone-Poulenc*, the Seventh Circuit reversed the certification of an issue class for hemophiliacs who unknowingly used contaminated blood solids in the course of their treatments.[31] The plaintiffs, who first attempted to certify a Rule 23(b)(3) class, turned towards certifying a Rule 23(c)(4) issue class because individual claims predominated over common issues.[32] The most significant example of an overpowering individual issue was the relative date of each of the infections caused by the defendant's contaminated blood solids.[33] The appellate opinion, written

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Cir. 1996) (explaining that the district court erred by certifying a class under Rule 23(b)(3) that could ultimately require individual trials, which would fail the predominance and superiority requirements).

[26] Myriam Gilles & Gary Friedman, *The Issue Class Revolution*, 101 B.U. L. REV. 133, 138, 171 (2021) [hereinafter Gilles & Friedman, *Issue Class Revolution*].

[27] *See* Klonoff, *Decline of Class Actions*, *supra* note 8, at 745–46 n.92, 746 n.95 (describing federal cases from 1993 to 2010 that demonstrate important trends where courts "have made class actions more difficult for plaintiffs to bring").

[28] *Id.* at 746 n.92 (describing cases that have either imposed rigorous certification requirements or made it more difficult to satisfy the typicality requirement).

[29] 51 F.3d 1293 (7th Cir. 1995), *cert. denied*, 516 U.S. 867 (1995).

[30] 84 F.3d 734, 738 (5th Cir. 1996) (finding Judge Posner's reasoning in *Rhone-Poulenc*, 51 F.3d at 1300, persuasive and supportive of the court's finding that "so too here, we cannot say that it would be a waste to allow individual trials to proceed, before a district court engages in the complicated predominance and superiority analysis necessary to certify a class"); *see also* Behr, 896 F.3d 405, 412 (6th Cir. 2018) (identifying the "narrow view" adopted by courts, citing *Castano*, 84 F.3d at 745 n.21).

[31] *Rhone-Poulenc*, 51 F.3d at 1297.

[32] See Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410, 414–15 (N.D. Ill. 1994) (noting plaintiffs' argument, in the alternative, that the "particular issues should be certified for class treatment pursuant to Rule 23(c)(4)"), mandamus granted, 51 F.3d 1293 (1995).

[33] *Rhone-Poulenc*, 51 F.3d at 1296–97 (explaining that the district court thought it could not certify the class under Rule 23(b)(3) in part because "[t]he differences in the date

by Chief Judge Posner, determined that this erroneously certified issue class was far beyond the scope of allowable discretion.[34]

The court focused on three concerns that convinced it to reverse issue class certification. First, the court was worried about forcing companies into potential bankruptcy because of a single jury trial without determining final liability and damages.[35] Particularly problematic to the court was that this bankruptcy option could arise, even though little legal standing existed for the plaintiffs given that every previous attempt against the pharmaceutical company was found for the defendant.[36] The second key concern was significant choice-of-law complications. One of the primary issues for certification—negligence of the defendants—would use a judicially-crafted amalgamation of negligence rules from all 50 states and D.C., rather than the rules that should apply to each individual claimant.[37] Finally, the court raised a constitutional concern with this level of issue bifurcation, especially with negligence as the key issue.[38] As discussed further below, issue class certification often brings in Seventh Amendment concerns.[39] According to the court, while the issue class might decide whether the defendants acted negligently, future damages analyses would require reanalyzing the same negligence determination in order to evaluate defenses involving comparative negligence. [40] Therefore, a judicial tool meant to speed along the litigation process would end up being repeated the same analysis over and over again in every relevant jurisdiction. As a result, the court worried that forcing a jury to re-evaluate a previous negligence determination would violate the Seventh Amendment.[41]

In *Castano*, a second disastrous case for the utilization and effectiveness of issue classes alongside a Rule 23(b)(3) class, the Fifth Circuit looked negatively at an issue class certification attempting to bring jus-

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of infection alone of the thousands of potential class members would make" certifying the class under Rule 23(b)(3) infeasible).

[34] *Id.* at 1297. This was not a normal interlocutory appeal concerning class certification; rather, it was a mandamus appeal. *Id.* at 1294. As such, much of the discussion in the case itself was couched in terms of "exceed[ing] the permissible bounds of discretion," rather than simply abuse of discretion concerning whether certification requirements were met. *Id.* at 1295–97.

[35] *Id.* at 1299 ("The first is a concern with forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability, when it is entirely feasible to allow a final, authoritative determination of their liability for the colossal misfortune that has befallen the hemophiliac population to emerge *from a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions* . . . ." (emphasis added)).

[36] *Id.* ("A notable feature of this case . . . is the demonstrated great likelihood that the plaintiffs' claims, despite their human appeal, lack legal merit.").

[37] *Id.* at 1300.

[38] *Id.* at 1302–03.

[39] *See* discussion *infra* Part IV.

[40] *Rhone-Poulenc*, 51 F.3d at 1303.

