No. 22-1744

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

IN RE: MARRIOTT INTERNATIONAL, INC.
CONSUMER DATA SECURITY BREACH LITIGATION

PETER MALDINI ET AL.,

v.

ACCENTURE LLP,

On Appeal from the United States District Court
for the District of Maryland

OPENING BRIEF OF DEFENDANT-APPELLANT ACCENTURE LLP

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INTRODUCTION

The district court exceeded the bounds of Rule 23 and Article III when it certified a class action against Accenture, despite finding that plaintiffs lacked a class-wide injury. Plaintiffs offered only one theory of class-wide harm and causation relating to the 2018 Marriott data-security incident for their negligence claims, which were the only claims against Accenture. But the sole evidence supporting that theory was the testimony of their expert economist, which the district court excluded under *Daubert* and Federal Rule of Evidence 702. Given plaintiffs' inability to show "fact of injury, injury causation, etc." on a class-wide basis, the district court found that they failed "to satisfy the predominance requirement" of Rule 23(b)(3). JA 0573. At this point, the inquiry should have been over: class certification against Accenture should have been denied. The essential Rule 23 requirement of "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*,

564 U.S. 338, 349–50 (2011).[1] No viable class-wide theory of common injury means no class action.

But the district court certified a class against Accenture anyway. Invoking "efficiency" and Federal Rule of Civil Procedure 23(c)(4), the district court certified a class action in which a jury would adjudicate whether Accenture owed a duty to the class and whether it breached that duty—nothing else. JA.0606. The class proceedings would not and, as the district court had previously found, could not determine whether class members were injured because of any breach by Accenture. Instead, any class members claiming injury would have to litigate core liability issues like "fact of injury, injury causation, etc." in separate individual trials. JA.0573.

The district court's remarkable certification order was error. These "issue" classes do not work—not as a matter of Rule 23, not as a matter of Article III, and not as a practical matter. Common harm is a fundamental requirement for class actions. *See Wal-Mart*, 564 U.S. at 349–50. Without it, there is no glue holding a class together. Without it,

[1] All case quotations have been cleaned up, unless otherwise noted.

there isn't even jurisdiction to hold a class trial. Time and again, the Supreme Court has instructed courts that "[e]very class member must have Article III standing" and "plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). But the class proceeding the district court envisions will, by definition, not determine standing. The facts that establish standing—such as injury and traceability (i.e., causation)—are the very issues the district court *excluded* from that proceeding as to Accenture, because they cannot be proven on a common, class-wide basis. The class trial would therefore be nothing more than an improper "roving commission" that would "publicly opine" on whether Accenture breached a duty of care. *TransUnion*, 141 S. Ct. at 2203. Nothing in principle or this Court's precedent justifies the district court's use of Rule 23(c)(4) in this manner.

Nor are there any practical benefits to the district court's approach, where millions (and potentially tens of millions) of follow-on, individual trials on important elements of liability like injury and causation would still be required. All the issue-class trial will achieve is a tremendous expenditure of resources by the parties and the court, with no guarantee

that any individual plaintiff will be able to prove any injury or secure any recovery. That cannot be what Rule 23 permits.

This Court should reverse the district court's order certifying classes under Rule 23(c)(4) against Accenture.

JURISDICTIONAL STATEMENT

Plaintiff invoked the district court's jurisdiction under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). On May 3, 2022, the district court certified four Rule 23(c)(4) issue classes against Accenture. JA.0611–12.[2] On May 17, 2022, Accenture petitioned to appeal pursuant to Rule 23(f), Dkt.2, and on July 14, 2022, this Court granted its petition, Dkt.27. This Court has appellate jurisdiction under 28 U.S.C. § 1292(e) and Rule 23(f).

STATEMENT OF ISSUES

1. Whether a court can certify a class under Rule 23 or Article III without a viable theory of class-wide injury susceptible to common proof.

2. Whether a court can use Rule 23(c)(4) to hold class trials on individual elements of a single claim.

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[2] References to "ECF" are to the district court's docket. References to "Dkt." are to the docket in this Court.

STATEMENT OF THE CASE

This litigation arises out of the 2018 Marriott data-security incident. On November 30, 2018, Marriott announced that it had experienced a cyberattack in which a threat actor had gained access to personal information stored in Marriott's legacy Starwood guest-reservation database. The information at issue varied by guest, but includes names, addresses, emails, phone numbers, and birthdates, and in some instances, passport and payment-card numbers, the vast majority of which were encrypted. ECF.598-1. Marriott estimates that about 133.7 million records (not individuals) may be associated with individuals in the United States; however, significant duplication remains. ECF.885-13. Following Marriott's announcement, numerous lawsuits were filed against Marriott and were ultimately consolidated in a multi-district litigation (MDL) in the District of Maryland. JA.0129.

Accenture provided IT infrastructure operations and support services in the Starwood IT environment. Its role was to deliver "operations management" services, supplying "support and services to ensure that [the] Starwood IT systems [we]re up and running." ECF.1019-18 at 46:10–17. Given its role as a third-party service

provider, Accenture did not interact with Starwood customers. Plaintiffs nevertheless added Accenture as a named defendant after the cases were consolidated. JA.0147. Plaintiffs' only claims against Accenture are for negligence and negligence per se.[3] JA.0493–97.

The MDL then proceeded into a bellwether process in which the parties selected a subset of claims on which to proceed. ECF.368. The bellwether claims selected for Accenture were negligence claims for the Maryland, Connecticut, and Florida classes of plaintiffs, and negligence per se claims for the Maryland, Connecticut, and Georgia classes. ECF.438. Accenture moved to dismiss these claims. The court granted the motion with respect to the Maryland negligence per se claim, but denied it as to the others. *See In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 2020 WL 6290670 (D. Md. Oct. 27, 2020).

Following discovery, plaintiffs moved for class certification. Plaintiffs did not seek to certify a nationwide class; instead, they asked for certification of state-specific classes for each of their bellwether claims. JA.0611–12. Plaintiffs moved to certify claims against both

[3] For purposes of the issues presented in this brief, the negligence and negligence per se claims are referred to as the "negligence claims."

Marriott and Accenture. Plaintiffs offered two theories of class-wide harm and causation, but only one of those theories applied to the negligence claims that were asserted against Accenture.[4] Plaintiffs offered a theory that Marriott customers paid more for their hotel rooms than they would have had they known of Marriott's allegedly lax data security, but that theory applied solely to Marriott. JA.0576.

For the negligence claims, plaintiffs asserted a single theory of class-wide harm and causation. They claimed that their personally identifying information, or PII, had "market value," and "that putative class members lost that value when hackers gained access to, and/or exported" their personal information from the Starwood database. JA.0572. Plaintiffs put forward an expert witness, Dr. Jeffrey Prince, in support of this theory. JA.0501. Dr. Prince claimed that he could determine the revenue ("R") that class members could have realized by multiplying a market price for the data ("P") by a total number of sales class members lost because of the data-security incident ("Q"). JA.0526–27.

[4] The negligence claims were also pressed against Marriott.

Accenture and Marriott moved to exclude this theory under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). After reviewing Dr. Prince's testimony and holding an all-day hearing in which Judge Grimm himself questioned both sides' experts, the court excluded Dr. Prince's market-value theory. JA.0537. The court found that Dr. Prince had not actually applied his method to any of the plaintiffs' data, and therefore had not demonstrated he could actually determine which pieces of data were at issue for each plaintiff, the value of those pieces of data, or the value of the plaintiff's bundle of data as a whole—much less that plaintiffs actually "lost" this value. JA.0528–29. Dr. Prince also proposed no method whatsoever for determining "Q," the quantity of lost sales. JA.0533.

The court then turned to plaintiffs' motion to certify the negligence claims for class treatment. Because it had rejected Dr. Prince's loss-of-market-value theory and that was the only theory of harm for the negligence claims—which, again, were the sole claims against Accenture—the court denied certification of a Rule 23(b)(3) damages class. JA.0573. "Without an accepted damages model," the district court found that "the loss of market value theory cannot support class

certification … even as to liability," as "too many open questions remain as to individualization"—including "fact of injury, injury causation, etc."—"to satisfy the predominance requirement" of Rule 23(b)(3). JA.0573. No Rule 23(b)(3) damages class could be maintained against Accenture. The district court did certify Rule 23(b)(3) classes against Marriott with respect to causes of action and the overcharge theory of harm that are inapplicable to Accenture. JA.0576 n.35.[5]

In their motion for class certification, plaintiffs also moved to certify classes for "liability purposes only" under Rule 23(c)(4) with respect to plaintiffs "seeking individualized damages related to identity fraud, time spent responding to the breach, and other out-of-pocket losses." ECF.1022-1 at 3. Plaintiffs acknowledged that damages for those claims could not be determined through common, class-wide evidence, but claimed that liability could still be determined through a Rule 23(c)(4) class action, with the individual amount of damages determined at a later proceeding. JA.0603. The district court rejected this argument too,

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[5] While the district court's order occasionally refers to "Defendants" generally when discussing these other claims, they have been asserted against only Marriott. E.g., JA.0543 n.7.

finding that the injury and causation elements of negligence were individualized and would require a "full-blown trial" for each plaintiff. *Id.* Liability therefore could not be determined on a class-wide basis. *Id.*

The court nevertheless agreed to certify a Rule 23(c)(4) class—not to resolve any *claims*, but to resolve only the discrete "duty and breach" *elements* of plaintiffs' negligence claims. JA.0606. The district court admitted that this approach of certifying elements but not claims relied on a "broad view" of Rule 23(c)(4) that has not been endorsed by this Court. JA.0601 & n.60. The court also acknowledged that any individual plaintiffs who actually want to recover anything would be required to participate in individual trials on causation, injury, and damages. JA.0606. But the court nevertheless posited that this approach would produce "efficiency gains," since the parties would "benefit" from having a class-wide, binding jury finding as to whether Accenture owed a tort duty to the class members that had been breached. JA.0606–07.

Accenture filed a motion for interlocutory appeal of the class certification order under Rule 23(f). Dkt.2. Marriott filed a 23(f) petition as well with respect to other issues. This Court granted the parties' motions. Dkt.27.

SUMMARY OF ARGUMENT

The district court's order certifying classes against Accenture should be reversed.

I. The district court erred by certifying a class that lacks a common injury. The Supreme Court has established that class-action treatment is appropriate only if "the class members have suffered the same injury." *Wal-Mart*, 564 U.S. at 350. The central requirement that class members present a common injury for adjudication stems from both Rule 23 and Article III, since "federal courts do not adjudicate hypothetical or abstract disputes," do not "possess a roving commission to publicly opine on every legal question," and certainly do not "exercise general legal oversight … of private entities," or "issue advisory opinions." *TransUnion*, 141 S. Ct. at 2203. The district court here found that plaintiffs did not have a common injury that could be established with class-wide proof for their only claims against Accenture. That should have been the end of the matter. In concluding that class treatment was nevertheless available, the district court replicated the same error that the Supreme Court has consistently sought to correct.

Rule 23(c)(4)'s issue-class device does not supply an end-run around this fundamental rule, and the district court's certification of individual elements of plaintiffs' negligence claims for class-action treatment violates Article III and Rule 23 multiple times over. A class proceeding that—by design—is incapable of determining injury or causation is incompatible with Article III. In a class action, each class member must have standing and "plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion*, 141 S. Ct. at 2208. By excluding issues of injury and causation from the class proceeding, the district court guaranteed that standing will not and cannot be determined. Federal courts "are not free to simply assume that they possess subject-matter jurisdiction and then proceed to decide the merits of the issues before them when their jurisdiction remains in doubt." *Stop Reckless Econ. Instability Caused by Democrats v. Fed. Election Comm'n*, 814 F.3d 221, 228 (4th Cir. 2016). It is therefore unsurprising that this Court has never permitted Rule 23(c)(4) to be used in this manner.

II. Even if it were, in theory, permissible to certify individual elements of a claim for class treatment, the classes here fail the

superiority requirement of Rule 23(b). They will do nothing to increase the efficiency of the litigation, as even if plaintiffs succeed in the class proceeding, every single class member will have to participate in an individual trial on the issues of injury, causation, and the amount of damages. These trials will involve detailed factual evidence and likely expert testimony. Moreover, the issue-class trial envisioned by the district court will not work as a practical matter. Under the state laws at issue, it is not possible to litigate the issues of duty and breach separate and apart from the individualized issues of injury and causation.