[41] *Id.* "In Suits at common law . . . no fact tried by a jury, shall be otherwise reexamined in any Court of the United States . . . ." U.S. CONST. amend. VII.

tice to millions of people defrauded by the American tobacco industry.[42] Plaintiffs attempted a novel theory of litigation to potentially break through an historically nearly undefeated defense by the industry.[43] The class, which "may [have been] the largest class action ever,"[44] was brought to seek compensation for the injury of nicotine addiction alone.[45] Plaintiffs attempted to litigate in four stages, which importantly included a stage solely for determining common issues which arguably impacted all plaintiffs equally, largely pertaining to the actions of the defendant tobacco company.[46] While the trial court did not certify the "four-phase" method as requested, the trial court did conditionally certify the class using "its power to sever issues for certification under…[Rule] 23(c)(4)."[47]

In a blistering opinion, the appellate court found that the trial court erred in its analysis and granted certification improperly.[48] While procedural defects in the trial court's certification analysis—including predominance—were the primary reasons for reversal, the appellate court also found that the lower court's analysis failed the superiority requirement of Rule 23(b)(3).[49] The predominance analysis had the harshest impact on issue class certification; the court described Rule 23(c)(4) as "a housekeeping rule that allows courts to sever the common issues for a class trial."[50] Most importantly, the court in *Castano* found that "[t]he proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3)."[51] The court found that determining predominance and superiority within the issue class itself, rather than within the Rule 23(b)(3) class, would "eviscerate the predominance requirement of Rule 23(b)(3); the result would be automatic certification in every case where there is a common issue."[52]

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[42] *See Castano*, 84 F.3d 734, 737, 752 (5th Cir. 1996) (reversing the district court under an abuse of discretion standard and finding that the defects in its class certification could not be corrected on remand and therefore required dismissal).

[43] *Id.* at 737 ("The gravamen of [plaintiffs'] complaint is the novel and wholly untested theory that the defendants fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature . . . ."). Prior to 2000, the tobacco industry was largely successful when using the defense that smokers knowingly assumed the risks related to smoking. Kathleen Michon, *Tobacco Litigation: History & Recent Developments*, NOLO, https://perma.cc/7BG6-FLJ5 [https://perma.cc/UX2L-9ZT8] (last visited April 13, 2022).

[44] *Castano*, 84 F.3d at 737.

[45] *Id.*

[46] *See id.* at 738 (describing plaintiffs' proposed four-phase trial plan where, of the eleven "common issues of 'core liability'" that would be determined in Phase 1, eight involve the defendants' actions or liability).

[47] *Id.* at 738 n.7, 739.

[48] *Id.* at 740–41.

[49] *Id.* at 740–49.

[50] *Id.* at 745 n.21 (finding plaintiffs "must satisfy the predominance requirement of (b)(3)").

[51] *Id.*

[52] *Id.*

The power of these two cases remains today in what has been termed by courts as the "narrow view."[53] This view largely limits the scope of issue classes by making certification incredibly difficult. Because of the new standard introduced as a footnote in *Castano* regarding the interplay between the two subdivisions of Rule 23, issue classes simply could not adjudicate widespread issues through a class setting if that same issue could not be determined through a more traditional Rule 23(b)(3) class as well, affecting Rule 23(c)(4): exactly what the court worried would happen to predominance.[54] However, thankfully for issue class advocates everywhere, the incredibly restrictive interpretations in *Rhone-Poulenc* and *Castano* did not inform all decisions or precedent in every circuit. Over time, the circuits split. Other circuits rejected the "narrow view" in favor of the significantly more common "broad view,"[55] and some circuits took an "alternative view,"[56] which seeks a middle ground between the two.[57]

The Second Circuit was one of the earliest adopters of the broad view. In *In re Nassau County Strip Search Cases*,[58] the certification analysis for Rule 23(c)(4) issue classes was an issue of first impression in that circuit, which split from the decisions of the Fifth and Seventh Circuits in *Castano* and *Rhone-Poulenc,* respectively, in its decision.[59] Instead, the court held that predominance and superiority only applied to the issue class itself.[60] The case involved a class of individuals who were subjected to unconstitutional strip searches while in the custody of the Nassau County Police Department.[61] These strip searches, according to the plaintiffs, violated multiple Constitutional amendments because officers performed the searches with no individualized suspicion.[62] After going through the litigation ringer,[63] the Second Circuit ultimately

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[53] *E.g.*, *Behr*, 896 F.3d 405, 412 (6th Cir. 2018) (defining the "narrow view" as prohibiting "issue classing if predominance has not been satisfied for the cause of action as a whole").

[54] *Id.* (citing *Castano*, 84 F.3d 734, 745 n.21 (5th Cir. 1996)).

[55] *Id.* at 411–12.

[56] *See id.* at 412 ("Two circuit court decisions have relied on a functional, superiority-like analysis instead of adopting either the broad or the narrow view."). "Alternative view" is used in this note to describe courts' approaches falling between the broad and narrow approaches, discussed *infra*, note 85.

[57] *See* Hohider v. United Parcel Serv., Inc., 574 F.3d 169, 201 (3d Cir. 2009) (applying a new set of balancing factors to issue class certification).

[58] 461 F.3d 219 (2d Cir. 2006). *See also* Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1231–32 (9th Cir. 1996) (adopting a broad view for issue class certification).

[59] *In re* Nassau County Strip Search Cases, 461 F.3d at 226 (declining to adopt the Fifth Circuit's interpretation of 23(c)(4) from *Castano*, 84 F.3d at 745 n.21). While the court never directly discussed *Rhone-Poulenc* or the Seventh Circuit, it explicitly adopted the Ninth Circuit's broad view, implicitly rejecting the narrow view expressed in *Rhone-Poulenc*. *Id.* (citing *Valentino*, 97 F.3d at 1231–32).