STANDARD OF REVIEW

This Court reviews a district court's class certification decision for abuse of discretion. *Gregory v. Finova Cap. Corp.*, 442 F.3d 188, 190 (4th Cir. 2006). "A district court per se abuses its discretion when it makes an error of law or clearly errs in its factual findings." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 317 (4th Cir. 2006). To "be affirmed, the district court must exercise its discretion within the framework of Rule 23." *Gregory*, 442 F.3d at 190. "[P]laintiffs bear the burden ... of demonstrating satisfaction of the Rule 23 requirements and the district

court is required to make findings on whether the plaintiffs carried their burden." *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 370 (4th Cir. 2004). "[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23[] have been satisfied." *Comcast*, 569 U.S. at 33.

ARGUMENT

I. The District Court's Certification of Rule 23(c)(4) Classes Violates Rule 23 and Article III

The district court's use of Rule 23(c)(4) to certify mere elements of plaintiffs' claims violates Rule 23 and Article III. Once the district court found there was no theory of common, class-wide injury, certification should have been denied. The Supreme Court has been clear that a common injury is a prerequisite to class treatment. Rule 23(c)(4)'s provision for issue classes does not alter this foundational principle, and the district court's reliance on that subsection to certify individual elements of a claim is incompatible with Article III limits on jurisdiction and Rule 23 itself.

A. The District Court Erred by Certifying a Class That Lacks a Common, Class-wide Injury

By certifying a class action against Accenture despite finding that class members could not prove a class-wide injury using common proof,

the district court deviated from the Supreme Court's clear direction. Because the "class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Wal-Mart*, 564 U.S. at 348, a plaintiff seeking class-action treatment of his claims "must affirmatively demonstrate his compliance with Rule 23," *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). When plaintiffs seek damages, they must satisfy both the commonality requirement of Rule 23(a) as well as "Rule 23(b)(3)'s predominance criterion," which is more "demanding." *Id.* at 34; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997). To justify class-action treatment, plaintiffs must show that their theories of liability are "capable of classwide resolution," meaning the essential elements of their claims can be determined in "one stroke" for everyone in the class. *Wal-Mart*, 564 U.S. at 350.

Injury is an essential element of both substantive liability and Article III jurisdiction. As the Supreme Court recently reiterated, "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion*, 141 S. Ct. at 2208. "No concrete harm, no standing." *Id.* at 2214. "And standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they

press and for each form of relief that they seek." *Id.* at 2208. The requirement that a class plaintiff suffer the same injury as class members is therefore rooted in the standing requirement of Article III. "To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents." *Schlesinger v. Reservists Comm. To Stop The War,* 418 U.S. 208, 216 (1974); *see also Kremens v. Bartley*, 431 U.S. 119, 131 n.12 (1977).

Rule 23 of the Federal Rules of Civil Procedure enforces these requirements through both Rule 23(a)'s commonality requirement and Rule 23(b)'s predominance requirement. The Supreme Court has long insisted that Rule 23's basic prerequisite of "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart*, 564 U.S. at 349–50; *see also id.* at 348–49 (plaintiffs who seek to represent a class must "possess the same interest and suffer the same injury as the class members"); *Schlesinger*, 418 U.S. 208 at 216–17 (same); *Ealy v. Pinkerton Gov't Servs., Inc.*, 514 F. App'x 299, 304 (4th Cir. 2013) (per curiam) (class must have "a shared injury"). And by

definition, if there is no common injury binding the class together, questions of law or fact common to the class members will not predominate. *See, e.g.*, *Amchem*, 521 U.S. at 623; *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977); *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 82 (2d Cir. 2015) (predominance requires that "the plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability."); *In re Rail Freight Fuel Surcharge Antitrust Litig.,* 725 F.3d 244, 252 (D.C. Cir. 2013) (similar); *Andrews v. Plains All Am. Pipeline, L.P.*, 777 F. App'x 889, 892 (9th Cir. 2019) (similar).

To be sure, class members need not have an identical measure of *damages*. But they must have suffered a common *injury*, for which damages can be assessed using some common form of measurement. *See, e.g.*, *Comcast*, 569 U.S. at 38. The through line in the Supreme Court's decisions is clear: if there is no viable class-wide theory of common injury, there can be no class action. *See Wal-Mart*, 564 U.S. at 349–50; *Comcast*, 569 U.S. at 38; *TransUnion*, 141 S. Ct. at 2214.

These settled principles should have made certification of any class against Accenture a non-starter. Plaintiffs' only purportedly *common*

evidence of class-wide injury, causation, and damages was Dr. Prince's market-value theory of harm. The district court carefully reviewed that theory and found it unscientific, unreliable, and a poor fit for the facts of the case. JA.0524–38. The court expressly acknowledged that without this theory, there was not a method for establishing a "classwide fact of injury" as to Accenture. JA.0600.

The district court likewise recognized that the only other theories of injury plaintiffs offered as to Accenture—identity theft and associated mitigation costs—were by their very nature individualized and not common. JA.0603. Many of the named plaintiffs did not claim identity fraud at all, which makes sense as the majority of the relatively small number of credit-card numbers that were taken were encrypted (and expired). JA.0148–76. And even as to the handful of plaintiffs who did claim identity fraud, discovery showed that attempting to tie that fraud to the Marriott breach (let alone to Accenture's conduct) was highly individualized. Take named plaintiff Paula O'Brien, for example. She claimed that she had experienced multiple fraudulent credit-card charges because of the Marriott data-security incident. ECF.1019-26 at 42:8–12. But third-party discovery from her banks revealed that the

unauthorized charges had been made with a physical credit card that she lost while on vacation rather than a credit-card number stored in Marriott's database. ECF.1019-26 at 42:13–44:20. No wonder, then, that the district court acknowledged that these injuries would require a "substantial individualized inquiry." JA.0603.

Because Dr. Prince's rejected theory was the only common proof plaintiffs offered to establish injury (not to mention causation and damages) as to the claims against Accenture, the district court correctly denied certification of a Rule 23(b)(3) damages class. JA.0573. The district court thus found that plaintiffs failed "to demonstrate that the class members have suffered the same injury" and thereby failed to satisfy Rule 23. *Wal-Mart*, 564 U.S. at 349–50; *see also Ealy*, 514 F. App'x at 304. And if injury or "concrete harm" cannot be determined on a class-wide basis, then Article III does not allow for class treatment either. *See TransUnion*, 141 S. Ct. at 2208, 2214. The district court should have gone pencils down at that point and denied class certification as to Accenture.