[60] *Id.* at 226, 230.

[61] *Id.* at 222.

[62] *Id.*

[63] Plaintiffs, in their attempt to certify a class, were denied four times for four different certification failures. *Id.* at 222–24. The first attempt at class certification failed due to a predominance issue, as some class members would need to litigate vastly different cir-

heard the case on appeal after another refusal to certify the class.[64] The courts repeatedly denied both Rule 23(b)(3) and Rule 23(c)(4) classes because individual issues generally predominated over common ones.[65] In the trial court's repeated denials, it relied heavily upon the narrow view espoused by the court in *Castano*.[66] However, when the Second Circuit finally took up issue class certification on appeal, it split from the *Castano* holding. Instead, the Second Circuit agreed with the Ninth Circuit's decision in *Valentino v. Carter-Wallace* by noting that the issue was whether a common question predominated in this particular issue, not over the entire class as a whole:[67]

> [E]ven if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues . . . and proceed with class treatment of these particular issues.[68]

First, the Second Circuit found that the plain language of the rule itself supported the broad view given that the rule instructs a court "[to] first identify the issues potentially appropriate for certification 'and . . . then' apply the other provisions of [Rule 23]."[69] Furthermore, the Advisory Committee Notes emphasized this supportive language when it set forth that Rule 23(c)(4) was correct in a case where "the action may retain its 'class' character *only* through the adjudication of [an issue such as] liability to the class."[70] As such, the *Castano* holding broke with the clear language of the Rule, because if Rule 23(c)(4) is the "only" way for

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cumstances. *Id.* at 222–23. After reclassifying to remove those members from the class, the second attempt also failed for predominance purposes, this time because the new class definition would require individualized trials simply to determine class membership, "all persons arrested for or charged with non-felony offenses who have been admitted to the [Nassau County Correctional Center] and strip searched *without particularized reasonable* suspicion." *Id.* at 223 (quoting plaintiffs) (emphasis added). Additionally, that predominance determination also doomed a new Rule 23(c)(4) issue class attempt by the plaintiffs. *Id.* As a result of a third attempt at certification, defendants conceded liability on the sole common issue, which, according to the trial court, meant that there was no more predominant common issue. *Id.* at 224. As a result, predominance was not met and therefore certification could not be approved. *Id.* (noting that the district court denied plaintiffs' motion because "defendants' concession removed all common liability issues from its predominance analysis"). A final attempt at certification was also denied, using the same lack of common issues, as well as a newfound lack of superiority. *Id.* After that final determination, a settlement was reached that included the right to appeal the denial of class certification. *Id.*

[64] *Id.* at 221.

[65] *See id.* at 222–24.

[66] *Id.* at 223 (citing *Castano*, 84 F.3d 734, 745 n.21 (5th Cir. 1996)).

[67] 97 F.3d 1227 (9th Cir. 1996).

[68] *In re* Nassau County Strip Search Cases, 461 F.3d at 226 (quoting *Valentino*, 97 F.3d at 1234).

[69] *Id.* (citation omitted) (adopting the broad view expressed by the Ninth Circuit); *see also supra* note 59 and accompanying text.

[70] *Id.* (quoting FED. R. CIV. P. 23(c)(4) advisory committee's note to 1966 Amendment).

a class to proceed, then the class could not meet the requirements of Rule 23(b)(3) as well.[71]

Second, the court adopted the broad view because the narrow view virtually nullifies the entire subsection of Rule 23(c)(4). If the narrow view nullifies Rule 23(c)(4), then the broad view would likely be the "correct" interpretation based on the principle that an interpretation by a court should not render an entire provision superfluous.[72] The narrow view, in fact, nullifies the entire subsection because courts craft issue classes to make broad, class-wide issues manageable for judicial efficiency.[73] If determining predominance, which includes a showing of manageability, must come first, then the narrow view makes issue classes irrelevant. This would require that issue classes—tools to achieve manageability—only be available after the case is already determined to be manageable.[74]

Finally, the *In re Nassau County Strip Search Cases* court noted that circuits that adopted the narrow view split from the most influential commentators of the time.[75] Generally, complex litigation manuals indicated that Rule 23(c)(4) classes applied only to issues for which the action as a whole would not satisfy the requirements of Rule 23(b)(3), including predominance.[76]

While the decision is reasonable, the *In re Nassau County Strip Search Cases* court failed to address some of the genuine concerns of the court in *Castano*. Those conflicts and concerns have been addressed as more and more circuits begin to accept the broader application of Rule 23(c)(4). For instance, the Sixth Circuit in *Martin v. Behr Dayton Thermal Products LLC* (*Behr*)[77] addressed one of *Castano*'s key concerns—that by adopting a broader view such as it did, virtually every class would meet the predominance analysis and would therefore flood courts with issue classes.[78] According to *Behr*, one of *Castano*'s mistakes leading to this concern was focusing entirely on the predominance require-

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[71] *See id.* (rejecting the Fifth Circuit's approach in favor of the Ninth Circuit's approach, finding the plain language and structure of Rule 23 support the Ninth Circuit's view).