B. The District Court's Use of Rule 23(c)(4) Violated Article III and Rule 23

Instead, the district court thought it could bypass the lack of commonality and predominance using Rule 23(c)(4)'s provision for issue classes to certify just the purportedly common issues associated with the duty and breach elements of plaintiffs' negligence claims. This was error. Issue classes certified under Rule 23(c)(4) are not exempt from the other provisions of Rule 23. It is well-established that the commonality and predominance requirements of Rule 23(a) and (b) apply to Rule 23(c)(4) classes. *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439, 458 (4th Cir. 2003). *Any* class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart*, 564 U.S. at 348–49. The only time an exception to this usual rule is permitted—and a class action is appropriate—is when the requirements of Rule 23 are satisfied. *See id.* The district court's failure to follow these principles led it to certify issue classes that are incompatible with both Article III and Rule 23 itself.

1. The District Court's Rule 23(c)(4) Classes Violate Article III

1. To start, the district court's order violates the well-settled rule that "Rule 23's requirements must be interpreted in keeping with Article

III constraints." *Amchem*, 521 at 592. By design, the class proceedings that the district court ordered will adjudicate legal obligations on behalf of a class without ever determining whether that class experienced a concrete harm because of Accenture's conduct. This does not comply with Article III of the United States Constitution.

Under Article III, federal courts may exercise jurisdiction over only "[c]ases" or "[c]ontroversies." U.S. Const. art. III, § 2. "For there to be a case or controversy under Article III, the plaintiff must have a 'personal stake' in the case—in other words, standing." *TransUnion*, 141 S. Ct. at 2203. The "irreducible constitutional minimum of standing" has three elements: injury-in-fact, traceability, and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures that federal courts decide only the rights of individuals" and "exercise their proper function in a limited and separated government," without violating the separation of powers mandated by the Constitution. *TransUnion*, 141 S. Ct. at 2203. In other words: federal courts do not "adjudicate hypothetical or abstract disputes" and do not "issue advisory opinions." *Id.* at 2203; *see also B.R.*

v. F.C.S.B., 17 F.4th 485, 493 (4th Cir. 2021) ("Article III does not assign to federal courts any power to address hypothetical circumstances, give advisory opinions, or resolve abstract disputes."). They "do not possess a roving commission to publicly opine on every legal question." *TransUnion*, 141 S. Ct. at 2203.

Standing is a matter of subject matter jurisdiction, and therefore "may be raised at any time." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Plaintiffs as the party invoking the court's jurisdiction bear the burden of proving they have standing. *See, e.g.*, *Lujan*, 504 U.S. at 561. At each stage of the case, standing must be proven "with the manner and degree of evidence required at the successive stages of the litigation." *Id.* Trial is no different. If a plaintiff is not able to prove standing at trial through evidence, then the case must be dismissed for lack of jurisdiction. *United States v. Hays*, 515 U.S. 737, 745 (1995) (remanding case to be dismissed for lack of standing where at trial plaintiffs had "not produced evidence sufficient to carry the burden our standing doctrine imposes upon them"); *Miller v. Rite Aid Corp.*, 334 F.3d 335, 345 (3d Cir. 2003) (similar); *Jacobson v. Fla. Sec'y of State*, 974

F.3d 1236, 1269 (11th Cir. 2020) (similar); *Loving v. Boren*, 133 F.3d 771, 773 (10th Cir. 1998) (similar).

These principles do not relax in the class-action context. "That a suit may be a class action adds nothing to the question of standing." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6 (2016). The Supreme Court recently reiterated that "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion*, 141 S. Ct. at 2208. And "standing is not dispensed in gross." *Id.* Instead, a class "must demonstrate standing for *each claim that they press* and for *each form of relief* that they seek." *Id.* (emphasis added).

A federal court must address questions of standing before it adjudicates any part of the merits of case. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Id.* To that end, the Supreme Court has rejected "hypothetical jurisdiction," a practice by which federal courts would occasionally assume subject-matter jurisdiction and dismiss a case on the merits to avoid more complex jurisdictional questions. *Id.* The

Court found that this practice "carrie[d] the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.*; *see also Stop Reckless*, 814 F.3d at 228. A "federal court necessarily acts *ultra vires* when it considers the merits of a case over which it lacks subject-matter jurisdiction." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 480 (4th Cir. 2005).

2. The issue classes certified by the district court against Accenture violate these fundamental principles. The district court intends to have a class action proceed to—and be bound by—a determination of only the "duty" and "breach" elements of plaintiffs' negligence claims. "[I]mportant issues" relating to the "fact of injury" as well as "causation, affirmative defenses, and damages related to Accenture's conduct *will not be resolved* during issue-class adjudication," because the court determined they cannot be adjudicated on a class-wide basis. JA.0600, 0606 (emphasis added). Instead, whether a given class member was harmed and whether that harm was caused by Accenture's negligence will be determined after the class proceedings end. And it will be

determined only for those plaintiffs—if any—that actually show up for the individual-trial phase.

By definition, the class proceeding will not and cannot determine, up or down, whether "[e]very class member … ha[s] Article III standing" for their claims against Accenture. *TransUnion*, 141 S. Ct. at 2208. Plaintiffs must establish standing for "[e]very class member," "each claim that they press," and "each form of relief that they seek." *Id.*; *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). The class proceeding, however, will not and cannot determine whether the class members suffered "an injury in fact that is concrete, particularized, and actual or imminent." *TransUnion*, 141 S. Ct. at 2203; *see also Lujan*, 504 U.S. at 561; *Spokeo*, 578 U.S. at 338. Plaintiffs' only theory of common, class-wide harm was excluded under Rule 702 and *Daubert*, plaintiffs have not appealed that determination, and plaintiffs expressly admit that the existence and extent of any other harm (identity theft or mitigation) would vary from class member to class member. No proceeding will determine whether the class has been injured.

The class proceeding also will not and cannot determine whether any injury "was likely caused by the defendant," which is referred to as "traceability" in standing parlance. *TransUnion*, 141 S. Ct. at 2203. Again, Dr. Prince's rejected model was plaintiffs' sole evidence of injury and causation as to the market-value harms. And "[w]hen considering Plaintiffs'" remaining "identity fraud and related mitigation theories of harm, … individualized issues related to causation are quite significant." JA 0603. No proceeding will adjudicate whether Accenture's action caused class-wide harm.

The class proceedings therefore cannot resolve whether the plaintiffs "suffered an injury that the defendant caused and the court can remedy." *TransUnion*, 141 S. Ct. at 2203. As a result, "there is no case or controversy for the federal court to resolve." *Id.* At the issue-class trial, the class will not be presenting evidence to show whether and how they were harmed by this data security incident and Accenture's conduct. That evidence will be presented only for certain individuals who choose to litigate liability in separate individual proceedings. For those class members who don't participate in the individual proceedings, standing will never be established.

The net result is an unconstitutional proceeding that purports to bind a class to a determination that the district court will not have established that it is authorized to make. "[F]ederal courts are not free to simply assume that they possess subject-matter jurisdiction and then proceed to decide the merits of the issues before them when their jurisdiction remains in doubt." *Stop Reckless*, 814 F.3d at 228. The issue-class proceeding that will determine whether Accenture owed a duty or breached a duty would be nothing more than a "roving commission" on "legal question[s]," which is precisely what Article III precludes. *TransUnion*, 141 S. Ct. at 2203; *see also Lujan*, 504 U.S. at 561; *Spokeo*, 578 U.S. at 339; *B.R.*, 17 F.4th at 493.

The issue-class proceeding cannot be dismissed as a mere case-management procedure. Here, the district court is purporting to bind the entire class on the merits issues of duty and breach, without hearing the factual evidence needed to establish that plaintiffs have standing and that the court has jurisdiction to make those binding determinations. The district court itself noted that "in the event that the results of the issues trials are favorable to Marriott and Accenture, the litigation against them as to the negligence and negligence per se claims

would end." JA.0606–7. Those negligence claims are the only claims plaintiffs have brought against Accenture. Entering judgment favorable to Accenture would purport to bind every class member when there would have been no showing that the court had jurisdiction to do so. Vice versa, too: the court's proposed process dictates that if the results of the issues trials are not favorable to Accenture, the determination that Accenture breached a duty of care would be binding as to Accenture and as to an entire class, even though standing would not have been established. Indeed, it is possible and indeed highly likely that most—if not all—class members will *never* put forward evidence of standing. A merits decision rendered when the court has not established its own jurisdiction is ultra vires and unenforceable.

The *fact of injury*—which must be susceptible to common proof to support certification under Rule 23—should not be conflated with the distinct issue of the *measure of damages*. *See, e.g.*, *Tillman v. Highland Indus., Inc.*, 2021 WL 4483035, at *12 (D.S.C. Sept. 30, 2021). "[T]he concept[s] of 'damage' (harm suffered) and 'damages' (compensation for harm suffered)" are therefore "distinct." *Yukos Cap. S.A.R.L. v. Feldman*, 977 F.3d 216, 245–46 (2d Cir. 2020). "The fact of damage pertains to the

existence of injury, as a predicate to liability; actual damages involve the quantum of injury and relate to the appropriate measure of individual relief." *Tillman*, 2021 WL 4483035, at *12 (emphasis omitted); *see also Windham*, 565 F.2d at 71.

This is not a situation where the court is simply deferring a determination on damages. In fact, courts bifurcate class actions into class liability and individual damages phases all the time. *See Gunnells*, 348 F.3d at 429 ("Bifurcation of class action proceedings for hearings on damages is now commonplace."); *Hill v. W. Elec. Co.,* 672 F.2d 381, 387 (4th Cir. 1982) (same). During the liability phase, liability is established on a class-wide basis, while the damages phase can involve individualized proof of the *quantum* of harm. These bifurcated proceedings do not pose the same Article III issues as the district court's process because the liability phase necessarily encompasses injury and causation. The problem with the district court's ruling is that it carved out of the class proceedings the very elements that would establish standing.

The district court pointed to "efficiency gains stemming from certification of the duty and breach issues," since "the Court will already

be analyzing the intertwined factual circumstances relevant to the duty and breach issues" in plaintiffs' separate damages class action against Marriott alone. JA.0606. But Article III does not yield to convenience or efficiency. Courts "are not free to simply assume that they possess subject-matter jurisdiction and then proceed to decide the merits of the issues before them when their jurisdiction remains in doubt." *Stop Reckless*, 814 F.3d at 228; *see also Steel Co.*, 523 U.S. at 94–95; *Constantine*, 411 F.3d at 480. Here, the district court is doing just that. It has expressly eliminated from the class proceeding questions of injury and causation. The certification order thus ensures that the court will exceed "the bounds of authorized judicial action and thus offend[] fundamental principles of separation of powers." *Steel Co.*, 523 U.S. at 94–95. These Article III problems are precisely why the district court should not have deviated from the Supreme Court's direction to certify classes only where the class members share a common harm caused by the defendant. *See Dukes*, 564 U.S. at 348–49.[6]

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[6] While some circuits have permitted the certification of certain elements of a claim, no court has previously addressed whether doing so violates Article III, all but one predates the Supreme Court's decision in *TransUnion*, even that case makes no reference to *TransUnion*. Some of

2. The District Court's Rule 23(c)(4) Classes Violate Rule 23

The district court's issue classes cannot be squared with Rule 23 itself, either. The court admitted that it was taking a "broad view" of the Rule by carving up a claim into its individual elements and certifying only some of those elements for class treatment. JA.0601. The district court's approach certainly finds no authorization in this Court's most-recent Rule 23(c)(4) precedent. In *Gunnells*, this Court held that Rule 23(c)(4) could be used to certify classes based on individual *causes of action* within a broader lawsuit. 348 F.3d at 444. That approach was not available to the district court here, given its conclusion that plaintiffs could not satisfy Rule 23 as to their negligence causes of action as a whole.