[72] *See id.* at 226–27 (noting that the Fourth Circuit found the "Fifth Circuit's view renders subsection (c)(4) virtually null, which contravenes the 'well-settled' principle 'that courts should avoid statutory interpretations that render provisions superfluous.'" (citing State Street Bank & Tr. Co. v. Salovaara, 326 F.3d 130, 139 (2d Cir. 2003))).

[73] *See id.* at 224, 226–27. *See also id.* at 227 (noting "that the commentators agree that courts may use subsection (c)(4) to single out issues for class treatment when the action as a whole does not satisfy Rule 23(b)(3)").

[74] *Id.* at 227 (citation omitted).

[75] *Id.* (citing § 1790 Partial Class Actions and Subclasses, 7AA Fed. Prac. & Proc. Civ. (Wright & Miller) § 1790 (3d ed.), which states that subsection (c)(4) "best may be used to designate appropriate classes or class issues at the certification stage" so that "the court can determine whether, as so designated, the other Rule 23 requirements are satisfied").

[76] *Id.*

[77] 896 F.3d 405 (6th Cir. 2018).

[78] *Behr*, 896 F.3d, at 412–13. *See also Castano*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("[T]he result would be automatic certification in every case where there is a common issue.").

ment.[79] To assuage the concerns of the Fifth Circuit, the court should have analyzed the entirety of Rule 23(b)(3) requirements; predominance is certainly easier to satisfy with a broad view, but the superiority factor protects the court from countless certified issue classes.[80] Superiority ensures that only reasonable issue classes achieve certification. If the common issues are minor or insignificant, the court can still decline certification.[81] Additionally, superiority helps determine what issues should be certified; both those issues efficiently "go[ing] a long way toward" resolving liability questions, and those issues which, when given class treatment, "materially advance the litigation."[82]

While most jurisdictions have rejected the narrow view,[83] including a Fifth Circuit decision that limits the footnote in *Castano*,[84] the Third and Eighth Circuits followed an entirely different route. The final method for interpreting issue classes utilized with Rule 23(b)(3) class actions in the Third Circuit is the functional, or "alternative" view. While this view still departs from the extreme limitations of the *Castano* footnote, the Third Circuit followed the lead of the commentators in the American Law Institute's (ALI) *The Principles of the Law: Aggregate Litigation* and took a more functional, predictable method of granting certification.[85] Essentially, instead of simply certifying any issue class meeting the requirements of Rules 23(a) and 23(b)(2) or 23(b)(3), ALI and the adopting courts have a long, non-exclusive set of factors to balance be-

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[79] *See Behr*, 896 F.3d at 412–13 (discussing and ultimately rejecting the "narrow view" expressed in *Castano*, 84 F.3d at 745 n.21, finding that the narrow view's "requirement that predominance must first be satisfied for the entire cause of action would under-cut the purpose of Rule 23(c)(4) and nullify its intended benefits").

[80] *See id.* at 413 (rejecting the narrow view that predominance must be satisfied for the whole class, in part because "[s]uperiority therefore functions as a backstop against inefficient uses of Rule 23(c)(4)").

[81] *See id.* (noting that "the concomitant application of Rule 23(b)(3)'s superiority requirement ensures that courts will not rely on issue certification where there exist only minor or insignificant common questions, but instead where the common questions render issue certification the superior method of resolution").

[82] *Id.* at 416.

[83] *See* Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1892 (2015) ("The First, Second, Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits have each taken various approaches that facilitate issue classes to different degrees." (citations omitted)).

[84] *See* Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 603 (5th Cir. 2006) (recognizing "[t]he cause of action as a whole must satisfy Rule 23(b)(3)'s predominance requirement," while also noting that bifurcation might serve "as a remedy for the obstacles preventing a finding of predominance" (first citing *Castano*, 84 F.3d at 745 n.21)).

[85] The alternative view is generally considered an approach between the broad and narrow approaches. *See supra* note 57 and accompanying discussion (noting that the Third Circuit adopted the alternative view (citing *Hohider*, 574 F.3d 169, 201 (3d Cir. 2009)). *See also, e.g.*, Gates v. Rohm & Haas Co., 655 F.3d 255, 273 (3d Cir. 2011) (adopting the alternative view originally introduced by ALI (citing PRINCIPLES OF THE LAW: AGGREGATE LITIGATION §§ 2.02–05, 2.07–2.08 (Am. L. Inst. 2010) [hereinafter A.L.I.])); *In re* St. Jude Med., Inc., 522 F.3d 836, 841 (8th Cir. 2008) (surveying the approaches taken by other circuits and ultimately reversing the district court's class certification because "the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation").

fore granting certification.[86] However, the ALI created little guidance for balancing the various factors, leaving courts to largely follow their own intuition.[87] The theory behind this list of factors is that the list could indicate, to some extent, whether the broader claim brought against the defendant would be "materially advance[d]" by a class-wide determination of the relevant issues.[88]

The Third Circuit, in *Gates v. Rohm & Hass Co.*,[89] found that a district court did not abuse its discretion when failing to certify an issue class; however, the lower court relied only on a few of the nine factors in its ruling.[90] The appellate court found that there was difficulty separating the issues, which weighed heavily against certification.[91] Additionally, the Third Circuit found that the relevant issues—whether an illegal discharge of chemicals occurred and whether that discharge resulted in evaporated carcinogenic material—would "unlikely . . . substantially aid resolution of the substantial issues on liability and causation."[92] Other minor conclusions were that certification would unfairly impact defend-

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[86] *Gates*, 655 F.3d at 273. The court in *Gates* set out nine factors for a trial court to consider when deciding to certify an issue class:

> [1] the type of claim(s) and issue(s) in question;
>
> [2] the overall complexity of the case;
>
> [3] the efficiencies to be gained by granting partial certification in light of realistic procedural alternatives;
>
> [4] the substantive law underlying the claim(s), including any choice-of-law questions it may present and whether the substantive law separates the issue(s) from other issues concerning liability or remedy;
>
> [5] the impact partial certification will have on the constitutional and statutory rights of both the class members and the defendant(s);
>
> [6] the potential preclusive effect or lack thereof that resolution of the proposed issue class will have;
>
> [7] the repercussions certification of an issue(s) class will have on the effectiveness and fairness of resolution of remaining issues;
>
> [8] the impact individual proceedings may have upon one another, including whether remedies are indivisible such that granting or not granting relief to any claimant as a practical matter determines the claims of others;
>
> [9] and the kind of evidence presented on the issue(s) certified and potentially presented on the remaining issues, including the risk subsequent triers of fact will need to reexamine evidence and findings from the resolution of the common issue(s).
>
> This non-exclusive list of factors should guide courts as they apply [Rule] 23(c)(4) . . . .

Id. (citations omitted)). *See also* A.L.I., *supra* note 85, § 2.02 (listing similar factors).

[87] *Gates*, 655 F.3d. at 273.

[88] Gilles & Friedman, *Issue Class Revolution*, *supra* note 26, at 139–40.

[89] 655 F.3d 255 (3d Cir. 2011).

[90] *Gates*, 655 F.3d at 274.

[91] *See id.* (calling the claims and issues in the case "complex" and noting the "common issues do not easily separate from individual issues").

[92] *Id.*

ants and absent class members, that the bald assertion concerning common facts was not supported by evidence, and that the relevant evidence relied upon for other issues was not nearly as broadly sweeping as plaintiffs claimed.[93]

One aspect of issue classes bemoaned by commentators and generally recognized by courts is that Rule 23(b)(3) is not the only method of class action with the possibility of bifurcation through issue class certification.[94] In fact, some commentators argue that this form of a Rule 23(b) class is the inferior, or even incorrect, form to receive this widespread judicial attention.[95] Instead, courts can certify issue classes alongside Rule 23(b)(2) class actions.[96] Besides the fact that this avoids the predominance contention surrounding Rule 23(b)(3) classes, plain language closely links this class action vehicle to the two respective rules.[97] Unlike Rule 23(b)(3) classes, which can be certified for both monetary damages as well as injunctive or declaratory relief, available rewards for Rule 23(b)(2) classes are limited—only declaratory judgements and injunctions are available.[98] While not laid out in the rule itself, Rule 23(c)(4) also results in a declaratory judgement rather than a monetary reward.[99] As such, it neatly fits into the requirement for Rule 23(b)(2) that the reward must effect all class members generally and declaratory relief is appropriate.

IV. ISSUE CLASS CONCERNS

Since the inception of the narrow view nearly 30 years ago, courts have generally walked back the overly restrictive viewpoint, instead advocating for the efficiency and justice of certifying valid issue classes.

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[93] *Id.*

[94] *E.g.*, Gilles & Friedman, *Issue Class Revolution*, *supra* note 26, at 138–40 (discussing the use of 23(c)(4)); Burch, *supra* note 83, at 1867 (discussing the use of 23(b)(2)); Myriam Gilles & Gary Friedman, *Rediscovering the Issue Class in Mass Tort MDLS*, 53 GA. L. REV. 1305, 1330–31 (2019) [hereinafter Gilles & Friedman, *Rediscovering the Issue Class*] (comparing (b)(2), (b)(3), and (c)(4) approaches to issue class certification).

[95] Gilles & Friedman, *Issue Class Revolution*, *supra* note 26, at 139; Gilles & Friedman, *Rediscovering the Issue Class*, *supra* note 94, at 1330.

[96] *See* Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 910–12 (7th Cir. 2003) (affirming certification of class that resolves certain "issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings"), *aff'g* Mejdrech v. Lockformer Co., No. 01 C 6107, 2002 WL 1838141, at *7 (N.D. Ill. Aug. 12, 2002) (certifying a 23(b)(2) class)).

[97] Gilles & Friedman, *Issue Class Revolution*, *supra* note 26, at 145 ("The proper vehicle for certifying an issue class, then, is Rule 23(b)(2), which specifically authorizes the certification of class actions seeking '*declaratory relief*.'" (emphasis added)).

[98] FED. R. CIV. P. 23(b)(2) ("A class action may be maintained if Rule 23(a) is satisfied and if: . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief *or corresponding declaratory relief* is appropriate respecting the class as a whole." (emphasis added)).

[99] "The (c)(4) class is not seeking damages. The (c)(4) class is seeking a declaration: it asks the court to declare that certain facts are true, or that the defendant's conduct violated some standard or law." Gilles & Friedman, *Rediscovering the Issue Class*, *supra* note 94, at 1330.