This Court did not decide in *Gunnells* whether Rule 23(c)(4) could be used to certify *elements* of a cause of action, declining to "enter that

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these cases have still reversed issue-class certification on other grounds. *See Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259, 274 n.7 (3d Cir. 2021); *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 413 (6th Cir. 2018); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012); *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 230 (2d Cir. 2006); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

fray" since it was not directly at issue in the case. *Id.* at 444. However, the thrust of *Gunnells* can be read to signify that individual elements of a claim should not be certified, given the Court's emphasis on certification of causes of action. *See Farrar & Farrar Dairy, Inc. v. Miller-St. Nazianz, Inc.*, 254 F.R.D. 68, 77 (E.D.N.C. 2008) ("the *Gunnells* court appeared to hold that a district court may certify individual causes of action, not individual issues, for class treatment.").

This Court should now determine that Rule 23(c)(4) does not permit the certification of individual elements of a cause of action. The text of that provision states: "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). "Issues" is not defined and, to be fair, is ambiguous when read in isolation. But it is well established that "Rule 23's requirements must be interpreted in keeping with Article III constraints." *Amchem*, 521 at 592. The Article III problems with the district court's slice-and-dice approach were covered at length in the prior section.

The structure of Rule 23 likewise precludes the reading of Rule 23(c)(4) adopted by the district court. When interpreting statutory language, this Court looks to the "language, structure, and purpose" of

the provision. *United States v. Horton*, 321 F.3d 476, 479 (4th Cir. 2003); *see Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (similar). Rule 23(a) sets out the "prerequisites" for class certification—numerosity, commonality, typicality, and adequacy of representation. Then, Rule 23(b) sets out three different "types" of class actions: (1) inconsistent-adjudication or limited-fund actions; (2) injunctive or declaratory-relief actions; and (3) monetary actions, which must meet the additional requirements of predominance and superiority. Rule 23(c) provides the mechanisms a district court can use to manage the types of class actions specified in Rule 23(b): the processes for the issuance of a certification order, the process for notification of class members, required information that must be included in a class action judgment, and the provisions for subclasses and the certification of "particular issues."

Rule 23(c)(4)'s placement in the procedural section of the Rule, rather than in subsection (a)—which discusses the "prerequisites"—or subsection (b)—which discusses the "types of class actions"—reinforces that Rule 23(c)(4) was not meant to create a fourth form of individual-element class action. It would be surprising if the drafters of Rule 23 intended to smuggle in such a revolutionary form of litigation by tucking

it into a section on how a court should handle a class after it has been certified. Courts do not find "elephants in mouseholes." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001); *see also United States v. Campbell*, 22 F.4th 438, 448 (4th Cir. 2022) (rejecting interpretation that would create an "elephants in mouseholes problem").

The better reading is that Rule 23(c)(4) permits courts to certify liability-only classes or certify one claim in plaintiffs' "action" for class treatment but not others (for example, the "issue" of plaintiffs' statutory claim but not the "issue" of plaintiffs' breach-of-contract claim). This reading aligns with Article III requirements and the broader structure of the Rule. The Note to Rule 23(c)(4) reinforces that the subsection is meant to address the certification of individual causes of action or liability-only classes. It provides the example that "in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims." Fed. R. Civ. Pr. 23(c)(4), advisory committee note.

Allowing element-by-element class certification under Rule 23(c)(4) would enable plaintiffs to disassemble nearly any claim and render the predominance requirement of Rule 23(b)(3) meaningless. "Courts must give effect to every provision and word in a statute and avoid any interpretation that may render statutory terms meaningless or superfluous." *Discover Bank v. Vaden,* 396 F.3d 366, 369 (4th Cir. 2005). In almost any situation, if a court has found that the predominance standard of Rule 23(b)(3) has not been met, this problem can be avoided by simply "rephrasing the same question as an 'issue'" pursuant to Rule 23(c)(4). *Tillman*, 2021 WL 4483035, at *18. District courts in this circuit have recognized this problem. *See In re Panacryl Sutures Prods. Liab. Cases*, 263 F.R.D. 312, 325 (E.D.N.C. 2009) ("Rule 23(c)(4) may not be used to manufacture predominance for the purposes of Rule 23(b)(3)"); *Peoples v. Wendover Funding, Inc.,* 179 F.R.D. 492, 501 n. 4 (D.Md. 1998) (similar). Rule 23(c)(4) should not be interpreted to allow an "end-run" around Rule 23(b)(3)'s requirements and render the predominance requirement meaningless. *Tillman,* 2021 WL 4483035, at *18.

Any putative class action will have *some* issue that is common. After all, any cause of action will have at least one element that is focused

on something the defendant did or did not do. Those elements will often rely on "common" proof, because they concern the defendant's conduct. In an antitrust case, for example, the question of market power will often be a common question. In a product-liability class action, the question of defective design will often be a common question. But courts should not certify these issues for class treatment simply to get the benefit of a factfinder's view on these common questions.

Courts can either certify or not certify class *actions*, where the requirements of Rule 23 are met as to one or more of the plaintiffs' causes of action and the representative plaintiffs "possess the same interest and suffer the same injury as the class members." *Wal-Mart*, 564 U.S. at 348-49; *see also Windham*, 565 F.2d at 68 ("where the issue of damages and impact does not lend itself to such a mechanical calculation, but requires 'separate mini-trial(s)' of an overwhelming large number of individual claims" courts deny class certification); *In re Rail Freight* 725 F.3d at 252 ("Meeting the predominance requirement demands more than common evidence the defendants colluded to raise fuel surcharge rates. The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy.");

Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003) (similar); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (similar); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 850–51 (6th Cir. 2013) (similar). The whole point of the predominance requirement is to "prevent[] the class from degenerating into a series of individual trials." *Bell Atl. Corp.*, 339 F.3d at 302.

In *Gunnells*, the dissent flagged this concern. Judge Niemeyer stated that "if Rule 23(c)(4)(A) allows a court to omit from its predominance analysis any claims or issues affecting only individual members, it would seem that the predominance of the selected issue is a foregone conclusion since the common question of law or fact would always predominate over the individual issues that are not a factor." *Gunnells*, 348 F.3d at 451 (Niemeyer, J., concurring in part and dissenting in part). The majority responded that this concern had "no relevance" in *Gunnells* because "Plaintiffs' *cause of action* as a whole . . . satisfies the predominance requirements of Rule 23." *Id.* at 445 (majority op.). Thus, the Court explained that even if it was the "law of this circuit" that "predominance must be established within a given cause of action to invoke (c)(4)" the holding in *Gunnells* was "in full accordance" with that

view. *Id.* This Court should not extend Rule 23(c)(4) to create the problems it expressly avoided in *Gunnells*, and instead should hold that the Rule cannot be used to certify individual elements of a claim.

II. The District Court's Rule 23(c)(4) Classes Independently Violate the Superiority Requirement of Rule 23(b)

Even if Article III and Rule 23 permitted a court to certify individual elements of a single claim for class-action treatment, the district court's order should still be reversed because it does not comply with the superiority requirement of Rule 23(b)(3). Rule 23(b)(3) requires that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Tillman*, 2021 WL 4483035, at *17. It is common wisdom among the district courts in this Circuit that because of this requirement, "issue certification" is "little used for good reason." *Id.* at *19; *see also Parker v. Asbestos Processing, LLC*, 2015 WL 127930, at *15 (D.S.C. Jan. 8, 2015). If the "Defendant's liability" in the case "will not be determined as a result of the trial on the certified issues," the superiority requirement is not met, given the significant individualized inquires that remain after the class issues are resolved, which undermine the value of the class process. *Tillman*, 2021 WL 4483035, at *19. (emphasis omitted).

Many courts have considered the specific situation presented here: certification of the duty and breach elements where the questions of causation and harm cannot be tried on a class-wide basis. These courts often deny class certification, reasoning that because individual inquiries will be required with respect to causation and damages, issue classes are not a superior approach to trying the case. *See, e.g., id.; Parker*, 2015 WL 127930, at *15; *Naparala v. Pella Corp.*, 2016 WL 3125473, at *14-15 (D.S.C. June 3, 2016). Certifying a class under such circumstances does not "promote judicial efficiency." *McGlenn v. Driveline Retail Merch., Inc.*, 2021 WL 165121, at *11 (C.D. Ill. Jan. 19, 2021). Instead, "[i]ndividual trials are a better mechanism for handling" such cases, given the "multiplicity of individual issues" that remain after the conclusion of the class process. *Farrar*, 254 F.R.D. 68, at 78 n.11.[7]

Indeed, one district court that considered this exact question in the context of a data-security incident found that because "[c]ausation and damages would be tried individually," "bifurcating elements of liability

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[7] The court in *Farrar* also found that the individualized inquiries defeated predominance. 254 F.R.D. at 77–78; *see also Panacryl*, 263 F.R.D. 312 at 325 (denying issue class certification on predominance grounds due to individualized issues).

does not materially advance the overall disposition of the case because the court must still consider plaintiff-specific matters such as fact of injury, causation . . . and extent of damage." *Adkins v. Facebook, Inc.*, 424 F. Supp. 3d 686, 697 (N.D. Cal. 2019). The court thus held that issue certification was not "appropriate" under Rule 23(c)(4). *Id.*

This case fails the superiority requirement at every turn: (1) significant individualized liability determinations would remain after the class trial; (2) there would be the exact same number of trials with class certification as there would be without; (3) the district court's perceived distinction between the purportedly common issues of duty and breach, on the one hand, and the individualized issues of injury and causation on the other does not withstand scrutiny; and (4) choice-of-law considerations further multiply the number of proceedings that certification would produce.

First, the highly individualized nature of the remaining issues of causation and injury makes it difficult to say that issue-class treatment of duty and breach meaningfully advances resolution of the cases. *Tillman*, 2021 WL 4483035, at *11 (noting that issues of causation and injury are "necessarily a highly individualized determination"). In this

case, the factual inquiries necessary to determine whether injury and causation exist will be extensive and will differ from plaintiff to plaintiff. The jury will need to determine what specific pieces of PII are at issue for each plaintiff and whether that PII could have led to the identity-theft and mitigation harms that the plaintiffs claim, among other things. That is not a straightforward task. As the district court acknowledged, "discovery taken to date from the bellwether plaintiffs has demonstrated [that] a large number of class members' PII may have been exposed in data breaches other than the Starwood breach or exposed in another manner." JA.0603. "As a result, substantial individualized inquiry is required to determine whether Defendants"—as opposed to some other security incident—"proximately caused any actual identity theft that might have occurred." *Id.* Plaintiffs claiming mitigation harms will need to provide evidence of mitigation measures that they took and show that they were reasonable. Further, each plaintiff will have to prove their specific monetary damages. All of these factual points will require a "full-blown trial," likely with specialized expert testimony. *Id.* Litigating a class action over the duty and breach elements alone does not bring these cases materially closer to finish line than where they stood before.

Second, this process achieves none of the benefits typically associated with class certification. Class certification is designed to reduce the number of trials and streamline adjudication. *See Windham,* 565 F.2d at 69; Fed. R. Civ. P. 23(b)(3), advisory committee note. (explaining the Rule's purpose of achieving "economies of time, effort, and expense"). But the number of trials is exactly the same after class certification as it was before class certification. As this Court recognized in *Windham*, if the "effect of class certification is to bring in thousands of other possible claimants, all of whom may assert individualized claims requiring mini-trials with juries, a procedure which will be tremendously time-consuming and costly, the justification of class certification is absent." 565 F.2d at 69.

The issue classes certified by the court will do nothing to increase the likelihood of actual recovery by any class members, either. If a class trial is conducted and a determination is made that Accenture breached a duty of care, class members will recover only if they participate in separate trials regarding the causation and injury issues, which will include an extensive inquiry into their history of exposure to other data-security incidents and mitigation efforts. As one district court in this

circuit has noted, even in a case where "many class members do not have enough at stake to justify such intense litigation efforts on their own account," this "incentive problem is not solved by issue certification where the remaining individualized issues will also require significant resources." *Naparala*, 2016 WL 3125473, at *16. Here, because each class member will be required to participate in a lengthy trial after the issue class questions are resolved, issue class certification will do nothing to increase class member's participation.

The district court justified its decision to certify issue classes on the fact that it was "already certifying some damages classes" in the case against Marriott and so there may be "efficien[cies]" in trying a few issues as to Accenture, too. JA 0606. This makes no sense. The damages theories as to Marriott are entirely inapplicable to Accenture. JA 0576 n.35. Accenture should not be kept in the case simply because class certification is proceeding against a separate entity on separate claims. Including a different party on a subset of issues will increase the likelihood of jury confusion and error.