However, a few judicial worries, including several justifications for limiting issue classes, are nearly constant across narrow view cases and circuits.

One key worry working against issue classes for years, as highlighted in both *Castano* and *Rhone-Poulenc*, was the concern by courts that certification of a class for some of the issues within a greater claim risked causing future re-litigation of that same issue.[100] This outcome would clearly violate the Seventh Amendment's Reexamination Clause.[101] This risk was considered strong when the individual cases brought after issue classes needed to determine defenses, such as comparative negligence, which in turn required an entirely new negligence determination by the second jury.[102] This concern, as espoused repeatedly by courts and commentators alike, ignores the practical realities behind issue classes and later individualized trials.[103] It is easy to avoid the problem with detailed instructions to a jury that include how the defendant was negligent.[104] Additionally, even if a risk of re-evaluating the same facts exists, that should not limit certification of an issue class at such an early stage. At that point, the risk is small and judges have the ability to limit that risk for future juries through various procedural methods.[105] Even the Seventh Circuit, just a few years after its decision in *Rhone-Poulenc*, reversed its stance and held that a correctly executed bifurcation could be consistent with the Seventh Amendment.[106] Therefore, many courts have dismissed the argument that issue classes violate the Seventh Amendment and cannot serve as a viable and key strategy for complex environmental litigation.

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[100] *Rhone-Poulenc*, 51 F.3d 1293, 1303 (7th Cir. 1995); *Castano*, 84 F.3d 734, 751 (5th Cir. 1996).

[101] "In suits at common law . . . no fact, tried by a jury, shall be otherwise re-examined in any court of the United States . . . ." U.S. Const. amend VII.

[102] *Castano*, 84 F.3d at 751 ("Comparative negligence, by definition, requires a comparison between the defendant's and the plaintiff's conduct. At a bare minimum, the second jury will rehear evidence. There is a risk that in apportioning fault, the second jury could reevaluate the defendant's fault, determine that defendant was not at fault, and apportion 100% of the fault to the plaintiff" (citations omitted)).

[103] *See* Gilles & Friedman, *Issue Class Revolution*, *supra* note 26, at 172; Burch, *supra* note 83, at 1925–27; Gilles & Friedman, *Rediscovering the Issue Class*, *supra* note 94, at 1323–24; *see also* Olden v. LaFarge Corp., 383 F.3d 495, 509 n.6 ("[I]f done properly, bifurcation will not raise any constitutional issues."), *cert. denied*, 545 U.S. 1152 (2005).

[104] "[T]hat risk can be avoided by using special verdict forms and instructing subsequent juries as to the first jury's findings." Burch, *supra* note 83, at 1927.

[105] *See, e.g.*, *Behr*, 896 F.3d 405, 417 (6th Cir. 2018) ("At this [early] stage, the district court has not formalized any procedures for resolving either the common issues or the remaining individualized inquiries . . . . Because the district court has not settled on a specific procedure, no constitutional infirmities exist at this time. Moreover, the fact that the district court preemptively raised the potential for Seventh Amendment concerns suggests that it will take care to conduct any subsequent proceedings in accordance with the Reexamination Clause.").

[106] *See* Houseman v. U.S. Aviation Underwriters, 171 F.3d 1117, 1126–28 (7th Cir. 1999) (distinguishing *Rhone-Poulenc*, 51 F.3d 1293, 1302 (7th Cir. 1995), to find that bifurcation satisfies the Seventh Amendment), *reh'g en banc denied*.

Some believe that a single decision against a defendant is simply too coercive, almost to the point of blackmail. Class action litigation can grant a single jury the power to send a party into debt or bankruptcy with harsh sentencing or by coercing defendants into unfair settlements.[107] According to those with concerns, the issue class system is inferior and unjust compared with individualized lawsuits allowing multiple juries to determine a defendant's ultimate fault.[108] One of the loudest advocates for this theory was Judge Posner:

> The first is a concern with forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability, when it is entirely feasible to allow a final, authoritative determination of their liability for the colossal misfortune . . . to emerge from a decentralized process of multiple trials, involving multiple juries, and different standards of liability, in different jurisdictions[.][109]

However, like the Seventh Amendment concern, no real strength or support appears behind the fear of unjust coercion.[110] The misguided "blackmail" argument forgets that the incredibly high cost of class action is not a new and unique form of liability; a guilty or settling defendant owes damages to every injured party.[111] While the number of litigating parties usually rises dramatically in a class strategy,[112] that should support the certification of a class; plaintiffs lacking time and resources to litigate also deserve compensation for their injuries, and class certification generally presents a means to that end. Additionally, and ignored by the court in *Rhone-Poulenc*, issue classes do not support a reward in damages.[113] As mentioned in Part II, a (c)(4) issue class results in a declaration of rights, and every single plaintiff is then still responsible for bringing individual lawsuits to litigate the remaining issues and exact a reward of damages or a settlement.[114]

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[107] *Rhone-Poulenc*, 51 F.3d 1293, 1299 (7th Cir. 1995).

[108] *E.g.*, *id.*

[109] *Id.*

[110] *See* Gilles & Friedman, *Rediscovering the Issue Class*, *supra* note 94, at 1325–26.

[111] *Id.*

[112] *Id.* at 1326–27 ("[D]amages increase because . . . class actions radically multiply the number of claimants to be compensated . . . . In general, it is only a small fraction of eligible claimants who would have brought an individual suit in the absence of the class device—and indeed, a relatively small percentage of eligible claimants typically submit claims in a class action.").

[113] *Id.* at 1330. *See Rhone-Poulenc*, 51 F.3d 1293, 1299 (7th Cir. 1995) (describing the "concern with forcing these defendants to stake their companies on the outcome of a single jury trial"); *Rhone-Poulenc*, 51 F.3d 1293, 1299 (7th Cir. 1995).

[114] *See id.*; discussion *infra*, Part II.

V. ISSUE CLASSES IN ENVIRONMENTAL LITIGATION

The broad view of issue classes now accepted by most jurisdictions neatly laid a path for a resurgence in environmental class actions led by the Rule 23(c)(4) issue class. Many of the restrictions placed on Rule 23(b) classes from the antagonistic courts of the previous few decades remain for environmental classes. For instance, Rule 23 (b)(3) predominance requirements were heightened after recent Supreme Court decisions such as *Comcast Corp. v. Behrend*, [115] which held that individualized damages raise serious predominance concerns.[116] Additionally, the commonality analysis faces harsher, more restrictive analyses following *Wal-Mart Stores, Inc. v. Dukes*.[117] These restrictive rulings on predominance and commonality often destroy traditional Rule 23(b) classes for environmental litigation,[118] but the return to form of issue class possibilities fits perfectly within environmental litigation.

First, the cause of an environmental mass tort is generally a single action or single set of related actions performed by a single actor, with relatively similar types of injuries for all plaintiffs, albeit to varying degrees of harm. For instance, in *In re Flint Water Cases* (*Flint*),[119] when a city's water supply was contaminated, traditional Rule 23(b)(2) and 23(b)(3) classes failed both the predominance and superiority analyses.[120] The predominance failures stemmed largely from the individualized damages demonized in the *Comcast* decision;[121] the case required individualized determinations of injury, causation of those injuries, and liabilities as a whole.[122] Because granting class-wide damages would require a substantial number of individualized determinations, the court found that the case failed the predominance test and that a Rule 23(b)(2) or 23(b)(3) class was not appropriate for adjudicating the matter.[123] While decades of anti-class action decisions doomed the *Flint* case as a traditional Rule 23(b) class, the court easily agreed that this was an ideal setting for an issue class.[124] As a result, the court certified nine separate issues for a Rule 23(c)(4) class.[125] Importantly, all of these issues related to the separate actions and duties of the defendants, and to the factual situation impacting all plaintiffs equally: whether contami-

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[115] 569 U.S. 27 (2013).

[116] *Id.* at 34–36. In fact, the case could be read as an outright ban on individualized damages, but that holding has not appeared beyond the case itself given that such arguments have been nearly universally unsuccessful. Klonoff, *Class Actions Part II*, *supra* note 9, at 991–92.

[117] 564 U.S. 338, 349–50 (2011).

[118] *See, e.g.*, *In re* Flint Water Cases (*Flint*), 558 F. Supp. 3d 459, 486, 510 (E.D. Mich. 2021) (denying Rule (b)(2) and (b)(3) classes for lack of superiority and predominance).

[119] 558 F. Supp. 3d 459 (E.D. Mich. 2021).

[120] *Id.* at 471, 486, 510.

[121] *Id.* at 511.

[122] *Id.* at 512.

[123] *Id.* at 498–99, 512.

[124] *Id.* at 511.

[125] *Id.* at 516–17 (all the Rule 23(a) requirements as applied to issue classes were satisfied).

nation existed or not.[126] All of the certified issues would materially advance any follow-up individualized lawsuits by determining existing duty of care and identifying liable parties.[127]

Flint is an excellent example of another strong benefit that environmental issue classes bring to litigation—efficiency. Part of the superiority analysis that must take place within the issue class itself is whether more fair and efficient methods of adjudicating the controversy exist.[128] Given that the relevant issues need determination in every individualized case, finding a more efficient route for a court beyond certifying a Rule 23(b) class itself presents difficulties. *Flint* started as a series of individual lawsuits, but became a monstrosity that included thousands of individuals and over 30,000 properties.[129] Even with issue class certification, hundreds of individualized lawsuits potentially fol-

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[126] *Id.* The issues included:

> [1] Did Defendants' contracts with the City create a duty of care to third parties, and if so, what was the scope of the duty?
>
> [2] What is the applicable standard of care in a professional engineering case?
>
> [3] If Defendants contracts created a duty of care to third parties, did Defendants breach that duty by failing to provide appropriate advice to the City of Flint regarding treating the water?
>
> [4] Did Defendants' conduct cause corrosive water conditions in the Flint water distribution system?
>
> [5] What is Defendants' role in creating, exacerbating, and/or prolonging the contamination of the city's water supply, including their involvement in the decisions to switch to the Flint River as a water source, refrain from using corrosion control at the Flint Water Treatment Plant, and conceal information related to the safety of the City's water supply?
>
> [6] Were the corrosive water conditions allegedly caused by Defendants capable of causing harm to Flint residents, property, and businesses?
>
> [7] To what extent were other actors at fault for causing corrosive water conditions in the City water distribution system, and how should fault be allocated among those responsible?
>
> [8] Was it foreseeable to Defendants that their conduct would cause corrosive water conditions in the City water system?
>
> [9] What, if any, precautions should Defendants have taken to prevent the resulting harm to human health and property?
>
> Id. at 517.