Third, the district court believed that the issues of duty and breach were entirely distinct from injury and causation, but that belief was

unfounded. It will be impossible for the issue-class trial to focus on duty and breach without getting into the individualized issues of injury and causation. Under the relevant states' laws, the issues of duty and breach are not, in fact, distinct from injury and causation. To start, the existence and scope of a duty of care will depend in the first place on whether plaintiffs' alleged injuries are purely economic in nature, or if they constitute harm to property. *See Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 451 Md. 600, 610 (2017) (requiring higher standard of "intimate nexus" between plaintiff and defendant to establish duty in cases of economic loss); *DeVillegas v. Quality Roofing, Inc.*, 1993 WL 515671, at *3 (Conn. Super. Ct. Nov. 30, 1993) (similar); *Tank Tech, Inc. v. Valley Tank Testing, LLC*, 244 So. 3d 383, 393 (Fla. 2d DCA 2018) (similar). The district court has expressly avoided this individualized question in the past, but will have to resolve it in order to conduct the issue-class trial. *See In re Marriott Int'l, Inc.*, 2020 WL 6290670, at *5, n.7.

Similarly, the question of whether a duty exists often depends on facts related to the plaintiffs' claimed injury. For instance, in Connecticut, courts look at "the measure of attenuation between [the

defendants'] conduct, on the one hand, and the *consequences to and the identity of the plaintiff*, on the other hand" to determine whether the defendant owed the plaintiff a duty of care. *RK Constructors, Inc. v. Fusco Corp.*, 231 Conn. 381, 387–88 (1994) (emphasis added). It is hard to see how the district court will be able to hold a trial on the issue of duty alone if that issue depends on an examination of "the consequences to" the plaintiff that resulted from the alleged breach. Because questions of duty/breach and injury/causation are not readily separated, class treatment of the duty/breach issue will not feasible.

The intertwined nature of the duty/breach issues with injury/causation also raises Seventh Amendment Reexamination Clause concerns. The Seventh Amendment provides that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States." U.S. Const. amend. VII. "The Seventh Amendment does not allow the Court to divide the proceeding such that issues decided by the initial factfinder are open to reconsideration by a different factfinder." *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 552 (E.D. Va. 2000). In *Chisholm*, the plaintiffs proposed a trial plan that would "delay litigation of damages and reliance

until Phase Two, before a different factfinder than Phase One." *Id.* The Court rejected this plan, explaining that "[p]ermitting this treatment of elements required to determine liability violates the Seventh Amendment in allowing the Phase Two factfinder to re-examine issues presented at Phase One." *Id.* The same is true here: the district court and the jury will have to consider plaintiffs' alleged injuries and make determinations about them during the class proceeding. Then, a second jury will consider plaintiffs' alleged injuries during the second, individual phase of the trial. This re-examination of factual issues is forbidden by the Seventh Amendment.

Fourth, the issue-class proceeding may not itself be a single proceeding, given yet-to-be-determined choice-of-law issues. To this point, the district court has assumed without deciding that the law of the plaintiffs' states of residence governs. *See In re Marriott Int'l, Inc.*, 2020 WL 6290670, at *5 (applying "Maryland, Connecticut, and Florida law" to Maryland, Connecticut, and Florida classes respectively). There is a significant chance that when the court does make a choice-of-law determination, it will continue to apply each state's law under Maryland's rule of *lex loci delicti*. *See Bank of Louisiana v. Marriott Int'l,*

Inc., 438 F. Supp. 3d 433, 443 (D. Md. 2020) ("Marriott's negligence may have occurred in a state other than Louisiana, but BOL's claim would not exist without injury. Because its injury was felt in Louisiana, Louisiana law governs BOL's substantive claims for negligence and negligence per se.").

If each state-specific class proceeds under its own state's law, it is likely that there will need to be separate proceedings. There are real differences between the law of negligence in these states. For example, some states do not recognize negligence claims in the context of data-security incidents. *See In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 440 F. Supp. 3d 447, 478 (D. Md. 2020) (dismissing negligence bellwether claim against Marriott based on Illinois precedent declining to recognize a duty in a data-security incident case). Others apply different versions of the economic-loss doctrine. *See S. Indep. Bank v. Fred's, Inc.*, 2019 WL 1179396, at *18 (M.D. Ala. Mar. 13, 2019) (finding significant differences between various states' applications of negligence economic loss doctrine). If the court applies the law of all 50 states, 50 classes will need to be addressed, and unless they are dismissed outright, issue-class trials will need to be conducted for each of

them, which would be followed by individual trials for each plaintiff. Class certification is therefore producing more litigation, not less.

Further, it is unclear how plaintiffs who lived in multiple states during the class period would be dealt with. A single person might need to have their rights adjudicated in multiple issue-class trials, only to be faced with yet another individual trial just to prove liability. This creates a high risk of conflicting results and would also be extremely different to administer. Such a complex and cumbersome system is not superior to just allowing those who actually wish to proceed to try these cases as individual actions from the outset.

Notably, neither the court's opinion nor plaintiffs' pretrial plan provides insight into how the issue-class trial would work in practice. As the First Circuit has recognized, "the district court must at the time of certification offer a reasonable and workable plan" for how the class trial will be conducted "in a manner that is protective of the defendant's constitutional rights and does not cause individual inquiries to overwhelm common issues." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 58 (1st Cir. 2018). Nobody has explained how the court will handle the duty and breach issues without getting into individualized injury issues.

Nobody has explained how choice of law will factor into the trial process. Indeed, plaintiffs' pretrial plan only anticipated a situation where the question of liability as a whole—not just duty and breach—would be decided in the first phase. *See* JA.0705 ("If there is a *liability* finding in favor of Plaintiffs, the Court can proceed with individual damages proceedings or other management tools for those members of the class seeking to make those claims.") (emphasis added). There has been no explanation of how a duty/breach issue-class trial regarding individual issues will work in practice or how it could result in a finding of "liability," nor could there be. The issue class process ordered by the district court is unconstitutional, violates Rule 23, and simply does not make sense.

CONCLUSION

This Court should reverse the decision of the district court certifying Rule 23(c)(4) issue classes against Accenture.

REQUEST FOR ORAL ARGUMENT

Accenture respectfully requests oral argument in this case. This appeal raises important issues under both Rule 23 and Article III of the U.S. Constitution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 5(c)(1) because this brief contains 9,847 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook type.

September 26, 2022

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