[127] *Id. See also Behr*, 896 F.3d 405, 410 (6th Cir. 2018) (discussing similar issues for 23(c)(4) certification, focused on the existence of contamination, actions taken by Defendants and Defendants' level of negligence).

[128] *Flint*, 558 F. Supp. 3d at 520.

[129] *Id.* at 471–72, 501. *See also In re* Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico on April 20, 2010, 910 F. Supp. 2d 891, 900 (E.D. La. 2012) ("Eventually, hundreds of cases with *thousands* of individual claimants would be consolidated with this [case]." (emphasis added)) *aff'd*, 739 F.3d 790 (5th Cir. 2014).

lowed.[130] One argument says issue classes do not achieve much; individualized lawsuits remain necessary to grant true justice and finality to the class members. However, for courts inundated with these individualized lawsuits, materially advancing issue classes even by a single issue has the potential to ease congestion and backlog. In general, environmental class actions have at least one common question,[131] and the efficiency of certifying environmental issue classes presents an appealing option for already overworked courts.

Environmental issue classes can still fail, especially when classification of the issues is poorly executed. While environmental matters lend themselves to issue class certification, overreaching for broader issue definitions can doom a Rule 23(c)(4) certification attempt. For instance, in *Gates*, the plaintiff class attempted to certify an issue class for the liability of the defendant.[132] However, the court found this defined issue too broad because "the common issues here are not divisible from the individual issues."[133] Specifically, liability in that case required a determination of causation and the extent of contamination.[134] Especially in toxic contamination cases—here air contamination—this requires extensive individualized adjudication because each class member's property sustains varying levels of contamination.[135] Where *Gates* failed and cases like *Flint* and *Mejdrech v. Met-Coil Systems Corp*[136] succeed is narrowness of the conclusions sought. A successful question focuses on discrete actions by the defendant with conclusions limited to a yes-or-no answer.[137] Pure questions of law—such as the level of duty required—see similar success.[138] For instance, the *Mejdrech* issue classes focused on whether the defendant caused contamination in the relevant area.[139] No individualized determinations were necessary—levels of injury were unrelated, and the potentially variable level of contamination was not at issue. Whether contamination occurred, and whether any existing contamination originated from defendant's plant, were issues limited in answer to a yes or a no.[140]

A third benefit for the certification of environmental issue classes in a mass tort context is fewer choice-of-law concerns. Generally, environmental torts occur in a single area. It may be a large area, like the city of Flint or the town of Lisle, but those areas hardly stretch across

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[130] *See Flint*, 558 F. Supp. 3d at 518 (finding that certification of an issue class can be proper even if important matters like injury and damages will have to be tried in separate lawsuits).

[131] *See, e.g.*, *Gates*, 655 F.3d 255, 274 (3d Cir. 2011) (finding some common questions amongst class members, even where the predominance factor was not satisfied).

[132] *Id.* at 258.

[133] *Id.* at 273.

[134] *Id.* at 272.

[135] *Id.* at 272.

[136] 319 F.3d 910 (7th Cir. 2003).

[137] *Id.* at 911.

[138] *Flint*, 558 F. Supp. 3d 459, 502 (E.D. Mich. 2021).

[139] *Mejdrech*, 319 F.3d at 911.

[140] *Id.*

multiple jurisdictions such as the failed issue class in *Rhone-Poulenc*.[141] Even disasters that effect multiple jurisdictions can lack choice-of-law concerns. For instance, offshore oil spills are far enough out to sea that at least some issues would be universally tried under federal admiralty law.[142] Given that choice-of-law is one of the factors in both superiority and the alternative Rule 23(b)(3) view, choice-of-law questions with simple answers ease the way for an environmental issue class to pass certification.

VI. CONCLUSION

Environmental disasters increasingly affect entire cities, or even several cities, contemporaneously. People need ways to hold bad actors accountable on a scale comparable to the damage caused, and on a scale that brings justice to every possible plaintiff. Environmental litigation is a crucial avenue, but decades of conservative decisions have weakened class action lawsuits to the point of near-death.[143] A glimmer of hope remains in issue classes. In the last fifteen years, issue classes have slowly returned to a high, early level of certifiability, giving class action litigants a way to manage incredibly large groups of cases, at least for specific issues. Because of each case's limited jurisdictional scope, the commonality of defendants and factual issues for all plaintiffs, and potentially enormous case numbers, issue classes are an ideal tool for environmental litigation.

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[141] *See Rhone-Poulenc*, 51 F.3d 1293, 1300 (7th Cir. 1995) (denial of certification partially because choice-of-law issues include all fifty states).

[142] *See* Hari M. Osofsky, *Multidimensional Governance and the BP* Deepwater Horizon *Oil Spill*, 63 FLA. L. REV. 1077, 1087 (noting that injured oil rig workers have sued BP under federal admiralty law).

[143] *See, e.g.*, Klonoff, *Decline of Class Actions*, *supra* note 8, at 731 ("The class action device, once considered a 'revolutionary' vehicle for achieving mass justice, has fallen into disfavor." (citation omitted)).